ASPEN COLLEGE SERIES

Edward C. Carter, III

CRIMINAL LAW AND PROCEDURE FOR THE PARALEGAL

SECOND EDITION

Wolters Kluwer

Aspen College Series

Criminal Law and Procedure for the Paralegal

Edward C. Carter, III

Second Edition

Wolters Kluwer

Published by Wolters Kluwer in New York.

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PO Box 990
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Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-7352-5

Library of Congress Cataloging-in-Publication Data

Names: Carter, Edward C., 1953- author.
Title: Criminal law and procedure for the paralegal / Edward C. Carter, III.
Description: Second edition. | New York : Wolters Kluwer, [2016]
Identifiers: LCCN 2016012200 | ISBN 9781454873525
Subjects: LCSH: Criminal law-United States. | Criminal procedure-United States.
Classification: LCC KF9219.85 .C37 2016 | DDC 345.73-dc23
LC record available at http://lccn.loc.gov/2016012200

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This book is dedicated to my wife Angela who,
without complaint, sacrificed all that I asked
and then had to sacrifice more than any person should.

Preface to the Second Edition

In this Second Edition of *Criminal Law and Procedure for the Paralegal*, the law has been updated where necessary, the examination of certain subjects has been deepened or expanded by the addition of new material, and some of the chapters have been reorganized either in response to changes in the law or to enhance analytic clarity and student understanding. The changes are described more specifically below.

Chapters 3 and 4 have been updated with the most recent statistics available about law enforcement agencies and federal and state prosecutions.

Chapter 6 has undergone extensive change. The law has been updated, the chapter has been expanded by the addition of new material, and the chapter has been reorganized.

New introductory paragraphs at the beginning of the chapter introduce the terms "legislative jurisdiction" and "adjudicative jurisdiction" and explain that one refers to the substantive element of criminal jurisdiction (the subject of Chapter 6) and the other refers to the procedural element of criminal jurisdiction (the subject of a later chapter). Those terms are new to both the chapter and the textbook. The new introductory paragraphs also make explicit what was only implicit in Chapter 6 of the First Edition: that a sovereign can exercise legislative jurisdiction under either customary international law or its own domestic law and still have a valid verdict.

As reorganized, Section A now examines how legislative jurisdiction is established under customary international law. Section B examines the domestic law alternative to establishing legislative jurisdiction through customary international law as that alternative is explicated in *United States v. Yunis*[1], a case which is reproduced in edited form in the body of the textbook.

The discussion of customary international law as it relates to legislative jurisdiction has been updated with new decisions and has been deepened by the addition of an examination of customary international law's reasonableness limitation.

The law in Chapter 7 has been updated and the chapter has been expanded by the addition of two subjects. First, recognizing the importance of the *Vilar*[2] decision, a brief discussion of the presumption against extra-territorial application of federal criminal statutes has been added. Second, a brief examination of the limits that the Fifth Amendment's due process clause places on the exercise of extra-territorial jurisdiction by the federal government has also been added.

Chapter 8 has been expanded, its treatment of certain subjects deepened, and its law updated. It has been expanded, and its discussion of the limits the equal protection clause imposes on the power of the federal government and the states to enact criminal laws has been deepened by the addition of a brief discussion about the application of the disparate impact doctrine to facially neutral criminal statutes. The chapter has also been expanded and its examination of the due process based void for vagueness doctrine has been deepened by the addition of a discussion of that doctrine in relation to jurisdictional statutes.

The law in Chapter 9 has been updated and the Eye on Ethics sidebar relating to the no contact rule has been edited and expanded to reflect developments in the law surrounding that rule since the First Edition of the textbook was published. The original sidebar explained that the no contact rule is case specific. The edited sidebar uses recent court decisions to explain in more detail what that means. A new section of the sidebar examines the "authorized by law exception" that is now found in versions of the no contact rule adopted by some states or which appears in comments that accompany a revised version of the rule adopted in other states. That new section of the sidebar also uses recent decisions to explain the limits of the authorized by law exception.

