

18-7944

No. _____

ORIGINAL

Supreme Court, U.S.
FILED

JAN 29 2019

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JERKENO WALLACE a/k/a ^{Uptown} _____ PETITIONER
(Your Name)

vs.

UNITED STATES _____ RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SECOND CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JERKENO WALLACE a/k/a ^{Uptown} _____
(Your Name)

Otisville F.C.I., P.O.Box 1000
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Otisville, N.Y. 10963
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

WAS THERE AN ERROR BY THE COURT AT SENTENCING
WHEN COURT CONSIDERED OBSERVATIONS OF THE NON-TESTIFYING
DEFENDANT AS BASIS OF PROVING NO REMORSE

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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STATUTES AND RULES

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at 178 Fed. Appx. 76 (April 27, 2006); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☒ reported at U.S. Dist. Lexis 184178 (2014); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was November 13th, 2018.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

The issue presented originated at defendant's sentencing in 2003. Co-defendant, Negus Thomas, had been sentenced first and at the time, the court made reference to Thomas not showing any remorse. Tr.p.70. Counsel pointed out that the defendant Wallace did not testify in the case and thus, had no opportunity to express remorse. Id at 70-71. Then the court went on to say the following:

"And let me clarify a couple of points that were alluded to by Mr.Cramer. [Wallace's trial counsel] Sometimes you try not to say things that might be hurtful to a defendant and you omit saying them and then your remarks are misunderstood. Let me make it clear that, to me, the right to go to trial is sacrosanct and I would not refuse to depart in a case because a defendant chose to go to trial. However, when I said there was no remorse and no acceptance of responsibility, I think that also applies to Mr. Wallace. I was not talking in a legal sense but in the sense of someone who has sat through the trial. Defendants and lawyers sometimes forget that the judges gets an extended opportunity to see and size up people during a trial. There are lots of things that go on that are not in the record, but the judge sees what happens. The judge observes the conduct, reactions of defendants and lawyers. And the judge gets an impression of those people. And you have extended proceedings, the judge gets extensive knowledge of those people. So my comment about no remorse and no acceptance of responsibility was not at all tied to the fact that the defendants went to trial, but, rather, based on my observations of the defendants as I've had an extended time period in which to observe them. Id 70-71.

I will say that I have had cases where defendants have gone to trial and I have felt that they were remorseful or accepted responsibility. So I don't want there to be an misunderstanding as to what I meant by that when I sentenced Mr. Thomas" Id at 91-92.

Essentially, the court was telling the defendants on the record that he watched and observed both defendants during the course of the trial. As a result, he was able to "see and size up" the defendant. Id at 92. He seemed to be saying that he observed the defendants' "conduct and the reactions, of defendants and lawyers".

He told the defendants that he was basing his sentence on "an impression of those people", and since the trial was somewhat lengthy, [He] told the defendants he acquired "extensive knowledge of those people". He said all this to disclaim any suggestion on the part of counsel that his comments of "no remorse" had anything to do with defendants going to trial per se, but because he has had "an extended time period in which to observe them". Id. What specifically he observed to lead him to this conclusion is never spelled out at this time or at any future proceedings before the trial court.

When the case was returned to the District Court in 2006 for a Crosby hearing, the government's sentencing memorandum specifically referred to these comments by the [court] in 2003 as a basis for not changing the sentence imposed prior to Booker. Government's "Reply to Defendant's Crosby Brief", Doc.#587, United States v. Wallace, No.3:02CR72 (AWT). Id. at p.6. The government invited the court to impose the same sentence and reminded it that neither defendant "displayed any remorse for the murder of Gil Torres". Id. at p.6.

Eight years later the court finally ruled on the Crosby remand issue, and, as previously stated, advised in writing that it would not have imposed a different sentence were the guidelines advisory and not mandatory. Doc.#657, p.2.

But the court did more than simply reassert that it would have imposed the same sentence and erroneously suggested that it could use post-sentence remorse or lack thereof for its decision. It apparently felt necessary to add at sentencing "the court also pointed to its personal observation of the defendant, Wallace, and his co-defendant during the extend proceedings in this case and its familiarity with proceedings involving the other defendants in the case. It informed the parties that based upon what the court had observed, it would be inappropriate to depart downward in defendant Wallace's case. Id. Doc. #657 at p.4. Thus, the court advised the defendants that, pursuant to the Crosby remand, that it was not just the gravity of the crime, but the court's observation of this defendant during the course of the murder trial. All of these factors formed the basis for the court

finding that it would not have imposed a non-trivially different sentence had the guidelines been mandatory.

On the appeal of that decision, the primary issue was the District Court's reference to post-trial rehabilitation. However, appellate counsel raised the issue of the judge's cryptic remarks concerning his observation of the defendant during the course of the trial. See defendant's brief at pp17-18. United States v. Wallace (Dkt.#14-1728). In that appeal, the defendant specifically asked the court to remand this case not only on the issue of the judge's remarks concerning post-trialrehabilitation, but also his remarks concerning his observation of the defendant and the alleged lack of remorse during the trial. Id at 18.

