Criminal Law

CASES AND MATERIALS
FOURTH EDITION

2018 SUPPLEMENT

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CHAPTER 2

PUNISHMENT

D. SEVERITY OF PUNISHMENT

[2] SENTENCING DISCRETION

[b] SENTENCING GUIDELINES AND BEYOND

Page 109: Add after the first paragraph:

In *Beckles v. United States*, 137 S. Ct. 886 (2017), the Supreme Court held that the Federal Sentencing Guidelines may not be challenged as unconstitutionally vague. Noting that "the system of purely discretionary sentencing that predated the Guidelines was constitutionally permissible," the Court reasoned that, "[i]f a system of unfettered discretion is not unconstitutionally vague, then it is difficult to see how the present system of guided discretion could be." *Id.* at 894.

[c] SENTENCING UNDER THE MODEL PENAL CODE AND ITS PROPOSED REVISIONS

Page 110: Add to the first paragraph:

The American Law Institute adopted the proposed revisions to the Model Penal Code's sentencing provisions in 2017. *See* Model Penal Code: Sentencing (2017). The numbering of the sections in the final version varies somewhat from the provisions in the proposed drafts described in the casebook on pages 110-12. In addition, the major substantive changes to those draft provisions are described below.

The considerations relevant in sentencing a defendant "when reasonably feasible" now include "preservation of families." In addition, this provision replaces "restoration of crime victims and communities" with "restitution to crime victims." *Id.* § 1.02(2)(a)(ii).

The overall purposes of "the sentencing system" now include "ensur[ing] that adequate resources are available for carrying out sentences." In addition, this provision omits the goal of encouraging intermediate sanctions. *Id.* § 1.02(2)(b).

Page 111: Add to the second paragraph:

The final version of the new MPC sentencing provisions now limits fines to three times (rather than five times) the amount of "pecuniary gain" realized by the defendant or "the loss or damage" incurred by the victim. *Id.* § 6.08(1)(h).

Page 111: Add to the fourth paragraph:

In the final version of the new MPC sentencing provisions, the provisions on "restorative justice" – now called "victim-offender conferencing" – are not "drafted in the form of model legislation." Instead, they are included as an Appendix entitled "Principles for Legislation," which is meant to recommend "principles" that a state legislature "should seek to effectuate when authorizing such experimentation." *Id.* § 6.16.

Page 112: Add to the first paragraph:

Likewise, the provisions granting prisoners the automatic right to move to modify their sentences every 10 or 15 years are not "drafted in the form of model legislation," but are included in the Appendix entitled "Principles for Legislation" in the final version of the new MPC sentencing provisions. *Id.* § 11.02. Also included in this Appendix are provisions for adopting "a framework for 'control release' from prison, jail, probation, and postrelease supervision when correctional populations exceed … operational capacities." *Id.* § 11.04.

The procedures allowing motions to modify a sentence based on a prisoner's age, health, family circumstances, etc. remain in the final version. *Id.* § 11.03. In addition, the new MPC sentencing provisions afford credits for good behavior that are available to any prisoner who has not been found to have committed a crime or a "serious violation" of prison rules by a preponderance of the evidence. Credits are also available for "satisfactory participation in vocational, educational, or other rehabilitative programs." *Id.* §11.01.

Page 112: Add to the second paragraph:

The sections on sentencing hearing procedures in the final version of the MPC sentencing revisions include provisions on victims' rights and appellate review of sentences. *See id.* §§ 10.08, 10.10. The latter section allows appellate courts to exercise their "independent judgment" to modify any "disproportionately severe" sentence. *Id.* § 10.10(5)(b). In addition, it instructs appellate judges to conduct de novo review of the "extraordinary departures" from the sentencing guidelines described on page 111 of the casebook. *Id.* § 10.10(5)(e).