The law in Chapter 10 has been updated and its discussion of the offenses of Mail Fraud and Forgery has been edited. In the case of both offenses the changes were made for the purpose of enhancing analytic clarity and student understanding. In the case of Mail Fraud and the other federal scheme statutes referred to in connection with the discussion of that offense the changes also reflect recent decisions relating to them.

Chapter 11 was expanded by the addition of a recent court decision to the body of the textbook. That decision, *State v. Kenny*,[3] provides an easy to understand explanation in a factually simple case of the principle of cause in fact and illustrates how that principle operates to relieve a defendant of criminal responsibility for results that his actions bring about.

In Chapter 13, the sidebar relating to the cultural background defense has been updated and expanded by a brief discussion of the International Convention of Civil and Political Rights and whether that convention creates a right to such a defense in the United States.

The law in Chapter 16 has been updated and the chapter has been edited and expanded to reflect the Supreme Court's teaching in the 2012 *Jones*[4] decision. The chapter now includes a discussion of the concept of a Fourth Amendment search, as explicated in *Jones* and reflects the holding of *Jones* that the *Katz*[5] expectation of privacy test does not supplant the pre-*Katz*, textually based, enumerated areas/trespass analysis. The chapter now also reflects the holding of *Jones* that the *Katz* expectation of privacy test is to be used only when government agents intrude into areas not specifically mentioned in the Fourth Amendment.

In Chapter 18, the section that examines the right to counsel has been reorganized and updated with the addition of several post-*Rothgery*[6] decisions.

Chapter 19 has been expanded by the addition of a brief examination of the concept of adjudicatory jurisdiction (an addition necessitated by the expanded examination of criminal law jurisdiction in Chapter 6 where the term "adjudicatory jurisdiction" is introduced) and how, in criminal law, that element of jurisdiction is established by acquiring *in personam* jurisdiction over the defendant.

Chapter 20 was expanded by the addition of a brief discussion of an alternate closing argument procedure used in some jurisdictions.

The law in Chapter 21 has been updated and the section of the chapter that discusses how and by whom a sentence in a criminal case is determined has been reorganized and deepened. As reorganized, that section now more clearly delineates the difference between the sentencing procedure in capital cases, a procedure that is fairly uniform among the states with a death penalty statute and the sentencing procedure in non-capital cases, a procedure in which there is substantially less uniformity among the states. The reorganized section has also been deepened to provide a fuller discussion of the process by which a death sentence is imposed and, as it relates to the death penalty, it: 1) incorporates the Supreme Court's January 2016 decision in *Hurst v. Florida*[7] and 2) replaces the portion of the now repealed Illinois death penalty that appeared in the First Edition of the textbook with a statutorily equivalent section of the Idaho death penalty statute.

ENDNOTES

1. 924 F.2d 1086 (D.C. Cir. 1991).
2. *United States v. Vilar*, 729 F.3d 62 (2nd Cir. 2013).
3. 116 So.3d 992 (Ct. Of App. of La. 4th Dist. 2013).
4. *United States v. Jones*, 565 U.S. _____ (2012).
5. *Katz v. United States*, 389 U.S. 347 (1967).
6. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008).
7. 557 U.S. _____ (2016).

Preface to the First Edition

Criminal Law and Procedure for the Paralegal takes a practical approach to teaching paralegal students about the criminal justice system, criminal law and procedure, the role of paralegals in the criminal justice system, and how to perform tasks that paralegals can reasonably expect to be assigned while working in the field.

Organization of the Textbook

The textbook is divided into four sections each of which covers a broad subject area. Each section contains a brief introduction to its subject and a brief description of the topics of each chapter in the section. At the beginning of each chapter there is a statement of chapter objectives. That statement tells the student what he or she is expected to learn from the chapter. Each chapter also has at least one introductory paragraph that explains what the chapter will cover thereby reinforcing for the students what they should expect to learn. When a new legal term or possibly unfamiliar nonlegal term is introduced, it is defined in the margin of the page on which the term first appears. In most instances, legal terms are also discussed within the body of text. Those terms then appear at the end of the chapter in a list called "Chapter Terms." At appropriate points there is a discussion of the role paralegals often play in relation to the chapter's subject.

