# United States Court of Appeals
for the
# Third Circuit

No. 14-3969

UNITED STATES OF AMERICA,

– against –

MICHAEL CALABRETTA, a/k/a MICHAEL CALLABRETTA,

*Appellant.*

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

## BRIEF FOR APPELLANT

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes**

**United States Sentencing Guidelines**

## JURISDICTIONAL STATEMENT

Michael Calabretta appeals from an amended final judgment disposing of all charges against him entered by the United States District Court of New Jersey on September 9, 2014.[1] A-2-7. *United States v. Calabretta*, 12-CR-131 (SRC). Mr. Calabretta pled guilty to a two-count information alleging violations of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) and 18 U.S.C. § 1956(h) on March 15, 2013. A-50-56; A-25 at Dkt. # 87.[2] Mr. Calabretta filed a timely notice of appeal on September 17, 2014. A-1.

The district court had jurisdiction pursuant to 18 U.S.C. §§ 3231 and 3238. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this case arises from a final decision of the district court.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the sentence was procedurally unreasonable because Mr. Calabretta was incorrectly adjudged a career offender and sentenced pursuant to U.S.S.G. § 4B1.1(a) (*see* A-82-83; A-120-123; A-130-132) and whether this case should be remanded for resentencing in Criminal History Category III without the application of the career offender guideline?

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[1] The final judgment was entered on September 9, 2014. The Amended Final Judgment, which instructs the Bureau of Prisons to attempt to designate Mr. Calabretta to a facility near his home and extends the date of his voluntary surrender until after December 19, 2014, is unchanged with respect to the sentence of 120 months imposed.

[2] "A" refers to the page number in the joint Appendix.

II. Whether the sentence was substantively unreasonable?

## STATEMENT OF RELATED PROCEEDINGS

This case has not been before the Court previously. Appellant was charged with codefendants James DellaBella; Michael Vacchiano; William Mabey, Sr.; William Mabey, Jr; Michelle Massaro; and Kenneth Martin. A-21 at Dkt. #51. Michelle Massaro and Kenneth Martin pled guilty and have been sentenced. A-29 at Dkt. # 112, 116.[3] To the best of Appellant's knowledge, the cases of his remaining co-defendants are proceeding as set forth in the PSR. Appellant is unaware of any pending appellate proceedings other than his own.

## STATEMENT OF THE CASE

Michael Calabretta pled guilty on March 15, 2013, to a two-count Superseding Information, charging him with a conspiracy to distribute and possess with the intent to distribute marijuana in violation of 21 U.S.C. §§ 841(b)(1)(B) and 846, and with money laundering of proceeds from that conspiracy in violation of 18 U.S.C. § 1956(h) from "at least in or about April 2008 through at least on or about October 6, 2010." A-50-51. The plea agreement contained a stipulation that "The offense involved at least 700 kilograms but less than 1,000 kilograms of marijuana," subjecting Mr. Calabretta to a mandatory minimum sentence of five

[3] The Presentence Report ("PSR"), which is provided under separate cover to this Court, lists numerous other individuals who are alleged to have been involved in the charged conspiracy. PSR at ¶¶ 18-53. Mr. Calabretta is unaware of the status of their cases other than as set out in the PSR.

years under 21 U.S.C. § 841(b)(1)(B), and a maximum sentence of 40 years. A-48; *see also* 18 U.S.C. § 841(b)(1)(B) (setting forth minimum and maximum sentences). Concerning the money laundering offense, the parties stipulated that, "The offense involved the laundering of more than $1,000,000 but less than $2,500,000 that were the proceeds of drug trafficking activity with the intent of promoting the drug trafficking activity." A-48. The parties agreed that, "If the sentencing court accepts the factual stipulations set forth above, both parties waive the right to file an appeal, collateral attack, writ, or motion claiming that the sentencing court erred in doing so. Otherwise, both parties reserve the right to file, oppose, or take any position in any appeal, collateral attack, or proceeding involving post-sentencing motions or writs." *Id.* The plea agreement did not contain a calculation of the applicable Guidelines range.

At the plea hearing on March 15, 2013, Mr. Calabretta admitted that he had conspired to distribute and possess with intent to distribute marijuana from 2008 to October 2010 in the New Jersey area and elsewhere and to traffic the proceeds of that conspiracy. A-75-78. The district court informed Mr. Calabretta of the mandatory maximum and minimum sentences and terms of supervised release as well as the monetary penalties and forfeiture allegations, A-60-62, and informed him that, "I won't be able to determine the guideline sentencing range until after a [pre] sentence report is prepared, and until after both you and the U.S. Attorney

had the opportunity to view it," and that it was possible he would conclude that a higher sentence than any estimate Mr. Calabretta had discussed with counsel was appropriate. A-71-73.

The Presentence Report calculated that Mr. Calabretta was a career offender as defined in U.S.S.G. § 4B1.2 because of two prior convictions that constituted crimes of violence, a 1990 Death by Auto conviction for which Mr. Calabretta was sentenced on June 26, 1992, principally to 120 days in jail and 5 years of probation (Ind. # 90-11-1605-I) (see PSR at ¶ 170[4]), and a 1994 Eluding in the Second Degree conviction for which Mr. Calabretta was sentenced on January 19, 1996, to

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| **170.** | **12/12/90 (Age: 22)** | **Death By Auto/New Jersey Superior Court, Passaic County, Paterson, New Jersey, Ind#: 90-11-1605-I** | **06/26/92: 120 days jail, 5 years probation, $100 fine**<br><br>**04/28/95: VOP, continued on probation**<br><br>**06/07/96: VOP, 5 years imprisonment, concurrent with Ind#: 94-12-01475**<br><br>**03/12/01: Paroled**<br><br>**05/26/03: Discharged from Parole** | **§4A1.1(a)** | **3** |

12 years of imprisonment and paroled on March 12, 2001 (Ind. # I1475-94) (see PSR at ¶ 186[5]). Mr. Calabretta was discharged from parole on May 26, 2003.

The facts of the 1990 Death by Auto offense are described in the PSR as follows:

> **171. On February 8, 1990, in Clifton, New Jersey, the defendant recklessly caused the death of Paul Hynes a.k.a. Paul Miller. Additional information has been requested, but not yet received.**
>
> **172. Regarding this incident, the defendant explained that a "drunk driver" hit his parked car, so he got in his car, along with Eugene Mantone, and attempted to follow the "drunk driver" with his car. Calabretta stated that he followed the other car for three or four miles, at which time the other car swerved and tried to hit his car. Both vehicles hit a telephone pole, but the driver of the other vehicle died in this accident. The defendant also indicated that Eugene Mantone, his passenger, later died in a motorcycle accident. (According to internet records, Mantone died in 2001.) The defendant was originally charged with manslaughter.**

While on probation for the 1990 Death by Auto offense, Mr. Calabretta received two violations of probation, the first on April 28, 1995, and the second on June 7, 1996. The second of the two violations resulted in five years of imprisonment, which was run concurrently with the sentence imposed in the

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| **186.** | **10/09/94 (Age: 26)** | **Eluding (2nd Degree)/ Jersey Superior Court, Passaic County, Paterson, New Jersey, Case#: I1475-94**<br><br>**Driving Under the Influence of Alcohol/Municipal Court, West Paterson, New Jersey, Case#: D007040** | **01/19/96: 12 years imprisonment (4 years parole ineligibility), $125 fine**<br><br>**12/05/95: 30 days imprisonment, concurrent with I1475-94, $545 fine**<br><br>**03/12/01: Paroled**<br><br>**05/26/03: Discharged from Parole** | **§4A1.1(a)** | **3** |

Eluding case. See PSR at ¶ 170. Mr. Calabretta was paroled on March 12, 2001 and discharged from parole on May 26, 2003. *Id.* To the best of counsel's knowledge, the probation violation that resulted in the sentence of imprisonment concerned the same conduct at issue in the 1994 Eluding case.