[3] PROPORTIONALITY

Page 123: Add to Note 5:

In a 2017 memo, Attorney General Jeff Sessions reversed the Obama administration's stance on mandatory minimum sentences, instructing federal prosecutors to "charge and pursue the most serious, readily provable offense" in each case, i.e., the offense that "carr[ies] the most substantial guidelines sentence, including mandatory minimum sentences." The backlog of federal prisoners seeking clemency is now more than 11,000. *See* Katie Benner, *They Wanted to Update the Pardon System, but Not Like This*, N.Y. TIMES, June 2, 2018, at A13.

Page 123: Add to Note 6:

The Fourth Circuit affirmed the district court's ruling that Lee Malvo is entitled to resentencing under *Miller v. Alabama* and *Montgomery v. Louisiana*. *See Malvo v. Mathena*, 2018 U.S. App. Lexis 16768 (4th Cir. June 21, 2018).

CHAPTER 3

THE ACT REQUIREMENT

[B] OMISSIONS

Page 141: Add to Note 7:

Noor Salman, the widow of Omar Mateen, the man who killed 49 people at the Pulse nightclub in Orlando, Florida, in 2016, was acquitted of charges that she aided and abetted a terrorist act and obstructed justice. Although the foreperson of the jury told reporters the jurors thought Salman was at least generally aware of her husband's plans, they did not find that she had done anything to intentionally assist him. After 11 hours of questioning without a lawyer, Salman told law enforcement officials that she had driven with her husband to scout the nightclub, but there was no evidence to corroborate that statement and defense counsel argued that it was a false confession. *See* Patricia Mazzei, *Orlando Gunman's Wife Is Acquitted in Shootings*, N.Y. TIMES, Mar. 31, 2018, at A16.

CHAPTER 4

MENS REA

[A] INTRODUCTION

Page 164: Add to the end of the first paragraph:

For an empirical study finding that mock jurors typically view MPC recklessness as a sufficiently culpable mens rea for criminal punishment, even when the criminal law requires proof of knowledge, see Matthew R. Ginther et al., *Decoding Guilty Minds: How Jurors Attribute Knowledge and Guilt*, 71 VAND. L. REV. 241 (2018).

CHAPTER 6

HOMICIDE

[D] FELONY MURDER

[1] THE POLICY ISSUES SURROUNDING FELONY MURDER

Page 347: Add to Note 4:

In *Commonwealth v. Brown*, 81 N.E.3d 1173 (Mass. 2017), the Massachusetts Supreme Judicial Court joined the group of states foreclosing prosecutors from using felony murder to prove the malice necessary to support a murder conviction. Although the court upheld the constitutionality of the felony murder rule, it ruled that felony murder would no longer be recognized as "an independent theory of liability for murder" in that state. Instead, felony murder would serve only as "an aggravating element of murder, permitting a jury to find a defendant guilty of murder in the first degree where the murder was committed in the course of a felony punishable by life imprisonment even if it was not committed with deliberate premeditation or with extreme atrocity or cruelty." *Id.* at 1178.

[E] THE DEATH PENALTY

[1] THE POLICY CONSIDERATIONS UNDERLYING THE DEATH PENALTY

Page 376: Add to the end of the first paragraph:

For research on the reasons for the recent reductions in capital sentences, see Brandon L. Garrett & Ankur Desai, *The State of the Death Penalty Decline*, NOTRE DAME L. REV. (forthcoming 2018) (concluding that the decline is more strongly correlated with states' creation of state-wide public defender offices to represent capital defendants than with either declining homicide rates or the option of a life imprisonment without parole sentence); Brandon L. Garrett et al., *The American Death Penalty Decline*, 107 J. CRIM. L. & CRIMINOLOGY 561, 562 (2017) (analyzing all death sentencing between 1990 and 2016, and finding that "death sentences are strongly associated with urban, densely populous counties" and with "counties that have large black populations"; that homicide rates are related to death sentencing in several ways; and that "death sentencing is associated with inertia or the number of prior death sentences within a county").

Page 389: Add to Note 2:

Although the California Supreme Court upheld the constitutionality of the 2016 referendum, it ruled that the provisions "that appear to impose strict deadlines on the resolution of judicial proceedings must be deemed directive rather than mandatory" "in order to avoid serious separation of powers problems." *Briggs v. Brown*, 400 P.3d 29 (2017).

