

## RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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### SUPREME COURT

#### I. 18 U.S.C. § 922(g)(9) / Misdemeanor Crime of Violence / Physical Force

*United States v. Castleman*, --- U.S. ---, 2014 U.S. LEXIS 2220 (Mar. 26, 2014).

The “physical force” required to satisfy the definition of a “misdemeanor crime of domestic violence” for purposes of 18 U.S.C. § 922(g)(9) is the degree of force necessary to support a common-law battery conviction, which is an “offensive touching.” The Court held that Castleman’s Tennessee conviction for “intentionally or knowingly causing bodily injury” to the mother of his child necessarily involved offensive touching and thus qualified as a predicate conviction under § 922(g)(9).

- Note that the force clause under § 922(g)(9) is almost identical to the force clause in the Armed Career Criminal Act’s (“ACCA”) definition of a “violent felony.” The Court’s held in *Johnson v. United States*, 559 U.S. 133 (2010) that the ACCA’s force clause requires “violent force,” which is “force capable of causing physical pain or injury to another person.” *Castleman* does not overrule *Johnson*. The Court held that Congress intended different meanings when it enacted the ACCA and § 922(g)(9).
- Likewise, *Castleman* leaves in tact the many Courts of Appeals’ decisions holding that common-law battery is not a “crime of violence” under 18 U.S.C. § 16.
- The Court did not reach the question of whether “causation of bodily injury necessarily entails violent force,” which will be helpful when fighting against the U.S.S.G. § 2L1.2 enhancement.

### THIRD CIRCUIT

#### I. Crack Reduction / Mandatory Minimum Erroneously Not Applied

*United States v. Ortiz-Vega*, --- F.3d ---, 2014 U.S. App. LEXIS 4595 (3d Cir. Mar. 12, 2014).

This case presented the unusual scenario where the defendant should have been facing a mandatory minimum sentence of 120 months for a crack cocaine offense with a mandatory consecutive 60 months for carrying a firearm in furtherance of that crime. At sentencing, the mandatory minimum was mistakenly ignored and the district court sentenced Mr. Ortiz-Vega to 108 months on the drug charge, even though he did not cooperate. The government failed to object, seek resentencing, or appeal within the relevant time periods.

The Third Circuit has previously held that Amendment 750 to the Sentencing Guidelines superseded *United States v. Doe*, 564 F.3d 305 (3d Cir. 2009), and allows for crack offenders who were sentenced below their mandatory minimum sentences for substantial assistance to move for a sentence reduction under 18 U.S.C. § 3582(c)(2). *United States v. Savani*, 733 F.3d 56 (3d Cir. 2013). The Third Circuit held that Ortiz-Vega is also eligible to seek a sentence reduction under 18 U.S.C. § 3582(c) based on the now-lower crack cocaine guideline range made retroactive under Amendment 759 to the Sentencing Guidelines. This is because his sentence was “based on” a guideline range that has now been lowered, even though he should have been subject to a mandatory minimum sentence. During § 3582(c)(2) proceedings, the court may not revisit or re-decide guideline applications, it must work only with the sentence actually imposed. This principle applies equally when a mistake was made in the defendant’s favor.

## **II. Incomplete Counterfeit Bills / U.S.S.G. § 2B5.1 / Reasonableness of Sentence**

*United States v. Woronowicz*, --- F.3d ---, 2014 U.S. App. LEXIS 4596 (3d Cir. Mar. 12, 2014).

Incomplete counterfeit bills count as “counterfeit items” and must be counted in calculating the total face value of the counterfeit items when the district court applies the sentencing enhancement at U.S.S.G. § 2B5.1(b)(1).

The Court also affirmed the sentence as both procedurally and substantively reasonable. In particular, the district court considered the large number of incomplete bills and varied downward two levels to account for the fact that the U.S.S.G. § 2B5.1(b)(1) enhancement may have overstated the actual or intended loss.

## **III. *Alleyne v. United States* / Retroactivity of Constitutional Rules of Law**

*United States v. Winkleman*, --- F.3d ---, 2014 U.S. App. LEXIS (3d Cir. Mar. 26, 2014).

The Winkleman brothers filed motions in the Third Circuit requesting that it recall its mandate and reinstate their direct appeals so they could try to seek relief under *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013). *Alleyne* held that “any fact that increases the mandatory minimum [sentence] is an ‘element’ that must be submitted to the jury” and proved beyond a reasonable doubt. The Court construed the motions as successive collateral attacks on the Winklemans’ convictions and sentences under 28 U.S.C. § 2255.

A second or successive § 2255 petition is only authorized if it is based on newly discovered evidence or a new rule of constitutional law, “made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” Even if *Alleyne* announced a new rule of law, the Supreme Court has not made it retroactive to cases on collateral review. It is not a new substantive rule that places certain private activity beyond the reach of the criminal laws and it is not a watershed rule of criminal procedure that alters “our understanding of the bedrock procedural elements” of the adjudicatory process.