APPENDIX A

UNITED STATES OF AMERICA, Appellee, v. JERKENO WALLACE and NEGUS THOMAS, Defendants-Appellants.
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
178 Fed. Appx. 76; 2006 U.S. App. LEXIS 10817
No. 03-1777-cr(L); 03-1778-cr(CON)
April 27, 2006, Decided

Notice:

RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Thomas v. United States, 549 U.S. 1011, 127 S. Ct. 534, 166 L. Ed. 2d 396, 2006 U.S. LEXIS 8277 (2006)US Supreme Court certiorari denied by Wallace v. United States, 549 U.S. 1011, 127 S. Ct. 541, 166 L. Ed. 2d 396, 2006 U.S. LEXIS 8278 (2006)On remand at, Request denied by United States v. Thomas, 2014 U.S. Dist. LEXIS 184177 (D. Conn., May 14, 2014)On remand at, Request denied by United States v. Wallace, 2014 U.S. Dist. LEXIS 184178 (D. Conn., May 14, 2014)

Editorial Information: Prior History

Appeal from judgments of the United States District Court for the District of Connecticut (Alvin W. Thompson, Judge). United States v. Wallace, 447 F.3d 184, 2006 U.S. App. LEXIS 10747 (2d Cir. Conn., 2006)

Counsel FOR APPELLANTS: Richard S. Cramer, Wethersfield, CT, for **Jerkeno Wallace**. David J. Wenc, Windsor Locks, CT, for Negus Thomas.

FOR APPELLEE: Michael J. Gustafson, Assistant United States Attorney (William J. Nardini, Assistant United States Attorney, on the brief) for Kevin J. O'Connor, United States Attorney for the District of Connecticut, New Haven, CT.

Judges: PRESENT: Hon. John M. Walker, Chief Judge, Hon. Richard J. Cardamone, Hon. Barrington D. Parker, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant and co-defendant challenged judgments from the United States District Court for the District of Connecticut, which convicted them of, inter alia, conspiracy to distribute 50 grams or more of cocaine base; drug distribution; firing a weapon into a group of persons, and, in doing so, committing first-degree murder; and possessing a firearm in relation to a drug trafficking crime, and, in doing so, committing first-degree murder.Interrogation of defendant at police station did not fall within Miranda's custody requirement because he had not been arrested, was questioned in room with open door, and was told that he was free to leave at any time. When he expressed a desire to leave after speaking with detectives for minutes, questioning stopped and he was transported home.

OVERVIEW: The district court sentenced defendant and co-defendant to life in prison. On appeal, the court rejected defendant's challenge to the constitutionality of the drive-by shooting statute, 18 U.S.C.S. § 36(b), because § 36(b) did not violate the Commerce Clause. Defendant could not challenge § 36(b)(2) based on vagueness because his conduct clearly fell within the plain language of the statute. His interrogation at a police station fell outside Miranda's custody requirement because he had not been arrested, he was questioned in a room with an open door, and he was told he was free to leave at any time. Defendant's Confrontation Clause rights were not violated when a witness testified that when defendant and co-defendant learned from a news report that a victim had died from his shooting wounds, co-defendant stated that the victim should not have robbed defendant. The statement could not be the basis for a Bruton error because it was incriminatory only when linked with evidence introduced later at trial. Because defendant and co-defendant were sentenced under the view that the U.S. Sentencing Guidelines were mandatory rather than advisory, a remand was required.

OUTCOME: The court affirmed the judgment as to the conviction. The court remanded the matter to the district court for consideration of whether to resentence defendant pursuant to United States v. Crosby.

LexisNexis Headnotes

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness
Governments > Legislation > Vagueness

If a defendant's conduct is clearly proscribed by a statute, he cannot successfully challenge it for vagueness.

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > General Overview

18 U.S.C.S. § 36(b)(2) criminalizes the conduct of a person who, in furtherance or to escape detection of a major drug offense and with the intent to intimidate, harass, injure, or maim, fires a weapon into a group of 2 or more persons and who, in the course of such conduct, kills any person. 18 U.S.C.S. § 36(b)(2).

Governments > Legislation > Interpretation

The rule of lenity is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of a statute.