Page 392: Add to Note 4:

The Supreme Court has agreed to consider a method of execution challenge filed by a Missouri prisoner who alleges that he suffers from a rare disease that has caused tumors and that may make death by lethal injection unusually painful. Among the questions raised by the case is whether the prisoner has met the burden imposed by *Glossip v. Gross* to prove that he is entitled to an alternative method of execution – in this case, the gas chamber. *See Bucklew v. Precythe*, No. 17-8151 (cert. granted, Apr. 30, 2018).

Page 406: Add to Note 5:

On remand after the Supreme Court's decision in *Buck v. Davis*, Duane Buck was sentenced to life in prison. *See* Alex Arriaga, *Texas Death Row Inmate Duane Buck Has Sentence Reduced to Life After Supreme Court Orders Retrial*, TEX. TRIB., Oct. 3, 2017.

In *Tharpe v. Sellers*, 138 S. Ct. 545 (2018) (per curiam), the Court held that a death row inmate should be allowed to reopen his habeas petition in order to challenge his conviction on the grounds that one of the jurors was biased against him because of his race. The prisoner introduced a sworn affidavit from the juror which stated that "'there are two types of black people: 1. Black folks and 2. N******'"; that the prisoner, "'who wasn't in the "good" black folks category…, should get the electric chair for what he did'"; and that "'[a]fter studying the Bible, I have wondered if black people even have souls.'" *Id.* at 546.

[2] THE CONSTITUTIONALITY OF THE DEATH PENALTY AND CAPITAL SENTENCING PROCEDURES

Page 414: Add to Note 8:

In *Panetti v. Davis*, 863 F.3d 366, 375 (5th Cir. 2017), the Fifth Circuit held that Panetti was entitled to appointed counsel and "funding for experts and other investigative resources," given that "a decade has now passed since the last determination of whether this concededly mentally ill petitioner is competent to be executed."

The Supreme Court has agreed to consider whether a prisoner is competent to be executed because he understands that he has been sentenced to die for a murder conviction even though, as the result of several strokes, he has no memory of the crime he committed more than 30 years earlier. *See Madison v. Alabama*, No. 17-7505 (cert. granted, Feb. 26, 2018).

Page 417: Add to Note 9:

On remand, the Fifth Circuit held that Kevan Brumfield is intellectually disabled and therefore ineligible for the death penalty under *Atkins*. *See Brumfield v. Cain*, 808 F.3d 1041 (5th Cir. 2015). But the Texas courts held that Bobby Moore was not intellectually disabled under the standards set out in the most recent version of the American Psychiatric Association's Diagnostic and Statistical Manual of Disorders. *See Ex parte Moore*, 2018 Tex. Crim. App. Lexis 178 (Tex. Crim. App. June 6, 2018).

Page 421: Add to Note 1:

In *Hidalgo v. Arizona*, 138 S. Ct. 1054 (2018), the Court denied cert in a case challenging the constitutionality of the Arizona death penalty statute, which makes all defendants convicted of first-degree murder eligible for a death sentence and defines first-degree murder broadly to include all premeditated killings and any felony murder committed in the course of 22 underlying felonies (including transporting marijuana for sale). The defendant's argument was based on an empirical study which found that at least one of the death penalty statute's aggravating circumstances could be found in 98% of the first-degree murder cases brought over a 10-year period in Maricopa County. Four Justices, in a statement written by Justice Breyer, took the position that the state supreme court had misapplied Supreme Court precedent in upholding the statute and that the defendant had raised "a possible constitutional problem," but they ultimately agreed with the decision to deny review because the record in the case was not fully developed. *Id.* at 1057 (statement respecting the denial of certiorari).

Page 423: Add to Note 2:

In *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016) (per curiam), the Court made clear that its holding in *Payne v. Tennessee* did not implicitly overturn the portion of *Booth v. Maryland* holding that the testimony a victim's family members provide at a capital sentencing hearing may not include "characterizations and opinions about the crime, the defendant, and the appropriate sentence." *Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991).