The PSR assigned three points to each of these convictions, leading to a total of six points and what would, without the career offender designation, be a Criminal History Category ("CHC") of III. See PSR at ¶ 192.

The PSR calculated Mr. Calabretta's Guidelines sentencing range (grouping the two offenses pursuant to U.S.S.G. § 3D1.2(c)) as follows (PSR at ¶¶ 138-150):

| | |
|---|---|
| Base Offense Level (U.S.S.G. §§ 2D1.1(c)(5) and 2S1.1(a)(1)) | 30 |
| Adjustment for conviction under 18 U.S.C. § 1956 (U.S.S.G. § 2S1.1(b)(2)(B)) | +2 |
| Adjustment for acceptance of responsibility (U.S.S.G. §§ 3E1.1(a) and (b)) | -3 |
| **Adjusted Offense Level** | **29** |
| Increase of base offense level for career offender status (U.S.S.G. § 4B1.1) | 34 |
| Adjustment for acceptance of responsibility | -3 |
| **Total Offense Level** | **31** |

At level 29 (the otherwise applicable adjusted offense level) in CHC III, Mr. Calabretta's potential sentencing range was 108 to 135 months. However, because the PSR found that Mr. Calabretta was a career offender, at level 31 in

CHC VI, Mr. Calabretta's sentencing range was 188 to 235 months—a difference of 80 to 100 months.

It its sentencing submission, the defense asked the district court to grant Mr. Calabretta the two level Guidelines sentencing range reduction for narcotics offenses pursuant to the Guidelines amendment 782, which was made retroactively applicable and scheduled to go into effect on November 1, 2014. A-82. Subtraction of an additional two points under Amendment 782 would have made Mr. Calabretta's applicable Guidelines range 87-108 months (level 27, CHC III), if he had not been adjudged a career offender. *See* U.S.S.G. § 1B1.10; U.S.S.G. § 2D1.1(c)(6) (2014 Guidelines Manual).

Mr. Calabretta, through counsel, also objected to the application of the career offender guideline. A-82-83. Counsel argued that Mr. Calabretta's criminal history category was substantially overstated because the most recent of his prior convictions had occurred nearly 20 years before the instant offense, and that a downward departure was warranted. A-88-91. Counsel also asked the district court to consider the declining public and judicial approval of mandatory minimum sentences and to impose the lowest sentence possible. *Id.*

In a supplemental sentencing submission, Mr. Calabretta argued that he should not be considered a career offender under U.S.S.G. § 4B1.1 because the PSR's attribution of career offender status was based on double counting of the

same offense—the 1994 Eluding conviction—once as an actual offense and once because the commission of that offense constituted a probation violation for which an additional sentence of imprisonment was imposed. A-120-123; *see also* PSR at ¶¶ 170, 186. Counsel argued that because the parole violation was not, in itself, a crime of violence and because, if that violation had not been counted, Mr. Calabretta would only have had a single eligible prior felony offense within the relevant time period, there was a colorable argument that he should not be designated as a career offender.[6]

Mr. Calabretta did not challenge the Probation Department's assertion that the New Jersey State offense of "Death by Auto" was a crime of violence within the meaning of the career offender guidelines. *See* PSR at ¶¶ 148, 170, 192. He therefore concedes that this Court may review that issue for plain error only.

At sentencing, the district court considered Mr. Calabretta's arguments but concluded that:

> With regard to whether or not the defendant's calculation as a career offender was correct, the Court is more than satisfied that the death-by-auto conviction, coupled with the conviction for eluding, both

[6] Counsel has searched for, but has not identified, a Third Circuit case that precisely addresses this point. But see *United States v. Garrett*, 504 Fed. Appx. 132, 135-36 (3d Cir. 2012) (holding that the sentence imposed upon the defendant's violation of probation, not the original sentence imposed, was to be counted when assessing the time period of the prior offense). From the facts in *Garrett*, the relationship between the violation of probation and any other offense for which Mr. Garrett was held responsible is not clear. Counsel is unaware of any case stating that a violation of probation is a crime of violence.

> qualify as a basis for determining that he indeed constitutes a career criminal.[7]
>
> The time frame of the offenses are indeed within the time frame which the guidelines contemplate for calculating a career offender enhancement and the Court is not satisfied that there is any double counting involved here.
>
> The eluding conviction resulted in both a sentence of incarceration and the violation of parole which extended his prior term and made that prior term for death by auto a term of imprisonment and a conviction which counted for career offender—felony offender determination, and the Court is satisfied that the calculation is indeed correct.

A-130-131. The district court adopted the PSR's Guidelines calculation of 188 to 235 months (level 31, CHC VI). A-132. The district court then asked for comments from counsel concerning the 3553 factors. *Id.* Counsel emphasized that Mr. Calabretta had taken responsibility for his actions and asked for a five-year sentence (the mandatory minimum under 21 U.S.C. § 841(b)(1)(B)). A-133. Mr. Calabretta also spoke on his own behalf, taking full responsibility for his actions. A-134. He explained to the court that he had promised his youngest daughter and his wife that, "this is it," and that he would never commit another crime. A-135. He emphasized that:

> My wife and my children, what I have with them, what I have with my fiancee is more than I could ever, you know, ever hope that I would have, and to me that's a lot and I just wish that I had thought a

[7] The district court did not question that the application of the career offender guideline based on the New Jersey Death by Auto conviction was appropriate; nor was the issue raised by either of the parties at sentencing.

> little better and a little longer about what I was doing while I was doing it, you know.
>
> [. . .]
>
> I truly am sorry for my involvement here and I'll never be back here in front of you or anyone else respectively.

A-135-136.

After hearing from the government and summarizing the factors it had considered under 18 U.S.C. § 3553(a), the district court imposed a sentence of 120 months on each count, to be served concurrently. A-142-143. The district court found that Mr. Calabretta's lengthy criminal history indicated that a sentence of 120 months was "the minimum sentence sufficient to secure the purposes that are set forth in 3553." A-141-143.

Mr. Calabretta's co-defendant Michelle Massaro pled guilty to a violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), which carries a 10-year statutory mandatory minimum sentence. PSR at ¶ 11, 13. She was sentenced to 37 months of imprisonment. A-29 (Dkt #112). Kenneth Martin pled guilty to a single violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). PSR at ¶ 8. He was sentenced to 30 months of imprisonment. A-29 (Dkt. #116).