Most chapters also contain cases. In most instances the cases provide examples of the legal principles discussed in the body of the text and often provide further explanation for or discussion of those principles. In some instances a case is included to provide historical context to a legal principle discussed in the text, and in other instances a case is included to illustrate a competing legal principle that the court considered or had previously adopted. Each case is followed by a "Case Focus" text box that contains questions aimed at focusing the students' attention on the point or points the case was included to illustrate. The cases do not introduce new subjects. Thus, instructors who do not want to assign cases for reading can do so without forfeiting coverage of any subject.

Many chapters also contain sidebars, two of which recur in various chapters. One of the recurring sidebars is the "Eye on Ethics" sidebar. The Eye on Ethics sidebars discuss ethical issues that relate to a subject discussed in a particular chapter. The other recurring sidebar is the "Historical Perspective" sidebar. The Historical Perspective sidebar provides

students with historical background to the development of some legal principle or legal institution discussed in a chapter. Non-recurring sidebars provide more depth or context to certain subjects.

At the end of each chapter there is a list of questions called "Review Questions." The review questions are tied to the chapter objectives and are designed to test whether the student has achieved those objectives. Many chapters also contain a section called "Additional Reading" that lists articles, books, and other material for students who are interested in reading more about a subject covered in the chapter.

Introducing Students to the Criminal Justice System

Unless they already work in the criminal justice system it is the author's experience that most paralegal students at best have an imperfect understanding of how the criminal justice system works, who its primary actors are, and the limits imposed on those actors. In particular, students have little understanding of the vast array of law enforcement agencies and prosecuting offices that enforce the criminal laws in the United States. The chapters in Section I introduce the student to the criminal justice system. The first chapter gives the students an overview of the criminal justice process by breaking it into different phases. The students will encounter those phases again in Section IV, which discusses criminal procedure in a phase-by-phase manner. In Chapter 2 the students are introduced to the legal concept of crime and learn the distinction between civil and criminal law. This chapter also provides the students with a brief history of the development of criminal law. The chapter also introduces the students in a general way to some of the different ways in which crimes are classified (e.g., felony/misdemeanor and *malum in se/malum prohibitum*) and explains why understanding those classifications is important.

The third and fourth chapters of Section I introduce students to the different types of law enforcement agencies that investigate crime and the different offices that initiate criminal prosecutions. In conjunction with its examination of the different types of law enforcement agencies at different levels of the American political system, Chapter 3 also examines the different types of investigations they conduct (informal and formal) and introduces the students to the different forms of investigations such agencies conduct. In particular, Chapter 3 introduces the student to the grand jury and explains how grand jury investigations are conducted. Included in Chapter 3 is a discussion of administrative investigations and administrative subpoenas—an important subject given the number of federal and state criminal investigations that are conducted in that manner and the role paralegals often play in them. This is a subject that is often ignored by other criminal law textbooks for paralegals.

Chapter 4 not only introduces the student to the different prosecuting offices found in the American political system, but it also discusses the nature and exercise of prosecutorial discretion and the limiting effect the principle of separation of powers has on the power of the judiciary to investigate and prosecute or to order the investigation and prosecution of crime.

Substantive Law and Procedure

Sections II through IV address the subjects of criminal law and procedure. Section II is a short section that consists of one chapter that examines the distinction between substantive criminal law and criminal procedure. Section III covers the subject of substantive criminal law and Section IV covers the subject of criminal procedure.

Approach of the Textbook in Relation to Criminal Offenses and Affirmative Defenses

Teaching substantive criminal law, even to the limited extent that it is done through a textbook for paralegal students, presents major challenges that are only exacerbated when the book is aimed at a nationwide audience. The existence of more than 51 different criminal codes in the American political system and the uncounted number of different crimes defined in those codes and in other statutes presents instructors with a daunting pedagogical challenge and makes it a nearly Sisyphean task to try to discuss even a substantial minority of offenses in any meaningful way.