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > General Overview

There is no ambiguity or uncertainty in the language of 18 U.S.C.S. § 36(b)(2).

Criminal Law & Procedure > Eyewitness Identification > Fair Identification Requirement

In order to determine whether an allegedly tainted identification is admissible, courts must conduct a sequential inquiry. Under the first step of that inquiry, the court must determine whether the pretrial identification procedures unduly and unnecessarily suggested that the defendant was the perpetrator.

Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation

There is no requirement that the Miranda warning be given merely because the interview takes place at a

police station. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." A defendant is not deemed to have been "in custody" where there was no indication that the questioning took place in a context where the defendant's freedom to depart was restricted in any way.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Evidence

Where a defendant raises a Bruton objection for the first time on appeal, his claim is reviewed for plain error.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

A statement cannot be the basis for a Bruton error if it is incriminatory only when linked with evidence introduced later at trial.

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Findings of Fact
Evidence > Hearsay > Exemptions > Statements by Coconspirators > Statements Furthering Conspiracy

A district court's factual finding that a given statement was uttered by a coconspirator "in furtherance" of a conspiracy will not be disturbed on appeal unless it is clearly erroneous. Where there are two permissible views of the evidence, the court's choice between them cannot be deemed clearly erroneous.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Carjacking > Penalties
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > Penalties
Criminal Law & Procedure > Sentencing > Consecutive Sentences

The United States Court of Appeals for the Second Circuit has upheld consecutive sentences for an 18 U.S.C.S. § The United States Court of Appeals for the Second Circuit has upheld consecutive sentences for a § 924(c)(1) violation and an underlying violation of the carjacking statute, based on a single episode, even though both statutes require the presence of a firearm during the offense. violation and an underlying violation of the carjacking statute, based on a single episode, even though both statutes require the presence of a firearm during the offense.

Opinion

{178 Fed. Appx. 78}SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED in part, and REMANDED for

consideration of whether to resentence pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

Defendants-Appellants **Jerkeno Wallace** and Negus Thomas appeal from judgments of the 10 United States District Court for the District of Connecticut (Alvin W. Thompson, *J.)*, convicting them of six counts and seven counts, respectively, of conspiracy to distribute 50 grams or more of cocaine base (21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(iii) and 846); aiding and abetting drug distribution (21 U.S.C. §§ 841(b)(1)(C); 18 U.S.C. § 2); drug distribution (21 U.S.C. § 841(b)(1)(C)); operating a drug distribution outlet as to Thomas (21 U.S.C. § 856(a)(2)); conspiracy to use a firearm in furtherance of a drug trafficking crime and/or a crime of violence (18 U.S.C. § 924(o)); firing a weapon into a group of persons, and, in doing so, committing murder in the first degree (18 U.S.C. §§ 36(b)(2)(A), 1111(a), 2); possessing a firearm in relation to a drug trafficking crime, and, in doing so, committing murder in the first degree (18 U.S.C. §§ 924(j)(1), 924(c)(1)(A)(iii), 2); and possessing a firearm in relation to a crime of violence, and, in 20 doing so, committing murder in the first degree (18 U.S.C. §§ 924(j)(1), 924(c)(1)(A)(iii), 2). Wallace and Thomas were both sentenced to life in prison. Familiarity with the relevant facts, procedural history, and legal issues is presumed.

Both Appellants challenge their convictions on several grounds. Thomas also challenges the imposition of certain enhancements at his sentencing. This summary **{178 Fed. Appx. 79}** order disposes of all of their claims, except Thomas's claim that he was inappropriately convicted for two violations of 18 U.S.C. § 924(c)(1) based on his committing two predicate offenses with a single use of a firearm. We treat that claim in a separate opinion. Having concluded that the Appellants' remaining objections lack merit, we affirm in part, and remand for proceedings consistent with *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), with respect to the sentences of both Appellants.

I.

Appellant Thomas invokes the Commerce Clause to challenge the constitutionality of the drive-by shooting statute. 18 U.S.C. § 36(b) . Although this argument has been waived, even if we were to reach it, we would easily reject it since we have held that several federal criminal statutes, including one which criminalizes the commission of murder while engaged in a large narcotics conspiracy, do not violate the Commerce Clause even after United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995). See United States v. Walker, 142 F.3d 103, 111 (2d Cir. 1998).