## SUMMARY OF THE ARGUMENT

Mr. Calabretta's sentence was procedurally unreasonable because the district court erroneously adjudged him a career offender and based its subsequent sentence in part on a determination that Mr. Calabretta's applicable Guidelines range was 188 to 235 months. However, under New Jersey law and the law of this Circuit, Death by Auto requires a mental state of "recklessness" and is therefore not a crime of violence that can serve as a predicate offense for career offender status. Because Mr. Calabretta's record does not contain two prior crimes of violence (or drug offenses) within the applicable 15-year period, Mr. Calabretta is not a career offender and should not have been sentenced with reference to that provision.

Mr. Calabretta was additionally adjudged a career offender because the PSR assigned criminal history points to Mr. Calabretta's 1990 Death by Auto conviction based on the 1994 revocation of probation and subsequent sentence of incarceration resulting from his 1994 Eluding conviction. If the probation violation had not caused the imposition of an additional term of imprisonment, Mr. Calabretta would have had only one "crime of violence" — the 1994 Eluding conviction — within the applicable 15-year period prior to the commencement of the instant offense (in 2008) and would not have been considered a career offender. The PSR's effective double counting of the Eluding conviction, once as a

revocation of probation that brought the 1990 Death by Auto conviction within the applicable time period, and once as a separate substantive offense (which the district court adopted at sentencing (A-132)), caused the district court to erroneously determine that he should be designated a career offender within the meaning of the Sentencing Guidelines, raising his applicable sentencing range from 108-135 months (or 87-108 with the 2014 Guidelines reduction) to 188-235 months.

Although Mr. Calabretta's sentence of 120 months (on each count, to be served concurrently) constituted a variance from what the district court had determined was the applicable career offender range, Mr. Calabretta's status as a career offender will preclude him from taking advantage of later Guidelines amendments that may lower his otherwise applicable Guidelines sentencing range, causing him substantial and actual harm. Because Mr. Calabretta is not a career offender, the case should be remanded for resentencing.

Finally, in light of the sentences imposed on his co-defendants, Mr. Calabretta's sentence was substantively unreasonable because the district court was under the misimpression that Mr. Calabretta was a career offender and therefore imposed a sentence that was four times as long as the sentence imposed on Kenneth Martin, who pled to the same level of narcotics offense and over three

times as long as the sentence of Michelle Massaro, who pled to a statutorily more serious offense.[8]

For all of these reasons, Mr. Calabretta's case should be remanded for resentencing.

## ARGUMENT

### POINT I
### MR. CALABRETTA'S SENTENCE WAS PROCEDURALLY UNREASONABLE BECAUSE HE IS NOT A CAREER OFFENDER.

#### I. MR. CALABRETTA'S SENTENCE WAS PROCEDURALLY UNREASONABLE IN THAT HE SHOULD NOT HAVE BEEN SENTENCED AS A CAREER OFFENDER BECAUSE THE NEW JERSEY OFFENSE OF DEATH BY AUTO IS NOT A CRIME OF VIOLENCE.

##### A. Standard of Review

This Court "review[s] sentencing decisions for abuse of discretion, looking first for procedural error and then examining the sentence for substantive reasonableness." *Garrett*, 504 Fed. Appx. at 134 (citing *United States v. Wise,* 515 F.3d 207, 217–18 (3d Cir. 2008)). A district court's legal interpretation of the Guidelines is reviewed *de novo*. *Id*. (referencing *United States v. Grier*, 475 F.3d 556, 570 (3d Cir. 2007) (en banc)).

[8] Mr. Calabretta recognizes that his co-defendants were not charged with and did not plead guilty to a violation of 18 U.S.C. § 1956(h). However, because the sentencing range for a violation of that statute depends on the range for the underlying offense (see U.S.S.G. § 2S1.1(a)(1)), that fact does not change the Guidelines analysis section of this argument.

"[A] district court's factual determinations underlying the application of the sentencing guidelines [are reviewed] for clear error," giving "due deference to the district court's application of the sentencing guidelines to those facts," and this Court then "exercises plenary review over legal questions concerning the proper interpretation of the Sentencing Guidelines." *United States v. Taylor*, 98 F.3d 768, 770 (3d Cir. 1996) (citing *United States v. McMillen,* 917 F.2d 773, 774 (3d Cir. 1990); *United States v. Holifield,* 53 F.3d 11, 12-13 (3d Cir. 1995)). *See also United States v. Harford*, 370 Fed. Appx. 322, 323 (3d Cir. 2010) (citing *United States v. Hull,* 456 F.3d 133, 137 (3d Cir. 2006)) ("The standard of review for questions of law, such as whether a conviction qualifies as a crime of violence, is plenary.").

> Where, as here, a challenge is made to the calculation of the Guidelines range, the Court reviews the District Court's interpretation of the Sentencing Guidelines *de novo, United States v. Pojilenko,* 416 F.3d 243, 246 (3d Cir. 2005), and scrutinizes any findings of fact used in the calculation for clear error. *United States v. Wise,* 515 F.3d 207, 217 (3d Cir. 2008).

*United States v. Wood*, 526 F.3d 82, 85 (3d Cir. 2008).

Where an issue is not raised before the district court, this Court's review is for plain error, which requires reversal if the Court finds that "(1) the District Court erred; (2) the error was obvious under the law at the time of review; and (3) the error affected substantial rights." *United States v. Midgley*, 218 Fed. Appx. 117, 122 (3d Cir. 2007) (referencing *Johnson v. United States*, 520 U.S. 461, 466-467,

117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)). If these three elements are established, the Court may award relief, exercising its discretion to overturn the district court's judgment if the error, "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Midgley*, 218 Fed. Appx. at 122 (citing *United States v. Olano,* 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d. 508 (1993)). "Where a district court's decision was 'clearly contrary to the law at the time of the appeal,' that decision constitutes plain error and satisfies the first two prongs of the *Olano* standard." *United States v. Phillips*, No. 10-3706, 2014 WL 5286111, at *2 (3d Cir. Oct. 16, 2014) (citing *Johnson,* 520 U.S. at 468). "An appellant bears the burden of demonstrating an injury to substantial rights by demonstrating that the error 'affected the outcome of the district court proceedings.'" *Phillips*, 2014 WL 5286111, at *2 (citing *Olano,* 507 U.S. at 734.).

The question of whether Death by Auto is a crime of violence was not considered at the district court level and is, therefore, subject only to plain error review. The question of whether the Eluding charge was improperly double counted was considered and rejected by the district court at sentencing and is, therefore, subject to plenary review.