Some paralegal textbooks try to meet this challenge by devoting much space to discussion of the Model Penal Code and examining the crimes and legal principles that code defines, usually to the exclusion of any discussion of federal crimes and the Federal Criminal Code. Other textbooks take a catalog-like approach placing criminal statutes into different categories and then briefly describing a large number of the federal and state crimes contained in those categories. To some extent some of the textbooks also put an emphasis on whatever offenses are the "crimes *du jour*" at the time they were written or revised. A glance at recently revised or released textbooks in the field reveals discussions of terrorism, terrorist crimes, and war crimes. Virtually all of the textbooks supplement

their examination of criminal offenses with discussions of crime related issues that are more appropriate to a sociology class or criminal justice class but which have nothing to do with the work of paralegals.

The Model Penal Code approach and the catalog approach both have serious drawbacks and do not serve the needs of paralegal students who may work in the field of criminal law. It makes little sense to place a heavy emphasis on discussing the Model Penal Code and the terms and crimes it defines when that Code has not been adopted in full in any state and to the extent it has been adopted, most of the states adopting it have chosen, to greater and lesser degrees, to use different terminology, define their terms somewhat differently, define their offenses differently, and give their offenses different names. It also makes little sense to ignore federal crimes and the Federal Criminal Code when that code is used across the country in federal criminal prosecutions and is significantly different in structure and approach from that of the Model Penal Code based state criminal codes. At the same time the brief snippet-like discussions of many different crimes found in the books that use the catalog approach provide a paralegal student with little that will help her do her job in a prosecuting or defense attorney's office or to understand what actually constitutes any particular crime.

This textbook takes a different approach to teaching paralegal students about crimes. Instead of following either of the above routes this textbook uses what the author refers to as the elemental analysis approach. The elemental analysis approach does not focus on a particular code or on particular offenses. Instead, it teaches students that all crimes are defined by elements, discusses the fundamental elements that are used to define all crimes in Anglo-American criminal law, and then teaches students how to find and learn about the elements of any criminal offense.

The elemental analysis approach, which the author has used in his classes, eliminates the pedagogical problems inherent in teaching about criminal law in a nation of more than 51 different criminal codes while at the same time teaches students a method which they can use to learn about and understand any type of Anglo-American criminal statute without regard to the jurisdiction, without regard to the type of offense, and without regard to the terminology it uses. The elemental analysis approach thus provides a paralegal student with knowledge that will enable her to perform any type of task given to her that requires her to have some understanding of a criminal statute, even if it is one with which she is wholly unfamiliar or it is one of the many new or recently amended criminal statutes regularly churned out by our many legislative bodies.

The subject of criminal offenses is examined in Chapter 10 and Chapter 11. Chapter 10 provides students with a broad overview of the different types of crimes defined in criminal statutes and uses a commonly recognized system to categorize statutes based on the type of crime they define. To the extent the textbook employs an offense

categorization paradigm it does so only as a vehicle to facilitate student understanding of the categories of conduct at which the criminal statutes are aimed and not as an end in itself. The textbook employs an eight category paradigm and uses as examples to illustrate the type of conduct to which the statutes in each of those categories apply, offenses whose names (e.g., incest, arson, perjury, and treason) capture, albeit in a non-technical way, the gist of the crimes they define.

The textbook does not completely forego a discussion of specific crimes. In connection with providing its overview of the different types of offenses, Chapter 10 discusses in a general way a few important, frequently prosecuted, and sometimes highly technical or widely misunderstood offenses. Consistent with the elemental approach to teaching about criminal offenses, each offense discussed is discussed in relation to the elements that define it. The following specific offenses are discussed:

- Each of the three anticipatory offenses is discussed. These are highly technical offenses which can be confusing and are difficult for students to understand.
- The offense of theft is examined. Theft in its various forms and under different names is one of the most frequently charged general property crimes. In many statutory forms it contains two *mens rea* elements and consists of multiple alternate elements which themselves often have multiple alternate definitions thereby making theft a highly technical offense. Theft is also an offense in connection with which most paralegals in prosecutors' offices will frequently be given some form of assignment. In its examination of the offense of theft the textbook notes three acts which theft statutes usually condemn and examines two of those acts.[1] The textbook includes a perfunctory discussion of theft's historical antecedents: the common law crimes of larceny, embezzlement, and false pretenses,[2] but spends no time discussing those crimes or the hyper-technical differences that distinguish them from each other. The author sees little value in devoting time to examining common law crimes that no longer exist and whose technical aspects today are of little interest to anyone other than law school academics and legal historians.
- The text includes a discussion of the statutes that define the homicidal crimes of murder and manslaughter, first degree murder and second degree murder, and felony murder. Few students are aware that there are two distinctly different approaches to defining crimes involving the intentional killing of a human being and virtually none are aware that there are important differences between how, under each approach, those forms of homicide are defined. Moreover, it is the rare paralegal student who has heard of the crime of felony murder or has any idea what the crime is. For all of those

reasons and because of the seriousness of those offenses the author considered it important to include a discussion of them.