Thomas challenges the vagueness of the drive-by shooting statute, 18 U.S.C. § 36. In a case such as this, vagueness is assessed in light of the specific facts of the case and not with regard to the statute's facial validity. United States v. Rybicki, 354 F.3d 124, 129 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809, 125 S. Ct. 32, 160 L. Ed. 2d 10 (2004). If a defendant's "conduct is clearly proscribed by the statute[, he] cannot successfully challenge it for vagueness." Id. (internal quotation marks omitted). Section 36(b)(2) criminalizes the conduct of "[a] person who, in furtherance or to escape detection of a major drug offense and with the intent to intimidate, harass, injure, or maim, fires a weapon into a group of 2 or more persons and who, in the course of such conduct, kills any person." 18 U.S.C. § 36(b)(2). The defendant's vagueness challenge fails because his conduct clearly falls within the plain language of the statute. The mode of transportation is irrelevant to the analysis, and the statute is not unconstitutionally vague as applied to defendant Thomas. The rule of lenity "is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of [the statute]." Chapman v. United States, 500 U.S. 453, 463, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991) (citation and internal quotation marks omitted). There is no such ambiguity or uncertainty in the language of this statute.

Thomas argues that the District Court erred in determining that the photo array was not unduly suggestive. In order to determine whether an allegedly tainted identification is admissible, courts

must conduct a sequential inquiry. Raheem v. Kelly, 257 F.3d 122, 133 (2d Cir. 2001). Under the first step of that inquiry, the court must "determine whether the pretrial identification procedures unduly and unnecessarily suggested that the defendant was the perpetrator." Id. We agree with the District Court that the array was not unduly suggestive.

Thomas argues that the District Court should have found that his interrogation at the police station, at which no Miranda warnings were given, was a violation of Miranda. Under Oregon v. Mathiason, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977) (per curiam), there is no requirement that the Miranda warning be given merely because the interview takes place at the police station. "Miranda warnings are required only where there has been such a restriction on a **{178 Fed. Appx. 80}** person's freedom as to render him 'in custody.'" Id. A defendant is not deemed to have been "in custody" where, as here, there was "no indication that the questioning took place in a context where [defendant's] freedom to depart was restricted in any way." Id.; see also California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (per curiam); United States v. Newton, 369 F.3d 659, 669-72 (2d Cir. 27 2004).

Here, Thomas had not been arrested. He had simply been asked if he was carrying a gun, and was not patted down or searched. He was questioned in a room with an open door, and was told that he was free to leave at any time. After talking to the detectives for minutes, he expressed a desire to leave, at which point the questioning stopped and the detectives immediately transported him home. Thus, the interrogation falls outside Miranda's custody requirement, and the District Court correctly denied Thomas's motion to suppress the statements made during the interview.

Thomas argues that his Confrontation Clause rights were violated when the court allowed a witness to testify that when Thomas and Wallace learned from the news reports that Gil Torres had succumbed to his shooting wounds, Wallace remarked, "good for Homes, he shouldn't have robbed you." Thomas argues that although the Court only allowed the testimony to be admitted against Wallace, the statement clearly implicated Thomas and the limiting instruction was meaningless in light of Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and Cruz v. New York, 481 U.S. 186, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987). Because the defendant raises the Bruton objection for the first time on appeal, his claim is reviewed for plain error. United States v. Cotton, 535 U.S. 625, 631-32, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002). The statement at issue -"That's good for Homes, he shouldn't have robbed you" -does not directly suggest that Thomas was the one who shot Gil Torres, and, the statement standing alone could be interpreted as mere bragging. Additional evidence presented in the course of the trial did indeed suggest that Thomas and Wallace had committed the shooting in retribution for the robbery, but Richardson v. Marsh, 481 U.S. 200, 208, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), clearly holds that a statement cannot be the basis for a Bruton error if it is incriminatory only when linked with evidence introduced later at trial. Therefore, there was no Bruton error.