### B. Applicable Law

Procedural review requires that the Court "ensure that the district court committed no significant procedural error, such as failing to calculate (or

improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence — including an explanation for any deviation from the Guidelines range." *Gall v. United States*, 552 U.S. 38, 51 (2007); *see also United States v. Rundle*, 585 Fed. Appx. 813, 815 (3d Cir. 2014) (citing *United States v. Clark*, 726 F.3d 496, 500 (3d Cir. 2013)) ("To satisfy the procedural requirements in imposing a sentence, '[a] sentencing court must (1) calculate the advisory Guidelines range, (2) formally rule on any departure motions and state how those rulings affect the advisory range, and (3) exercise its discretion pursuant to the factors set forth in § 3553(a).'"); *United States v. Langford*, 516 F.3d 205, 211 (3d Cir. 2008) (neither the Guidelines nor the factors under § 3553(a) are to be given greater weight). An error in determining the applicable Guidelines range renders a sentence procedurally unreasonable. *Gall,* 128 U.S. at 597.

**1. The Career Offender Guidelines: "Crime of Violence" Defined**

Under *Booker*[9], the district court must calculate the correct sentencing range including, if applicable, the career offender provision, before imposing a sentence. *Nabried v. United States*, 199 Fed. Appx. 102, 104 (3d Cir. 2006) (internal footnote omitted). An individual is a "career offender" according to the Guidelines

[9] *United States v. Booker*, 543 U.S. 220, 259, 264, 125 S.Ct. 738 (2005).

if "(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). A "prior felony conviction" is "a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed." U.S.S.G. § 4B1.2 Application Note 1.

"The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1." U.S.S.G. § 4B1.2 Application Note 3. "[I]n determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry." U.S.S.G. § 4B1.2 Application Note 2.

The Guidelines define a "crime of violence" as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

1. has as an element the use, attempted use, or threatened use of physical force against the person of another, or

2. is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

U.S.S.G. § 4B1.2(a). *See also* U.S.S.G. § 4B1.2 Application Note 1: "Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as "crimes of violence" if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

In determining whether a state offense constitutes a "crime of violence," "The Supreme Court has mandated a categorical approach, so that the designation 'crime of violence' depends not on whether the defendant's particular conduct was violent, but on whether the 'offense of conviction' meets the requirements of the guidelines definition; and, while the definition is a federal one set forth in the guidelines, it is applied to the range of conduct that falls within the state statute." *United States v. Brown*, 631 F.3d 573, 577 (1st Cir. 2011) (referencing *United States v. Giggey* (*Giggey II*), 589 F.3d 38, 41 n.2 (1st Cir. 2009) [referencing *Taylor v. United States,* 495 U.S. 575, 600-02, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990); *Chambers v. United States,* --- U.S. ----, 129 S.Ct. 687, 690-93, 172 L.Ed.2d 484 (2009); *Begay v. United States,* 553 U.S. 137, 128 S.Ct. 1581, 1584,

170 L.Ed.2d 490 (2008); *James v. United States*, 550 U.S. 192, 201-02, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007); *Shepard v. United States*, 544 U.S. 13, 17, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)]).

The Third Circuit has instructed that:

> [I]t is "settled law in this Circuit that an offender has committed a 'crime of violence' **only if he acted with an intent to use force**." *Popal,* 416 F.3d at 254. *See also United States v. Parson,* 955 F.2d 858 (3d Cir.1992). *Popal* limits categorical crimes of violence to offenses committed through intentional use of force against another rather than reckless or grossly negligent conduct. *Id*. *See also Fernandez-Ruiz v. Gonzales,* 466 F.3d 1121, 1132 (9th Cir.2007).

*United States v. Otero*, 502 F.3d 331, 335 (3d Cir. 2007) (emphasis supplied).

To qualify as a crime of violence, the crime at issue must present "a serious potential risk of physical injury" and be one that "typically involves purposeful, violent, and aggressive conduct." *Begay*, 553 U.S. at 144–45. As this Circuit discussed in *United States v. Lee*, 612 F.3d 170, 196 (3d Cir. 2010), the Supreme Court's *Begay* holding "expressly distinguished crimes involving negligence or recklessness from those involving violence or aggression. *Id*. at 146, 128 S.Ct. 1581; *see also United States v. Johnson,* 587 F.3d 203, 208 (3d Cir. 2009). Thus, following *Begay,* a conviction for mere recklessness cannot constitute a crime of violence." *Lee*, 612 F.3d at 196. *See also Aguilar v. Attorney Gen. of U.S.*, 663 F.3d 692, 698 (3d Cir. 2011) ("Post-*Begay,* we have held that 'a conviction for

mere recklessness cannot constitute a crime of violence" under the federal sentencing guidelines.'") (quoting *Lee*, 612 F.3d at 195–97).

**2. The New Jersey Crime of "Death by Auto" Is Not A Crime of Violence.**

The New Jersey crime of "Death by Auto," is not a crime of violence. As the Supreme Court has instructed:

> In determining whether [a] crime is a violent felony, we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion. See *Taylor v. United States,* 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (adopting this "categorical approach"); see also *James v. United States,* 550 U.S. 192, 208 – 209, 127 S.Ct. 1586, 1597, 167 L.Ed.2d 532 (2007) (attempted burglary is a violent felony even if, on *some* occasions, it can be committed in a way that poses no serious risk of physical harm).

*Begay*, 553 U.S. at 141. Thus, the starting point for analysis of Mr. Calabretta's "death by auto" conviction is the New Jersey State statute, which provides that, "Criminal homicide constitutes vehicular homicide when it is caused by driving a vehicle or vessel **recklessly**." N.J. Stat. Ann. § 2C:11-5(a) (West) (emphasis supplied).

The state has the burden of proving beyond a reasonable doubt three elements in order to establish the crime of vehicular homicide: (1) that defendant was driving a vehicle, (2) that defendant caused the death, and (3) that the death was caused by driving a vehicle recklessly. *State v. Buckley*, 216 N.J. 249, 78

A.3d 958 (2013). New Jersey's manslaughter statute (N.J. Stat. Ann. § 2C:11-4) defines the crime of manslaughter separately from the definitions in the Death by Auto statute that Mr. Calabretta was convicted of having violated, providing, *inter alia*, that "criminal homicide constitutes manslaughter when . . .. [i]t is committed recklessly." N.J. Stat. Ann. § 2C:11-4(b)(1). *See also* N.J. Stat. Ann. § 2C:11-2 (defining "criminal homicide") ("(a) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or, under the circumstances set forth in section 2C:11-5, causes the death of another human being. (b) Criminal homicide is murder, manslaughter **or** death by auto.") (emphasis supplied).[10]

Under New Jersey law:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. . . .

[10] In contrast, the federal definition of manslaughter provides that, involuntary manslaughter occurs, "In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." 18 U.S.C. § 1112(a). The Sentencing Guidelines instruct that "all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. § 1112" are reckless, and that "A homicide resulting from driving a means of transportation, or similarly dangerous actions, **while under the influence of alcohol or drugs** ordinarily should be treated as reckless." U.S.S.G. § 2A1.4 Application Note 1 (Definitions) (emphasis supplied). There is no allegation here that Mr. Calabretta was under the influence of any substance.

