2023 UPDATE MEMORANDUM

For

THE LAW AND POLICY OF SENTENCING
(Tenth Edition)

By

Lynn S. Branham
Visiting Professor of Law
University of Missouri School of Law

UPDATE MEMORANDUM – 2023

THE LAW AND POLICY OF SENTENCING (10th 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*:

- *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;

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

- *Ramirez v. Collier*, a case ruling that the Religious Land Use and Institutionalized Persons Act (RLUIPA) required the issuance of a preliminary injunction enjoining enforcement of a state's ban on a spiritual advisor's audible prayers in the execution chamber and laying on of hands on the person being executed; and

- *Jones v. Mississippi*, which considered whether the Eighth Amendment requires an explicit or implicit finding on the record that a defendant is permanently incorrigible before a life-without-parole sentence can be imposed for a homicide committed when the defendant was a juvenile.

Lynn S. Branham
August 2023

TABLE OF CONTENTS

Chapter 2. GULTY PLEAS AND PLEA BARGAINING.

Page 64 – Add new note 4A after note 4:

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.

Chapter 4. PROCEDURAL RIGHTS DURING SENTENCING.

Page 190 – Add new notes 1A and 1B after note 1:

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 reimprisonment; 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 – 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 – 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 – 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?

Page 355 – Add new note 5 after note 4:

5. At times, execution protocols are challenged on other than Eighth Amendment grounds. For example, in Ramirez v. Collier, 142 S.Ct. 1264 (2022), the plaintiff contended that state officials' refusal to allow his pastor to lay hands on him and pray aloud during the plaintiff's upcoming execution by lethal injection abridged his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5. RLUIPA bars state and local governments from imposing a "substantial burden" on a confined person's exercise of religion unless the government proves that the restriction both furthers a compelling governmental interest and is "the least restrictive means" of furthering that interest. Id. § 2000cc-1(a).

The Supreme Court held that the district court should issue a preliminary injunction enjoining enforcement of the restrictions on audible prayers and laying on of hands within the execution chamber. After first finding that the restrictions substantially burdened the plaintiff's exercise of sincerely held religious beliefs springing from his faith as a Baptist, the Court concluded that the state officials had failed to demonstrate that the restrictions were the least restrictive means of furthering the state interests invoked in defense of the restrictions. The Court noted, for example, that concerns that a spiritual advisor might pray so loudly as to disrupt the execution process could be addressed by placing limits on the volume of audible prayers and ejecting spiritual advisors who violated those or other "reasonable restrictions" on audible prayers. And the interest in avoiding the suffering that might ensue if a spiritual advisor accidentally bumped into or otherwise interfered with an IV line could be met by permitting the laying on of hands only on a part of the body far away from the IV lines, such as a foot.

Chapter 8. CRUEL AND UNUSUAL PUNISHMENT AND NONCAPITAL CASES.

Pages 388 – 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).

Page 401 – Add new note 1A:

1A. In Jones v. Mississippi, 141 S.Ct. 1307 (2021), the Supreme Court rebuffed the defendant's argument that the Eighth Amendment requires an explicit or implicit finding on the record that a defendant will be incorrigible forever before a life-without-parole sentence can be imposed for a homicide the defendant committed when a juvenile. The defendant in *Jones* had argued that a finding of permanent incorrigibility is necessary to avoid the unconstitutional imposition of a life-without-parole sentence for a homicide that was the product of "transient immaturity." The Court responded that a state's "discretionary sentencing system is both constitutionally necessary and sufficient" in the juvenile-homicide context, expressing confidence that courts exercising their sentencing discretion will, as constitutionally required, consider a defendant's youth as a mitigating factor. *Id.* at 1313. At the same time, the Court alluded to the possibility that a defendant might still prevail on an as-applied constitutional challenge to a life-without-parole sentence. The Court thus left open the possibility that if a reviewing court later determined that a homicide reflected the defendant's "transient immaturity," not "irreparable corruption," the defendant's life sentence without parole would be unconstitutionally disproportionate under the Eighth Amendment.