Thomas challenges the admission into evidence of Wallace's statement to a fellow conspirator a few hours after the robbery and shooting that "we got him by a school on Farmington Avenue." The District Court admitted the statement as a "statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). Thomas concedes that the statement was made by a coconspirator to a fellow conspirator during the existence of the conspiracy, but argues that the statement was not made in furtherance of the narcotics conspiracy. Instead, he characterizes the statement as "puffing" or a "spilling of the beans." We have held that a district court's factual finding "that a given statement was uttered by a coconspirator 'in furtherance' of a conspiracy will not be disturbed on appeal unless it is clearly erroneous." United States v. Maldonado-Rivera, 922 F.2d 934, 959 (2d Cir. 1990). "Where there are two permissible views of the evidence, the court's choice between them cannot be deemed clearly erroneous." Id. The District

Court's conclusion that the statement was made in furtherance **{178 Fed. Appx. 81}** of the conspiracy is certainly reasonable, and therefore could be deemed to be one of two possible readings of the facts. Accordingly, the District Court's admission of the statement did not amount to clear error.

Thomas also argues that the use of the firearm was one and the same with the "drive-by shooting" crime of violence because the drive-by-shooting crime charged in Count Twelve was a crime of violence that necessarily included the use, carrying and discharge of a weapon. Therefore, he argues, the evidence was insufficient to prove that he committed the crime alleged in Count Fourteen. We reject this argument. In United States v. Mohammed, 27 F.3d 815 (2d Cir. 1994), we upheld consecutive sentences for a § 924(c)(1) violation and an underlying violation of the carjacking statute, based on a single episode, even though both statutes require the presence of a firearm during the offense. Id. at 819-21. The same reasoning underlying that decision applies with respect to the drive-by shooting statute under which Appellants were convicted.

II.

Thomas raises a Sixth Amendment challenge to his sentence. Because the District Court sentenced Wallace and Thomas under the view that the Guidelines were mandatory rather than advisory, see United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), we remand his case to the District Court for further proceedings in conformity with United States v. Crosby, 397 F.3d 103 (2d Cir. 2005).

We have considered Wallace and Thomas's remaining arguments and find them to be without merit.

Accordingly, the judgment of the District Court is hereby AFFIRMED in part, and REMANDED for consideration of whether to resentence pursuant to Crosby, in part.

APPENDIX B

UNITED STATES OF AMERICA v. JERKENO WALLACE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT
2014 U.S. Dist. LEXIS 184178
Criminal No. 3:02CR72(AWT)
May 14, 2014, Decided
May 14, 2014, Filed

Editorial Information: Subsequent History

Decision reached on appeal by, Remanded by United States v. Wallace, 617 Fed. Appx. 22, 2015 U.S. App. LEXIS 10422 (2d Cir. Conn., June 22, 2015)

Editorial Information: Prior History

United States v. Wallace, 178 Fed. Appx. 76, 2006 U.S. App. LEXIS 10817 (2d Cir. Conn., 2006)

Counsel For US Court of Appeals, Interested Party: US Court of Appeals, LEAD ATTORNEY, New York, NY USA.

Judges: Alvin W. Thompson, United States District Judge.

Opinion

Opinion by: Alvin W. Thompson

Opinion

ORDER RE REQUEST FOR POST-BOOKER RESENTENCING UPON REMAND

For the reasons set forth below, defendant Jerkeno Wallace's request for resentencing set forth in the Memorandum in Support of Resentencing by the Defendant, **Jerkeno Wallace** (Doc. No. 581) (the "Defendant's Crosby Brief") is denied.

The United States Court of Appeals for the Second Circuit ordered a remand in part of this case (i) in light of the Supreme Court's decision in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), and the Court of Appeals' decision in United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), and (ii) so the court could exercise its discretion to vacate the conviction on either Count 13 or Count 14.