N.J. Stat. Ann. § 2C:2-2(b)(3) (West).[11] It follows that "reckless" conduct does not contain the "intent to use force" that this Circuit has found to be a necessary element of a crime of violence. *See Otero*, 502 F.3d at 335.[12] *But see United States v. Hernandez-Rojas*, 426 Fed. Appx. 67 (3d Cir. 2011) (finding that a conviction for involuntary manslaughter, which required a *mens rea* of recklessness or gross negligence under Pennsylvania law, constituted a crime of violence). The Pennsylvania definition of "recklessly" mirrors the New Jersey definition. *See* 18 Pa.C.S. § 302(b)(3).

**C. Discussion**

The PSR and the district court found that Mr. Calabretta was a career offender, having committed the prerequisite two "crimes of violence" as defined in the Guidelines. However, because one of the predicate offenses, the 1990 Death by Auto conviction, was not, in fact a crime of violence within the meaning of the Guidelines, this finding was in error.

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[11] "Recklessness," "with recklessness," or equivalent terms have the same meaning. *Id.*

[12] Similarly, under the Guidelines, "'Reckless' means a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation." U.S.S.G. § 2A1.4 Application Note 1 (Definitions). "'Means of transportation' includes a motor vehicle (including an automobile or a boat) and a mass transportation vehicle. 'Mass transportation' has the meaning given that term in 18 U.S.C. § 1992(d)(7)." *Id*.

Because Mr. Calabretta does not have the prerequisite two convictions of crimes of violence under U.S.S.G. § 4B1.1[13] he is not a career offender within the meaning of U.S.S.G. § 4B1.1 and should not have been adjudged as such at sentencing. Therefore, the Court should remand the case for resentencing with an instruction to the district court to sentence Mr. Calabretta without application of the career offender provision.

**1. Death by Auto Is Not A Crime of Violence and Mr. Calabretta Does Not Have the Prerequisite Two Convictions Under U.S.S.G. § 4B1.1 to Be Considered A Career Offender.**

Mr. Calabretta's conviction of Death by Auto does not constitute a crime of violence because the crime was not committed with the "intentional use of force." *Otero*, 502 F.3d at 335. The generic offense of Death by Auto is not a crime of violence. *See Begay*, 553 U.S. at 141 (recognizing that a crime should be analyzed as a generic offense, that is, "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion"). The *mens rea* for Death by Auto is "recklessly." N.J. Stat. Ann. § 2C:11-5(a) ("Criminal homicide constitutes vehicular homicide when it is caused

[13] Mr. Calabretta admits that he has one prior conviction of a crime of violence. The Third Circuit has held that the New Jersey crime of Eluding in the Second Degree is a crime of violence. *United States v. Lipscomb*, 285 Fed. Appx. 877, 880 (3d Cir. 2008). Eluding is defined as the "**knowing**[]" flight or attempt to elude a police officer after receiving a command to stop. See N.J. Stat. Ann. § 2C:29-2 (emphasis supplied). He does not have two prior narcotics offenses, and cannot be considered a career offender on those grounds.

by driving a vehicle or vessel recklessly."); *Buckley*, 216 N.J. 249 (state must prove (1) that defendant was driving a vehicle, (2) that defendant caused the death, and (3) that the death was caused by driving a vehicle recklessly); *Lee*, 612 F.3d at 196 ("a conviction for mere recklessness cannot constitute a crime of violence").

Further, the facts of Mr. Calabretta's offense, as set forth in the PSR do not even support a conclusion that Mr. Calabretta acted recklessly. The PSR states only that Mr. Calabretta, in his own vehicle, was following an allegedly drunk driver who had hit Mr. Calabretta's car, when *the drunk driver's car swerved* and tried to hit Mr. Calabretta's car. PSR at ¶ 172 (emphasis supplied). There is no indication that Mr. Calabretta was under the influence of any substance. *Id*. When both cars then hit a telephone pole, the allegedly drunk driver died in the accident. *Id*. Although it may be inferred that Mr. Calabretta was not driving slowly, the record contains no indication that Mr. Calabretta acted recklessly. Even if he had, such reckless conduct would not suffice to make the offense a crime of violence, as interpreted by this Circuit. *See Begay*, 553 U.S. at 144–45 (to qualify as a crime of violence, the crime at issue must present "a serious potential risk of physical injury" and be one that "typically involves purposeful, violent, and aggressive conduct"); *Otero*, 502 F.3d at 335 (for an offense to be a crime of violence within the meaning of U.S.S.G. § 4B1.1, the *mens rea* must involve "an intent to use force").

Further, Mr. Calabretta's case, which arose under New Jersey law, is distinguishable from *Hernandez-Rojas*, which found a Pennsylvania offense with a *mens rea* of "reckless" sufficient for "crime of violence" designation under a separate section of the Guidelines. In *Hernandez-Rojas*, the defendant was convicted of illegal reentry of a removed alien (8 U.S.C. § 1326) and sentenced pursuant to U.S.S.G. § 2L1.2 based on a prior Pennsylvania conviction for involuntary manslaughter. *See Hernandez-Rojas,* 426 Fed. Appx. at 69. The involuntary manslaughter conviction arose out of an automobile crash in October 2001 during which Mr. Hernandez-Rojas was driving with a blood alcohol level of 0.267% and hit another car, causing that driver's death. *Id*. at 68-69. Mr. Hernandez-Rojas pled guilty to "homicide by vehicle caused by a violation of [75 Pa. C.S.] § 3731; homicide by vehicle; involuntary manslaughter; driving under the influence of alcohol; recklessly endangering another person; reckless driving; driving on the right side of the highway; and drivers required to be licensed." *Id.* at 69. Examining Mr. Hernandez-Rojas' appeal of the 16-level enhancement under U.S.S.G. § 2L1.2 for the prior commission of a "crime of violence" under that guideline's specific definition[14], this Court held that the Pennsylvania definition of

[14] At the time of the offense, U.S.S.G. § 2L1.2 ("Unlawfully entering or remaining in the United States") defined a "crime of violence" as, "Any of the following offenses under federal, state, or local law: ... manslaughter ... or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another."

involuntary manslaughter[15] satisfied the "generic, contemporary meaning" of the offense of manslaughter, *id.* at 70-71 (citing *Taylor v. United States*, 495 U.S. 575, 598 (1990)), and was, therefore, a crime of violence within the Guidelines' definition.

The New Jersey offense of Death by Auto cannot be equated with involuntary manslaughter. *See* N.J. Stat. Ann. § 2C:11-2(b) ("Criminal homicide is murder, manslaughter **or** death by auto.") (emphasis supplied); *also compare* N.J. Stat. Ann. § 2C:11-5(a) with N.J. Stat. Ann. § 2C:11-4(b)(1). The fact that New Jersey saw fit to enact a separate statute concerning vehicular homicide indicates that the two offenses cannot be conflated; nor, therefore, can *Hernandez-Rojas* and the instant case. Therefore, because Mr. Calabretta's 1990 conviction for Death by Auto was not a crime of violence within this Circuit's interpretation of U.S.S.G. § 4B1.1, it follows that this conviction should not have been used as a predicate act either in the PSR or at sentencing to designate Mr. Calabretta a career offender.

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U.S.S.G. § 2L1.2 Application Note 1(B)(iii).

[15] "A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person." 18 Pa.C.S. § 2504(a).