Page 430: Add to Note 7:

Shortly after taking office, Alabama's new Governor, Kay Ivey, signed legislation amending that state's death penalty statute so that judges may no longer override a jury's decision not to impose the death penalty. Under the statute, Ala. Code § 13A-5-46, a death sentence requires a unanimous jury finding of a statutory aggravating circumstance, but only 10 votes in favor of execution. *See It's About Time, Alabama*, L.A. TIMES, Apr. 13, 2017, at A12.

Page 431: Add to Note 8:

An empirical study surveying almost 500 people who reported for jury duty in Orange County, California – one of only 16 counties in the country that imposed five or more death sentences since 2010 – found that 35% or more of the prospective jurors could be excluded from jury service under the *Witherspoon/Witt* standard and that almost a quarter of them said that they would be reluctant to find the defendant guilty in a capital case. *See* Brandon Garrett et al., *Capital Jurors in an Era of Death Penalty Decline*, 126 YALE L.J. F. 417 (2017).

CHAPTER 7

RAPE

[B] FORCIBLE RAPE

[2] MENS REA

Page 473: Add to n.20:

In September of 2017, Secretary of Education Betsy DeVos withdrew the Obama administration's 2011 "Dear Colleague Letter," promising that the Department of Education planned to engage in rulemaking on campus sexual misconduct. The Department issued interim guidance in the form of "Q&A on Campus Sexual Misconduct" that instructs schools to use the same standard of proof in sexual misconduct cases – preponderance of the evidence or clear and convincing evidence – that they use in other student disciplinary cases. The Q&A also provide that "[a]ny process made available to one party," such as the right to have an attorney or cross-examine witnesses, "should be made equally available to the other party." Unlike the 2011 "Dear Colleague Letter," the new interim guidance allows schools to limit the right to appeal to the student accused of sexual misconduct. *See* United States Department of Education Office for Civil Rights, Q&A on Campus Sexual Misconduct (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

Page 481: Add to Note 9:

Brock Turner's appeal of his conviction is pending. In June of 2018, the trial judge who sentenced Turner became the first California judge to lose a recall vote in more than 80 years. *See* Maggie Astor, *Judge in Sex Assault Case Is Recalled*, BOS. GLOBE, June 7, 2018, at A2.

[3] ACTUS REUS

Page 517: Add to Note 13:

The American Law Institute has approved two additional provisions of the proposed revisions to the Model Penal Code sections governing sex offenses. The first now defines "sexual penetration" as "an act involving penetration, however slight, of the anus or genitalia by an object or body part, except when done for legitimate medical, hygienic, or law-enforcement purposes." Model Penal Code: Sexual Assault and Related Offenses § 213.0(1) (Tentative Draft No. 3, 2017). The second adds a definition of "oral sex": "a touching of the anus or genitalia of one person by the mouth or tongue of another person." *Id.* § 213.0(2). In place of the prior draft's references to "sexual penetration," the new draft defines the various sex offenses to prohibit acts of penetration or oral sex.

In addition, the most recent draft of the proposed revisions would change the mens rea for *aggravated forcible rape* to require that the defendant acted knowingly. *See id.* § 213.1(2).

The latest draft also makes *sexual penetration or oral sex without consent* a fifth-degree felony, punishable by a maximum of three years in prison, rather than a fourth-degree felony punishable by up to five years. But the crime is still a fourth-degree felony if "the act occurs in disregard of the other person's expressed unwillingness, or is so sudden or unexpected that the other person has no adequate opportunity to express unwillingness before the act occurs." *Id.* § 213.4(2).

CHAPTER 9

AGGRAVATED PROPERTY CRIMES

[A] ROBBERY

Page 631: Add to Note 2:

The Supreme Court has agreed to consider whether a state robbery offense that requires proof that the defendant overcame "victim resistance" is categorically a "violent felony" under the federal Armed Career Criminal Act, even though the state appellate courts have interpreted the statute to require only slight force to overcome resistance. *See Stokeling v. United States*, No. 17-5554 (cert. granted, Apr. 2, 2018).