- There is also a brief discussion of the offense of forgery. That discussion examines the modern form of the offense which, in many jurisdictions, is broadly defined to include the making or delivery of a document that is false in any material way. The book also examines how in many jurisdictions the offense has been updated for the digital age by defining the term "document" to include electronic documents and the term "signature" to include electronic signatures. Because the breadth of the offense of forgery is widely misunderstood by the public as well as by many prosecutors and defense attorneys and because of how the offense has been updated for the digital age it was considered important to include a discussion of it.
- The text also contains a somewhat lengthy discussion of the crime of mail fraud and of the scheme element of that offense. (The scheme can be a scheme to defraud, a scheme to deprive someone of honest services, or a scheme to obtain money or property by means of false pretenses or representations.) Paralegal texts virtually ignore any discussion of this offense. Examination of the offense and particularly of its scheme element is important for a number of reasons: First, mail fraud is one of the most wide sweeping and, with the possible exception of drug offenses, one of the most frequently charged of all federal crimes; it is used to prosecute simple fraud schemes, public corruption, and sophisticated business frauds and because prosecutions of the offense usually involve large volumes of documents, overhear tapes, video recordings, and digital evidence it is one of the crimes in relation to which paralegals in federal prosecutors' offices are most frequently assigned to work. For those reasons alone a paralegal should have some understanding of the offense and of its scheme element. Secondly, mail fraud's scheme element has been imported into other important federal crimes such as wire fraud, bank fraud, and securities fraud. That makes an understanding of that element even more important, particularly for paralegals who may work in federal prosecutors' offices or in federal regulatory agencies such as the FDIC, Federal Reserve, SEC, or FTC. Thirdly, many states have adopted criminal statutes which either contain a scheme element as part of the offense they define[3] or are state level statutory clones of a federal scheme statute.[4] Given the widespread use of the scheme element in so many federal and state statutes it is a gross disservice to paralegal students not to examine it and show how it is used in a particular criminal statute.[5]

Building on the introduction to the concept of elements provided by the discussion of the above offenses in Chapter 10, Chapter 11 provides students with an introduction to and extended discussion of the fundamental elements that are used to define all crimes in American criminal law.

In keeping with the philosophy that it disserves students to ignore the Federal Criminal Code, the discussion of fundamental elements is done with reference to that code, the Model Penal Code, and the common law concepts on which the terms used in both codes are based. The text devotes significant space to the discussion of *mens rea* and explains the fundamental difference between the approach taken to that concept in the Federal Criminal Code and the approach taken to it by the Model Penal Code and by the states that have patterned their criminal codes after it.

Building on that foundation the textbook proceeds to discuss how to find the elements of an offense and how to determine the meaning of those elements. In connection with that latter discussion the book examines the use of terms in the definitions of offenses that themselves are defined in a definitions section of a criminal code that then carry that meaning wherever those terms are used in it and the use of special or limited definitions that are applicable only when a term is used in the definition of a particular offense or in relation to a particular category of offenses. The Illinois theft statute is used to illustrate how to go about finding and learning the meaning of the elements of an offense. The book then employs a hypothetical prosecution referral to illustrate how a paralegal would combine the factual information contained in the referral with the law as explicated in the Illinois theft statute to prepare a report that will assist a prosecutor in making a charging decision or which a prosecutor can use as the basis of a prosecution memorandum, if his office uses them, or which a defense attorney can use in evaluating a client's case.

Chapters 12 through 15 cover affirmative defenses. On its face it may seem incongruous to devote more space to discussing affirmative defenses than to criminal offenses, but because there are far fewer affirmative defenses than criminal offenses, a somewhat greater degree of uniformity in their definitions, and because most of them apply to multiple offenses and some, such as the constitutionally based defenses apply to all offenses, a more thorough discussion is not only possible, but useful and warranted.