**2. The District Court's Application of the Career Offender Guideline Constituted Plain Error.**

Because Death by Auto is not a crime of violence, the district court's adoption of the PSR's finding that Mr. Calabretta was a career offender (A-131) was plain error. *Phillips*, 2014 WL 5286111, at *2 (referencing *Johnson*, 520 U.S. at 468) ("Where a district court's decision was 'clearly contrary to the law at the time of the appeal,' that decision constitutes plain error and satisfies the first two prongs of the *Olano* standard."). Because the New Jersey Death by Auto statute and the Sentencing Guidelines' career offender provision were both in effect at the time of sentencing and remain unchanged at the time of filing this appeal, the error was plain. *Id.*

**3. The Error Affected Mr. Calabretta's Substantial Rights**

If a defendant is a "career offender," his sentence is determined pursuant to the provisions of U.S.S.G. § 4B1.1, which raise the base offense levels and may preclude him from various forms of subsequent sentence reduction. *See United States v. Mateo*, 560 F.3d 152, 154-55 (3d Cir. 2009) (holding that a defendant sentenced as a career offender was not eligible for a § 3582(c)(2) sentencing reduction under a Guidelines amendment that would otherwise have been available to him). Under *Mateo*, Mr. Calabretta's designation as a career offender will have

a substantial impact on his ability to take advantage of subsequent sentencing amendments and/or possible sentence reductions.

Moreover, the district court's finding that Mr. Calabretta was a career offender has already affected his substantial rights because the district court sentenced Mr. Calabretta to a significantly longer term of incarceration (120 months) than his equally- or more-culpable co-defendants who received sentences of 37 and 30 months of incarceration. *See* A-29 at Dkt. # 112, 116. It is not unlikely that the district court, if faced with a correctly calculated, non-career offender Guidelines range (87-108 months at level 27, CHC III), would not have imposed a 120-month sentence. Therefore, the district court's erroneous finding that Mr. Calabretta was a career offender has affected his substantial rights. *See Midgley*, 218 Fed. Appx. at 122.

For all of these reasons, Mr. Calabretta should not have been sentenced as a career offender and this Court should remand the case for re-sentencing without consideration of the career offender Guidelines.

## II. MR. CALABRETTA SHOULD NOT HAVE BEEN ADJUDGED A CAREER OFFENDER BECAUSE THE ELUDING OFFENSE SHOULD NOT HAVE BEEN DOUBLE COUNTED.

Under the same standard of review set forth in Point I section I(A), *supra*, Mr. Calabretta should not have been adjudged a career offender based on the double-counting of the 1994 Eluding offense.

**A. Applicable Law.**

A violation of probation is not, inherently, a crime of violence. *See* U.S.S.G. § 5D1.3 (setting forth mandatory conditions of supervised release). Moreover, "[t]he Third Circuit has not yet considered whether re-incarceration upon a parole or probation violation constitutes confinement for the original conviction . . ." *United States v. Millhouse*, No. CRIM.06-397, 2007 WL 1366974, at *3 (E.D. Pa. May 7, 2007) (considering admission of prior conviction in the context of an *in limine* motion pursuant to Fed. R. Evid. 609(b)). In fact, Appellant is aware of only one district court decision from this Circuit considering the question of whether a revocation of probation alters the relevant time period and operates to "bring an otherwise-too-old conviction into play" for purposes of career offender status. *See United States v. Fisher*, No. CRIM.A. 12-777 RMB, 2014 WL 200644, at *1 (D.N.J. Jan. 15, 2014).

Both the length of the sentence imposed and the date of imposition limit the sentences that may be counted in the computation of a defendant's criminal history. Concerning the length of sentence, U.S.S.G. § 4A1.2(e)(1) instructs that, "Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one

year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period."

U.S.S.G. § 4A1.2(k) concerns revocations of probation, parole, mandatory release, or supervised release:

> (1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable.
>
> (2) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in §4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (see §4A1.2(e)(1)); . . .

But Application Note 11 implies that consideration of revocations of probation are considered only for the purpose of determining the length of a prior sentence (i.e., for the purpose of determining how many criminal history points are added under § 4A1.1), not for the separate purpose of (re-)defining the time period of the offense or establishing career offender status under U.S.S.G. § 4B1.1:

> Revocations to be Considered.—Section 4A1.2(k) covers revocations of probation and other conditional sentences where the original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single

> conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation. [. . .]

U.S.S.G. § 4A1.3 Application Note 11.[16]

**B. Discussion**

The PSR attributes three criminal history points to Mr. Calabretta's 1990 Death by Auto conviction based on the revocation of probation and subsequent five year sentence of incarceration which falls within the 15-year period prior to the commencement of the instant offense.[17] PSR at ¶ 170. The revocation of probation, however, was based on the same conduct as the 1994 Eluding conviction. *See* PSR at ¶¶ 173, 186. Thus, Mr. Calabretta was effectively punished twice for the same conduct—once because the Eluding offense and conviction constituted a violation of the terms of his probation and once for the offense itself.

Given the facts set forth in the PSR at ¶ 186 and this Court's holding in *Lipscomb*, 285 Fed. Appx. at 880, Mr. Calabretta concedes that the Eluding

[16] Notably, however, the *Garrett* court accepted without deciding that U.S.S.G. § 4A1.2(k) applied to a sentence imposed upon the defendant's violation of probation, and that the termination date of that new term of imprisonment, not the termination date of the original sentence imposed, was to be counted when assessing the time period of the prior offense in the context of a career offender calculation. *Garrett*, 504 Fed. Appx. at 135-36.

[17] The Superseding Information charges Mr. Calabretta with conspiracy beginning in April 2008. A-50.

conviction is counted as a crime of violence under U.S.S.G. § 4B1.1. Nor does he dispute that three criminal history points are properly attributable to the 1990 conviction, given that the term of incarceration served on the probation violation falls within the 15-year period under U.S.S.G. § 4A1.2(e)(1). Therefore, he concedes that he does have six criminal history points and is properly in Criminal History Category III.

However, for the purpose of determining whether or not he is a career offender, Mr. Calabretta submits that, especially because it is not settled in this Circuit "whether re-incarceration upon a parole or probation violation constitutes confinement for the original conviction . . .", *Millhouse*, No. CRIM.06-397, 2007 WL 1366974, at *3, the same conduct should not have been counted against him twice and used to bring both offenses into the applicable timeframe. A violation of probation is, in itself, not violent. *See* U.S.S.G. § 5D1.3. Nor do the Guidelines provisions cited above appear to approve such double counting. Indeed, Application Note 11 to U.S.S.G. § 4A1.3 implies that revocations of probation are to be used in computing criminal history category to ensure that a maximum of three points are attributed to any single conviction, not in altering the timeframe of applicable convictions. *Id.* ("Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and

the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked.").