Pursuant to Crosby, a district court is required to determine whether it would have "imposed a materially different sentence, under the circumstances existing at the time of the original sentence, if the judge had discharged his or her obligations under the post-Booker/Fan Fan regime and counsel had availed themselves of their new opportunities to present relevant considerations . . . ." Crosby, 397 F.3d at 117. "In making that threshold determination, the [district court] should obtain the views of counsel, at least in writing, but need not require the presence of the defendant . . . ." Id. at 120. However, the district court need not hold a hearing in order to reach its decision as to whether to resentence the defendant. But if, after considering the factors set forth in 18 U.S.C. § 3553(a) and treating the Sentencing Guidelines as advisory, the court concludes "that the original sentence would have differed in a non-trivial manner from that imposed," id. at 118, then a full resentencing in

compliance with Rule 32 of the Federal Rules of Criminal Procedure is required.

The court has treated the Sentencing Guidelines as advisory and considered the arguments in the Defendant's Crosby Brief concerning the defendant's personal history and characteristics, the circumstances under which the homicide was committed, the point that providing the defendant with needed educational and vocational training and psychological counseling can be accomplished with a sentence of 10 or 20 years, and comparison of Wallace to his co-defendant Negus Thomas. Having done so, the court concludes, for the reasons set forth below, that it would not have imposed a different sentence had the Sentencing Guidelines been advisory at the time the sentence was imposed. In reaching this conclusion, the court is very conscious of the fact that the defendant was sentenced to, inter alia, life imprisonment on Counts One and Twelve and a ten-year consecutive sentence on Count Fourteen.

First, at the time of sentencing, the points made by the defendant in the Defendant's Crosby Brief with respect to the defendant's personal history and characteristics, the circumstances under which the homicide was committed, and comparison of Wallace to co-defendant Negus Thomas were covered by the arguments made in the defendant's sentencing memorandum and were all considered by the court. Also, while the defendant could be provided with the needed educational and vocational training and psychological counseling in 10 to 20 years, a sentence in that range would not adequately serve the purposes of sentencing identified by the court as being most important in this case, i.e., the need to protect society and the need to deter others from acting as defendant Wallace acted.

Second, the sentence imposed was not imposed as a result of a conclusion by the court that it did not have discretion to depart from the Sentencing Guidelines. To the contrary, the court informed the parties that even if the defendant met the standard for a downward departure, the court would choose not to exercise its discretion to depart in this particular case. The court emphasized that it was particularly aware of the need to protect society and the need to deter others who may be tempted to act as defendant Wallace acted. The court also pointed to its personal observations of defendant Wallace and his co-defendant during the extended proceedings in this case and its familiarity with the proceedings involving the other defendants in the case, and informed the parties that, based on what the court had observed, it would be inappropriate to depart downward in defendant Wallace's case. Also, while defendant Wallace compares his conduct to that of co-defendant Thomas, the court considered defendant Wallace's conduct in comparison to other defendants in general, including his other co-defendants in this case. Thus, the court's analysis as to the appropriate sentence in this case as to each of Counts One, Five, Eleven, Twelve, and Fourteen was not limited by the mandatory nature of the Sentencing Guidelines, and the court's conclusion that the sentence imposed with respect to each of those counts is the most appropriate sentence under all the circumstances remains unchanged.

The court is all too aware of the devastating impact on the defendant of the sentence imposed in this case, and of the fact that the defendant's appeal was for the most part unsuccessful. Within the structure of the Crosby remand, the court has very carefully considered whether there is anything it has learned about the defendant since the time of the original sentencing in terms of relevant considerations that could cause the court's perspective on the defendant to change, such that the court could possibly conclude that the purposes of sentencing that are most important in this case are not the need to protect society and the need to deter others from acting as defendant Wallace acted. Unfortunately, nothing in the Defendant's Crosby Brief has led the court to conclude that such a possibility exists, and although in some cases defendants who have had time for reflection undergo positive changes, the court has received no submission that persuades it that such a possibility exists here. Consequently, the court concludes that the defendant's sentence would not have differed

at all from that imposed, much less differed in a non-trivial manner and that a hearing is not required and would not be helpful.

Also, in accordance with the decision in United States v. Wallace, et al., 447 F.3d 184 (2d Cir. 2006), the court hereby exercises its discretion to vacate the defendant's conviction on Count Thirteen.

Accordingly, the judgment in this case shall be amended to reflect the fact that the conviction on Count Thirteen has been vacated, and in all other respects, the judgment shall remain in full force and effect.