The first section of Chapter 12 provides the students with a general introduction to the concept of defenses in criminal law. That section discusses simple defenses and affirmative defenses and distinguishes between them. That section also provides a general discussion of affirmative defenses that tells students what such defenses are and examines the three burdens (assertion, production, and persuasion) that are associated with all affirmative defenses. That section also introduces students to a five category system for classifying different types of affirmative defenses. That system is then used as a framework for discussing affirmative defenses in that and the remaining affirmative defense chapters. The classification system employed in the textbook uses the following categories: 1) excuse defenses; 2) justification defenses; 3) failure of proof defenses; 4) offense modification defenses; and 5) non-exculpatory

public policy defenses. The author recognizes that the category titles may not be what some instructors are accustomed to seeing and that some instructors may not be accustomed to considering certain concepts contained in those categories as defenses. While any classification system may to some extent be arbitrary, the system employed in the textbook represents a modern classification system that is used in at least one major treatise and is recognized by many courts.[6]

The first section of Chapter 12 also explains that as is the case with criminal offenses: 1) affirmative defenses are defined differently in different states and 2) different states may give some of the defenses different names. Also as with the chapter that discusses criminal offenses, the affirmative defense chapters urge students to look at the criminal code of their own jurisdiction to see what affirmative defenses their jurisdiction's code recognize and how their jurisdiction's code defines them. Continuing the elemental approach taken with respect to criminal offenses, all the chapters dealing with affirmative defenses focus the students on the elements of each defense.

The instructor should be aware that the textbook does not purport to catalog and examine all of the affirmative defenses. Instead, each affirmative defense chapter discusses the important affirmative defenses contained in the affirmative defense category or categories to which the chapter relates. In the same vein, the textbook does not purport to provide a comprehensive analysis of the defenses it examines. Instead, the textbook examines the broad contours of the defenses and a few of the major variations in those contours that exist in different jurisdictions.

Approach of the Textbook in Relation to Criminal Procedure

Section IV of the book covers criminal procedure and examines that subject differently than most textbooks. Instead of focusing on the specific procedural rights the textbook focuses on the different stages of the criminal justice process and examines both what occurs at each stage and what rights are applicable at that stage. One result of that approach is that some rights, albeit different aspects of those rights are discussed in more than one chapter. An example of one such right is the privilege against self-incrimination. The chapters in Section IV examine the criminal justice process chronologically starting with the investigative stage and concluding with the post-trial stage. It is the author's belief that this organization helps the student to understand not only the flow of the criminal justice process but also how the procedural rights operate.

Textbook Resources

The companion website for *Criminal Law and Procedure for the Paralegal* at aspenparalegaled.com/books/crimlaw_crimpro includes additional resources for students and instructors, including:

- Study aids to help students master the key concepts for this course. Visit the site to access interactive StudyMate exercises such as flash cards, matching, fill-in-the-blank, and crosswords. These activities are also available for download to an iPod or other hand-held device.
- Instructor resources to accompany the text
- Links to helpful websites and updates

Text comes packaged with four months of prepaid access to Loislaw's online legal research database, at http://www.loislawschool.com. Blackboard and eCollege course materials are available to supplement this text. This online courseware is designed to streamline the teaching of the course, providing valuable resources from the book in an accessible electronic format.

Instructor resources to accompany this text include a comprehensive Instructor's Manual, Test Bank, and PowerPoint slides. All of these materials are available on a CD-ROM or for download from our companion website.

Acknowledgments

I would like to thank the following reviewers for their helpful insights:

Laura Barnard, Lakeland CC
Janine Ferraro, Nassau CC
Shawn Friend, Daytona State College
Victoria Green, Baker College
Mark Gruwell, Iowa Lakes Community College
Deborah Howard, University of Evansville
Russell J. Ippolito, SUNY/Westchester Community College
Kathryn Myers, St. Mary-of-the-Woods College
Tom Ogas, California State University—East Bay
Marcy Trew, Brown Mackie College