

# RECENT THIRD CIRCUIT AND SUPREME COURT CASES

---

August 4, 2016  
Christofer Bates, EDPA

## SUPREME COURT

### THIRD CIRCUIT

#### I. Collateral Attack on Prior State Sentence in Federal Appeal

*United States v. Napolitan*, --- F.3d ---, 2016 U.S. App. LEXIS 13157 (3d Cir. July 19, 2016).

A defendant may not collaterally attack a prior state court sentence as part of a federal sentencing challenge unless (1) he claims the sentence was imposed in violation of his right to counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963), or (2) the relevant federal statute or sentencing guideline expressly authorizes such a collateral attack.

Napolitan attempted to argue that his state sentence under a statute later struck down by the Pennsylvania Superior Court as unconstitutional in light of *Alleyne v. United States*, 133 S. Ct. 2151 (2013) made it unreasonable for the district court to order his new federal sentence run consecutively. The Court affirmed the district court's sentence since Napolitan's argument would have required the district court to accept a collateral attack to the state sentence.

#### II. Career Offender Guideline / Residual Clause / Vagueness / Plain Error

*United States v. Calabretta*, --- F.3d ---, 2016 U.S. App. LEXIS 13568 (3d Cir. July 26, 2016).

The career offender guideline's residual clause ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") is unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that an identically worded residual clause in the Armed Career Criminal Act ("ACCA") was unconstitutional. Therefore, it was error for the district court to consider Calabretta's New Jersey eluding conviction as a career offender predicate.

The Court remanded Calabretta's case for resentencing after engaging in plain error review. The error was plain because *Johnson* was decided while Calabretta's appeal was pending, and the Third Circuit has consistently construed the career offender guideline similarly to the ACCA. Finally, the error affected Calabretta's substantial rights. Without application of the career offender guideline, Calabretta's advisory guideline range goes from 188 to 235 months down to 108 to 135 months imprisonment. It could even be reduced to 87 to 108 months given Calabretta's previous request for a downward variance in anticipation of Amendment 782, which lowered all drug guideline ranges by two levels – a request the district court denied based on the erroneous career offender designation. The Court was not willing to assume the district court would have imposed the same sentence regardless of the career offender designation.

### **III. Speech and Debate Clause / Separation of Powers / Venue**

*United States v. Menendez*, --- F.3d ---, 2016 U.S. App. LEXIS 13791 (3d Cir. July 29, 2016).

The district court did not clearly err when it denied Senator Menendez's motion to dismiss his indictment as privileged under the Speech and Debate Clause, which protects Congressmen and women from indictment for any acts which constitute "legislative activity." After determining that the challenged acts were neither manifestly legislative in nature nor clearly non-legislative, the Court proceeded to the second step of the analysis and considered the content, purpose, and motive of the acts. The indictment in this case sufficiently alleged that the predominant purpose of Sen. Menendez's challenged acts was to pursue a political resolution to his friend's disputes with the government and not to discuss broader policy issues, vet a presidential nominee, engage in legislative oversight, or engage in informal information gathering for legislation.

The district court also properly denied Sen. Menendez's motion to dismiss the charge against him under the Ethics Act for willfully falsifying, concealing, or covering up reportable gifts he allegedly received from his friend as part of a bribery scheme. The Separation of Powers doctrine does not bar prosecution by the Executive Branch merely because there are Senate Rules which allow it to punish Ethics Act violations related to financial disclosures. Sen. Menendez also failed to identify any Senate Rule the Court would have to interpret during the course of his prosecution that is so vague as to be non-justiciable. Finally, the Ethics Act disclosures are not protected legislative acts under the Speech and Debate Clause because they are not an integral part of the deliberative and communicative processes by which Congressional members participate in committee and Senate proceedings.

Sen. Menendez waived the venue claim he pursued on the Ethics Act charge via a petition for a writ of mandamus by not raising it in his opening brief. Even if the issue was properly raised, it would fail because the indictment alleges he covered up material facts in New Jersey before he filed his financial disclosures in Washington, D.C. The Senator failed to show that a trial in New Jersey rather than the District of Columbia would cause him irreparable injury or that a post-conviction appeal would be an inadequate remedy to challenge venue.