Counsel concedes that there is a plausible reading of U.S.S.G. § 4A1.2(k)(2)(A) that mandates counting the date of Mr. Calabretta's release on the probation violation (March 12, 2001) as the determinative date for career offender calculation purposes because that provision specifies that, "in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence" is the date to be used "in determining the applicable time period" "under which certain sentences are counted." U.S.S.G. § 4A1.2(k)(2). However, because this Court has not yet conclusively determined "whether re-incarceration upon a parole or probation violation constitutes confinement for the original conviction . . .", *Millhouse*, No. CRIM.06-397, 2007 WL 1366974, at *3, there is an equally plausible reading not foreclosed by the plain language of the Guidelines that that date is to be used in computing criminal history points only.

Even if this Court concludes that the probation violation was properly counted to bring the 1990 conviction into the applicable time period for the assignment of criminal history points, Mr. Calabretta is not a career offender because Death by Auto does not satisfy the requirements of the Guidelines to

constitute a crime of violence and therefore cannot be used as a predicate act under U.S.S.G. § 4B1.1. See Point I section I, *supra.* Therefore, under any calculation, Mr. Calabretta has only one predicate felony under U.S.S.G. § 4B1.1. The district court sentenced Mr. Calabretta based on a plainly erroneous belief that he was a career offender. A-130-131; A-142-143 ("I don't know if you listened when I told you what the guidelines range was, but the top of it was 235 months."). Because he is not a career offender and the Guidelines range that the district court believed to be applicable was erroneous, the sentence was procedurally unreasonable.

## III. BECAUSE MR. CALABRETTA IS NOT A CAREER OFFENDER, THE DISTRICT COURT'S RESULTING CALCULATION OF THE SENTENCING GUIDELINES AND ANALYSIS OF THE § 3553(A) FACTORS WAS PLAINLY ERRONEOUS.

This Circuit has established a three-step process for sentencing:

> (1) Courts must continue to calculate a defendant's Guidelines sentence precisely as they would have before [*United States v. Booker,* 543 U.S. 220, 246, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)].
>
> (2) In doing so, they must formally rule on the motions of both parties and state on the record whether they are granting a departure and how that departure affects the Guidelines calculation, and take into account our Circuit's pre-*Booker* case law, which continues to have advisory force.
>
> (3) Finally, they are required to exercise their discretion by considering the relevant section 3553(a) factors in setting the sentence they impose regardless whether it varies from the sentence calculated under the Guidelines.

*United States v. Fuentes-Mariche*, 537 Fed. Appx. 131, 133 n.3 (3d Cir. 2013) (quoting *United States v. Gunter*, 462 F.3d 237, 247 (3d Cir. 2006)).

Title 18 United States Code Section 3553(a) directs the sentencing court to "impose a sentence sufficient but not greater than necessary, to comply with . . . the need for the sentence to: (A) reflect the seriousness of the offense, promote respect for the law and provide just punishment for the offense, (B) afford adequate deterrence to criminal conduct; (C) protect the public from further crimes of the defendant; and (D) provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2). In considering these sentencing goals, courts are directed to consider the advisory Sentencing Guidelines and their policy statements, the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available and the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a).

Mr. Calabretta has discussed above and hereby incorporates by reference his argument concerning the district court's erroneous determination that he was a career offender and does not challenge the district court's discretionary departure rulings herein.

In imposing sentence, the district court clearly considered the § 3553(a) factors, discussing Mr. Calabretta's offense and his history and characteristics at length. Likewise, the district judge appropriately weighed the need for specific and general deterrence and imposed a sentence that the court believed to be "sufficient but not greater than necessary" to achieve the goals of sentencing. *See generally* A-126-147. However, because the district court analyzed the case while under the misapprehension that Mr. Calabretta was a career offender (A-130-131), the resulting sentence was arguably greater than the district court would otherwise have believed necessary under the parsimony clause. In fact, given that the same judge sentenced Mr. Calabretta's co-defendants, one of whom pled guilty to a statutorily more serious offense, to just 37 and 30 months respectively (A-29), and given that Mr. Calabretta's otherwise applicable Guidelines range was 87 to 108 months, with a statutory mandatory minimum of 60 months (CHC III level 29 minus an additional two points for the 2014 Guidelines amendment; 21 U.S.C. § 841(b)(1)(B)), it is unlikely that the district court would have imposed the same sentence if it had been aware that Mr. Calabretta was in fact not a career offender. Although Mr. Calabretta was admittedly ineligible for relief pursuant to 18 U.S.C. § 3553(f) (the "safety valve"), without career offender status clouding the district court's perspective, he might have found a sentence at or close to the mandatory

minimum of five years sufficient, but not greater than necessary, to meet the goals of sentencing. Therefore, the sentence was procedurally unreasonable.

## IV. IN THE ALTERNATIVE, THE COURT SHOULD INSTRUCT THAT MR. CALABRETTA IS ELIGIBLE FOR A SENTENCE REDUCTION BASED ON THE 2014 GUIDELINES AMENDMENT OR ANY SUBSEQUENT GUIDELINES AMENDMENT THAT IS GIVEN RETROACTIVE EFFECT, BECAUSE ALTHOUGH THE DISTRICT COURT FOUND THAT HE WAS A CAREER OFFENDER, IT DID NOT SENTENCE HIM ACCORDING TO THE CAREER OFFENDER GUIDELINE.

If a defendant is a "career offender," his sentence is determined pursuant to the provisions of U.S.S.G. § 4B1.1, which raise the base offense levels and may preclude him from various forms of subsequent sentence reduction. *See Mateo*, 560 F.3d at 154-55 (holding that a defendant sentenced as a career offender was not eligible for a § 3582(c)(2) sentencing reduction under a Guidelines amendment that would otherwise have been available to him).

Although the district court sentenced Mr. Calabretta to a term of months substantially below the recommended sentence within the career offender guidelines (A-143), the district court's determination that Mr. Calabretta was a career offender will have a substantial impact on Mr. Calabretta's ability to take advantage of future Sentencing Guidelines amendments and potential sentence reduction provisions that would otherwise be available to him. *Mateo*, 560 F.3d at

154-55. For example, in the event the Smarter Sentencing Act of 2014[18] (or similar legislation) is passed, Mr. Calabretta's mandatory minimum sentence would be reduced from five to two years.[19] It is understood that the Guidelines would subsequently be amended so that the applicable Guidelines range for the offense would be proportionate to the reduced mandatory minimum. Such an amendment would result not only in a lesser mandatory minimum penalty, but also in a substantially lower Guidelines range. It is not possible to determine exactly what Mr. Calabretta's new Guidelines range without the application of the career offender provision would be under the Smarter Sentencing Act of 2014 and any related Sentencing Guidelines amendments. However, it is evident that, while designated as a career offender, he will be unable to take advantage of any changes in the law, even if made retroactively applicable, that might otherwise shorten his sentence. *See Mateo*, 560 F.3d at 154-55. Because Mr. Calabretta is not a career offender, such an outcome does not do justice in this case.

Therefore, this Court should either remand this case for resentencing without application of or reference to the career offender provision or, in the alternative, should issue a decision instructing that Mr. Calabretta is not barred from subsequent sentencing relief, should such become otherwise available to him through an Act of Congress or Sentencing Guidelines amendment.

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[18] S. 1410, available at https://www.govtrack.us/congress/bills/113/s1410/text
[19] *Id.* at section 4(a)(2).