During oral argument in the Second Circuit Court Of Appeals May 12, 2015 the defendant, on appeal, again argued that it was inappropriate for the court not only to consider post-sentencing rehabilitation, but to base the court's sentence upon his "personal observations of the defendant during the course of the trial". During argument, [the court] expressed a view that in his many years as a trial judge, he could not understand what mental state of a defendant could be construed from silently sitting there throughout the course of a trial. Appellate counsel, having heard the tape of [the courts] remarks, believed that [the court] stated in response to counsel's argument that "I looked at people during trial, and they didn't exhibit remorse. I've been a trial judge, and I don't know how you tell that. I just don't know".

On remand, the trial court issued a four page decision on April 18,2017, that never addressed the issue of percived lack of remorse during the course of the trial. Doc.#700. Defendant now submits the instant Writ of Certiorari and asks this high court to compel the district court and or Second Circuit court of appeals to compel the district court to clarify the basis for its personal observations of lack of remorse if, in fact it exist. January 28, 2019

REASONS FOR GRANTING THE PETITION

The government was correct in its argument before the Court that it could consider lack of remorse as a factor in sentencing, and it could be at least a partial reason, under Crosby, for not imposing a different sentence than it imposed under the guidelines. Government's sentencing memorandum, Doc. #696, United States v. Wallace, 12/22/15 at 9-10. The government argued that "to the extent the court relied on lack of remorse it perceived at the time of the original sentencing, such reliance was entirely appropriate. Lack of remorse plainly falls within 'the history and characteristics of the defendant'". Id at p.23. But even though this issue has been repeatedly raised and not resolved, the government, in its fairly lengthy sentencing memorandum before the Court, does not even suggest what it was in the court's "observations" of defendant which could lead to a conclusion that this defendant lacked remorse.

The Second Circuit has recognized a lack of remorse as a factor in sentencing. United States v. Brown, 843 F. 3d 74, @82 (2d Cir. 2016). But that Court specifically went on to emphasize that the District Court in that case had made reference to "Brown's behavior at sentencing, as well as statements to the probations officer named in the pre-sentenc report". Id.

The Second Circuit has also approved lack of remorse as a factor in a case where the defendant continued to blame other people for the commission of the crime. United States v. Corsey, 723 F.3d 366 (2d Cir. 2013). The specific reasons for a lack remorse finding there were that the defendant was "still blaming others, and depicting himself as a messenger". Id at 371. Similarly, the court has used lack of

remorse at sentencing as a basis for an upward variance. The defendant spoke out in an extremely disrespectful way between the time of plea and sentencing. United States v. Stewart, 686 F.3d 156 (2d Cir. 2012). Additionally, when a defendant refused to cooperate with the probation officer, the court has upheld that behavior as a sufficient basis for a lack of remorse finding. United States v. Spencer, 362 Fed. Appx. 163, 166 (2d Cir.2010). Where defendant constantly was laughing in court during testimony, one court has found that behavior grounds for a higher sentence for lack of remorse. United States v. Ochoa, 809 F.3d 453, 457-58 (9th Cir.2015). This is not a situation where the defendant, either individually or through counsel, uttered false statements at the time of sentencing which could show lack of remorse. United States v. Butters, 588 Fed. Appx. 12, 13 (2d Cir. 2014).

Most importantly is the requirement that the trial judge adequately explain "[a] chosen sentence to allow meaningful appellate review". Gall v United States, 552 U.S. 38, @50 (2007). The Second Circuit has in recent times remanded sentences when the trial court's reasoning was ambiguous. United States v. Jones, 531 F.3d 163 @181 (2d Cir. 2002). Although the trial court may have given fairly specific reasons as to the life sentence it imposed, it has repeatedly made reference to a lack of remorse during the trial and repeatedly failed to adequately explain with some specificity to what it was referring. It appears clear that the trial court did consider lack of remorse at the time of sentencing in imposing the sentence that it did, and yet, whether this was appropriate or not is something this High Court of The Land cannot review until such time as the trial court explains what it meant.

There is concern, of course, that the court simply sentenced the defendant based upon his silence both at trial and at the time of sentencing. This Honorable Court has made clear that a trial court cannot draw any adverse inference at sentencing because of a defendant's silence. Mitchell v. United States, 526 U.S. 314 (1999). The defendant cannot be punished in any way for his silence. Estelle v. Smith, 451 U.S. 454, 468 (1981).

As stated, this defendant not only did not testify at trial, but did not speak at any other stage of the proceedings other than perfunctory not guilty plea at his arraignment, and his generalized remarks that he had reviewed the pre-sentence report with counsel at sentencing. The trial court heard nothing from this defendant which could in any way allow a conclusion that he was lacking in remorse. If his demeanor as he sat next to trial counsel somehow caused this conclusion from the sentencing court, that information should be spelled out on the record so that it can possibly provide a basis for meaningful review by this Honorable Court. Rita v. United States, 551 U.S. 338, 357 (2007). and the Second Circuit Court of Appeals.

CONCLUSION

For all the above reasons, this defendant respectfully request that this Honorable Court find that the remarks or the District Court at the time of sentencing and thereafter, are constitutionally unclear and require a subsequent remand for clarification. The defendant respectfully requests that this case be reassigned to a different judge for resentencing. Remand in this case would be the "third" time this case has been sent back down to the trial judge and review for an appropriate sentence by a different judge would be fair and equitable.