Page 637: Add to Note 12:

In 2017, after serving nine years of his sentence, O.J. Simpson was released on parole because of his age (70 years at that time) and his good behavior in prison. *See* Richard Pérez-Peña, *Simpson Gets Parole After Nine Years*, BOS. GLOBE, July 21, 2017, at A2.

[D] BURGLARY

Page 689: Add to Note 5:

The Supreme Court has agreed to consider whether the burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation – such as a mobile home, trailer, or tent – can qualify as a "burglary" under the federal Armed Career Criminal Act. *See United States v. Stitt*, No. 17-765 (cert. granted, Apr. 23, 2018).

CHAPTER 11

ATTEMPT AND SOLICITATION

[A] ATTEMPT

[2] THE ELEMENTS OF ATTEMPT

Page 749: Add to Note 6:

In a recent application of the common law's physical proximity test, the Vermont Supreme Court found insufficient evidence that Jack Sawyer, who told police he had planned to commit a mass shooting at his former high school, had committed the actus reus necessary for the crime of attempt. Sawyer had written about his plans in a journal, had selected a date for the shooting, had a shotgun and 17 rounds of ammunition in his possession, planned to buy a handgun and observe the school resource officer's daily routine, and told police that "he wanted to exceed the body count from the Virginia Tech shooting." *State v. Sawyer*, 2018 Vt. Lexis 39, at *7 (Vt. Apr. 11, 2018). Reasoning that, under Vermont law, an attempt is "'the direct movement toward the commission [of the crime] after the preparations are made'" – "a preparatory act 'such as would be likely to end, if not extraneously interrupted, in the consummation of the crime intended'" – the Court noted that its precedent made clear that, "despite a showing of the intent to commit the offense, obtaining the tools necessary to complete an intended crime did not constitute an attempt to commit that crime." *Id.* at *12-13. Concluding that Sawyer had committed "no act that was the 'commencement of the consummation' of the crimes he [was] charged with," the court held that he could not be detained without bail. *Id.* at *21. As a result of the court's ruling, the prosecution dropped the felony charges against Sawyer and charged him with the misdemeanor offenses of criminal threatening and carrying a dangerous weapon. The decision to release Sawyer on bail prompted a great deal of controversy and has led to calls to amend the state's attempt laws. *See* Jess Bidgood, *"I'm Aiming to Kill," He Wrote. Was That a Crime?*, N.Y. TIMES, May 5, 2018, at A1.

CHAPTER 12

ACCOMPLICE LIABILITY

[E] ACCESSORY AFTER THE FACT AND OBSTRUCTION OF JUSTICE

Page 821: Add to Note 1:

In *Marinello v. United States*, 138 S. Ct. 1101, 1104 (2018), the Court relied on *Aguilar* in holding that a similarly worded statute involving obstruction of "the due administration" of the federal tax code requires proof that the defendant was aware of a pending tax-related proceeding, such as "a particular investigation or audit." The Court rejected the argument that the statute broadly "cover[s] routine administrative procedures that are near-universally applied to all taxpayers, such as the ordinary processing of income tax returns."

Page 822: Add to Note 1:

For further discussion of the issue of presidential obstruction of justice, see Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. – (forthcoming 2018) (arguing that that a president "obstructs justice when his motive for intervening in an investigation is to further personal or narrowly partisan interests, rather than to advance the public good"); Isaac Chotiner, *An Argument with Alan Dershowitz*, SLATE (Dec. 4, 2017, 9:40 PM), http://www.slate.com/articles/news_and_politics/interrogation/2017/12/an_interview_with_alan_dershowitz_on_trump_and_the_mueller_investigation.html (reporting Professor Alan Dershowitz's view that a president can be impeached, but cannot be charged with obstruction of justice, for pardoning someone, for "'firing somebody he's authorized to fire,'" or otherwise for "'exercising his constitutional authority'").

CHAPTER 13

CONSPIRACY

[C] MODERN APPLICATIONS OF CONSPIRACY LAW

[1] CONSPIRACY CHARGES IN POST 9/11 TERRORISM CASES

Page 870: Add to the end of the second paragraph:

The Supreme Court denied certiorari in Al Bahlul's case. *See Al Bahlul v. United States*, 138 S. Ct. 313 (2017).