## POINT II
## MR. CALABRETTA'S SENTENCE WAS SUBSTANTIVELY UNREASONABLE.

### I. MR. CALABRETTA'S SENTENCE WAS SUBSTANTIVELY UNREASONABLE BECAUSE THE DISTRICT COURT BASED ITS SENTENCE IN PART ON AN ERRONEOUS DETERMINATION THAT MR. CALABRETTA WAS A CAREER OFFENDER.

Mr. Calabretta's 120-month sentence was based in large part on the district court's determination that he was a career offender. A-130-131; A-142-143. Because it is now clear that Mr. Calabretta is not a career offender, it is likewise clear that his 120-month sentence was substantively unreasonable, when considered in the context of the otherwise applicable Guidelines range and the sentences of his co-defendants.

#### A. Standard of Review

This Court reviews the reasonableness of a district court's sentence for abuse of discretion. *See United States v. Tomko,* 562 F.3d 558, 567 (3d Cir. 2009). *See also Gall*, 552 U.S. at 46 (same). "When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Gall*, 552 U.S. at 51. Substantive reasonableness review asks "whether the District Judge abused his discretion in determining that the § 3553(a) factors supported" the sentence imposed. *Gall*, 552 U.S. at 56. "In evaluating a challenge to the substantive reasonableness of a

sentence, we must affirm 'unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.'" *Garrett*, 504 Fed. Appx. at 134 (quoting *Tomko*, 562 F.3d at 568).

### B. Applicable Law: Substantive Reasonableness Mandates Consideration of the Totality of the Circumstances.

"[S]ubstantive review mandates that [this Court] consider the totality of the circumstances, rather than one or two factors. *Hernandez-Rojas*, 426 Fed. Appx. at 72 (internal citations omitted). In so doing, this Court defers to the district court to determine the appropriate sentence "unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided." *Tomko,* 562 F.3d at 568.

Whether a sentencing error was harmless depends on "whether the district court would have imposed the same sentence had it not relied upon the invalid factor." *Williams v. United States,* 503 U.S. 193, 203, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992). A sentencing calculation error may be harmless where it is "clear that the error did not affect the district court's selection of the sentence imposed." *United States v. Carter*, 730 F.3d 187, 193 (3d Cir. 2013) (quoting *United States v. Langford,* 516 F.3d 205, 215 (3d Cir. 2008)). However, "**when the starting point for the ... analysis is incorrect, the end point, i.e., the resulting sentence, can**

**rarely be shown to be unaffected**." *Carter*, 730 F.3d at 195 (quoting *Langford*, 516 F.3d at 217) (emphasis supplied).

### C. Discussion: Mr. Calabretta's 120-Month Sentence Was Substantively Unreasonable.

The narcotics statute to which Mr. Calabretta pled guilty, 21 U.S.C. § 841(b)(1)(B), carries a mandatory minimum of five years and a maximum of 40 years. The money laundering charge (18 U.S.C. § 1956(h)) carries no statutory minimum and a statutory maximum sentence of 20 years. Without application of the career offender Guideline, Mr. Calabretta's sentencing range would have been 108 to 135 months (level 29 in Criminal History Category III). Moreover, with the application of the November 2014 Guidelines Amendment 782, Mr. Calabretta's Guidelines range would have been lowered by two points to 87-108 months. *See* U.S.S.G. § 1B1.10; U.S.S.G. § 2D1.1(c)(6) (2014 Guidelines Manual). This point was raised in the defense's sentencing submission, A-82, and considered by the district court in the context of downward departures at sentencing, A-131-132.

Ruling that Mr. Calabretta was properly designated a career offender (A-130-131), the district court found that a sentencing range of 188-235 months was applicable. A-132; A-142-143. Although the district court then imposed a sentence of 120 months, which was substantially below the low end of the career offender Guidelines range that the district court had found applicable, that sentence was so

much higher than the sentences imposed on his co-defendants that it was substantively unreasonable. Michelle Massaro, who pled guilty to violations of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846 (a 10-year mandatory minimum sentence) was sentenced to 37 months of imprisonment. Kenneth Martin, who pled guilty to violations of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846, was sentenced to just 30 months of imprisonment. A-29. Given these sentences, it is likely that, if the district court had not found that Mr. Calabretta was a career offender, the district court might have imposed a significantly lower sentence. *See Williams,* 503 U.S. at 203 (harmlessness depends on "whether the district court would have imposed the same sentence had it not relied upon the invalid factor.").

Because it appears that the district court's determination that Mr. Calabretta was a career offender caused him to impose a sentence that was significantly higher than either the mandatory minimum sentence or the sentences imposed on his equally (if not more) culpable co-defendants, Mr. Calabretta respectfully submits that the district court's erroneous determination that he was a career offender caused him to impose a sentence well above that which he would have otherwise found sufficient to meet the purposes of 18 U.S.C. § 3553(a). *See Carter*, 730 F.3d at 195 ("when the starting point for the ... analysis is incorrect, the end point, i.e., the resulting sentence, can rarely be shown to be unaffected."). Indeed, the sentence of 120 months represents a 68-month departure from the low

end of the career offender Guideline of 188-235 months. If the district court had applied a proportionate departure from the applicable Guidelines range of 108 to 135 months, Mr. Calabretta respectfully submits that the sentence imposed would not have been more than the mandatory minimum of 60 months, which would have been reasonable considering all of the facts and circumstances of this case.

Therefore, because the sentence imposed was substantively unreasonable and based on an erroneous finding that Mr. Calabretta was a career offender, the case should be remanded for resentencing.

## CONCLUSION

Wherefore, based on the facts and arguments set forth above, Mr. Calabretta's case should be remanded for resentencing without application of the career offender provision.

Dated: February 5, 2015
New York, NY

Respectfully submitted,

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## COMBINED CERTIFICATION

I, John Meringolo, whose name appears on the foregoing brief for Appellant Michael Calabretta, certify as follows:

**Certification of Admission-Bar Membership**

I am admitted to practice before the United States Court of Appeals for the Third Circuit and am a member in good standing.

**Certification of Compliance with Federal Rule of Appellate Procedure 32(a)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,296 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 in 14 point Times New Roman font.

**Certification of Service upon the Court and Counsel**

I have caused the Brief for Defendant-Appellant Michael Calabretta and Appendix Volumes I and II to be electronically filed and served by CM/ECF upon:

Mark E. Coyne, Esq.
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970 Broad Street, Suite 700
Newark, New Jersey 07102-2535

I have further caused seven hard copies of the Brief for Defendant-Appellant Michael Calabretta and four hard copies of the Appendix to be sent by Federal Express/overnight mail to:

Office of the Clerk
United States Court of Appeals for the Third Circuit
601 Market Street, Room 21400
Philadelphia, Pennsylvania 19106-1790

**Certification of Identical Compliance and Virus Check Pursuant to Rule 31.1**

The text of the e-brief filed on February 5, 2015, and the text of the hard copies of the Brief filed by Appellant are identical. A virus check using Virus Total was performed on the e-brief and no viruses were detected.

Dated: February 5, 2015
New York, NY

s/John Meringolo
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