CHAPTER 14

JUSTIFICATION

[B] SELF-DEFENSE

Page 895: Add to Note 7:

South Africa's Supreme Court of Appeal agreed with the prosecution's challenge to the six-year prison sentence imposed on Oscar Pistorius. The Court more than doubled the sentence, to 15 years, leaving Pistorius to serve more than 13 years after he is credited for the time he already spent in prison or under house arrest. *See* Alan Cowell, *Murder Sentence for Olympic Amputee Is Increased to 15 Years in South Africa*, N.Y. TIMES, Nov. 25, 2017, at A4.

Page 921: Add to Note 1:

In 2017, the Florida legislature expanded the immunity granted by the state's stand-your-ground law. The new version of the statute requires prosecutors in the pretrial immunity hearing to

shoulder the burden of proving by clear and convincing evidence that the defendant did not act in self-defense, a burden that previously was imposed on the defense by a preponderance of the evidence. *See* Fla. Stat. § 776.032. The constitutionality of the new law is being litigated. *See* Dan Sullivan, *Do-Over in Shooting Ruling?*, TAMPA BAY TIMES, May 9, 2018, at 1.

[C] OTHER USES OF DEFENSIVE FORCE

[2] LAW ENFORCEMENT

Page 936: Add to Note 1:

For an article that discusses law enforcement's use of robots to kill suspected felons and argues that, even when police are authorized to use deadly force, the Constitution still governs the type and magnitude of lethal force that is used, see Melissa Hamilton, *Excessive Lethal Force*, 111 NW. U. L. REV. 1167 (2017).

Page 939: Add to Note 5:

Michael Slager was sentenced to 20 years in prison in connection with the shooting of Walter Scott. *See* Alan Blinder, *White Officer Who Killed Black S.C. Motorist Sentenced*, BOS. GLOBE, Dec. 8, 2017, at A6. The civil suit filed by Michael Brown's family was settled for $1.5 million. *See News Briefing*, CHI. TRIB., June 24, 2017, at C6.

[D] NECESSITY

Page 954: Add to Note 7(a):

In January of 2018, Attorney General Jeff Sessions rescinded the Obama administration's 2013 policy of deferring to the states in addressing the prosecution of marijuana use. Noting that federal narcotics statutes "reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime," Sessions directed federal prosecutors to "follow the well-established principles that govern all federal prosecutions" in deciding when to bring charges in cases involving marijuana. *See* Memorandum for All United States Attorneys, Marijuana Enforcement (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download. Sessions has also asked Congress to lift the Rohrabacher-Blumenauer amendment (initially known as the Rohrabacher-Farr amendment), a budget rider that must be passed each year which prohibits the Justice Department from using federal funds to prevent states from implementing their medical marijuana laws. *See* Chris Ingraham, *Sessions Asks to Eliminate Medical-Pot Protections*, WASH. POST, June 14, 2017, at A6.

Those opposing the federal government's efforts to restrict the states' attempts to decriminalize the use of marijuana may find support in the Supreme Court's holding in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018). In that case, the Court ruled that a federal statute prohibiting the states from allowing sports betting violated the principle, grounded on the Tenth Amendment, that the federal government may not issue direct orders to the states. Under this "anti-commandeering" principle, the Court held, the federal government may not order the states to enforce federal laws

or policies, and the federal sports gambling statute "unequivocally dictate[d] what a state legislature may and may not do." *Id.* at 1478.

CHAPTER 15

EXCUSE

[A] DURESS

Page 985: Add to Note 9(c):

As noted above in the material supplementing page 123, the Fourth Circuit held that Lee Malvo is entitled to resentencing under the Supreme Court's ruling in *Miller v. Alabama*, 567 U.S. 460 (2012), that juveniles may not automatically be sentenced to life in prison without parole even for the crime of homicide. *See Malvo v. Mathena*, 2018 U.S. App. Lexis 16768 (4th Cir. June 21, 2018).