It is so ordered.

Dated this 14th day of May, 2014 at Hartford, Connecticut.

/s/ Alvin W. Thompson

United States District Judge

APPENDIX C

14-1728(L)
United States v. Thomas (Wallace)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of November, two thousand eighteen.

PRESENT:

Chester J. Straub,
Barrington D. Parker,
Susan L. Carney,
Circuit Judges.

United States of America,

Appellee,

v.

14-1728 (L);
14-1980 (con);
17-1190 (con);
17-1196 (con)

Jerkeno Wallace, AKA Uptown, Negus Thomas, AKA Brown Eyes, AKA B.E.,

Defendants-Appellants,

Kevin Coleman, Kimberly Cruze, Lavar Jackson, AKA Smokey, Peter Pitter, Enrique Stewart, Kavohn Taylor, AKA Ox, Kuwan Wallace, AKA Killer Q, Shakon Wallace, AKA Shock, Aaron Wood,

Defendants.

FOR DEFENDANTS-APPELLANTS: Richard S. Cramer, Hartford, Connecticut (for Wallace).

David J. Wenc, Baram, Tapper & Gans, LLC, Bloomfield, Connecticut (for Thomas).

FOR APPELLEE: Michael J. Gustafson, Assistant United States Attorney, Marc H. Silverman, Assistant United States Attorney (of counsel), *for* John H. Durham, United States Attorney for the District of Connecticut, New Haven, Connecticut.

Appeals from orders of the United States District Court for the District of Connecticut (Thompson, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the orders of the District Court dated April 18, 2017, are **AFFIRMED**.

In 2003, Defendants-Appellants Jerkeno Wallace and Negus Thomas were convicted of narcotics conspiracy, firearms, and murder charges, and were sentenced to life imprisonment plus ten years. On appeal, this Court substantially affirmed their convictions, but remanded pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), for the District Court to determine whether it would have imposed nontrivially different sentences had it known that the United States Sentencing Guidelines were not mandatory and, if so, to resentence. *See United States v. Wallace*, 447 F.3d 184, 185 (2d Cir. 2006); *United States v. Wallace*, 178 F. App'x 76, 81 (2006). The District Court declined to resentence, and, on a second appeal, we remanded pursuant to *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994), for the District Court to clarify whether, without considering an impermissible factor (post-conviction rehabilitation and remorse), it would have reached the same decision not to resentence. *See United States v. Wallace*, 617 Fed. App'x 22, 23 (2d Cir. 2015). The District Court has now clarified that it would have reached the same decision, and jurisdiction has been restored to the Court. We assume the parties' familiarity with the

underlying facts, the procedural history of the case, and the issues on appeal, to which we refer only as necessary to explain our decision to affirm the District Court's orders.

Following a *Crosby* remand, we may review "the manner in which the district court conducted the *Crosby* remand" and the reasonableness of the original sentence. *United States v. Williams*, 475 F.3d 468, 476 (2d Cir. 2007). Under the law of the case doctrine, however, a defendant is barred from raising arguments that "could have been adjudicated by us had the defendant made them . . . during the initial appeal that led to the *Crosby* remand." *Id.* at 475; *see also United States v. Frias*, 521 F.3d 229, 234 (2d Cir. 2008) (stating that law of the case doctrine "prohibits a party, upon resentencing or an appeal from that resentencing, from raising issues that he or she waived by not litigating them at the time of the initial sentencing" (citation omitted)).

I. Wallace's Sentence

In his initial appeal, Wallace did not challenge his sentence. Accordingly, the law of the case doctrine precludes him from raising here any challenges to the original sentencing. Wallace has not identified any "cogent and compelling reasons" to depart from this doctrine in his current appeal. *See United States v. Quintieri*, 306 F.3d 1217, 1230 (2d Cir. 2002) (internal quotation marks and citation omitted).

The law of the case doctrine does not bar Wallace's current arguments about the propriety of the proceedings that have been conducted on remand under *Crosby* or *Jacobson*. Upon consideration, however, we conclude that those arguments are meritless. Wallace principally contends that, in deciding against resentencing him under *Crosby*, the District Court erroneously relied on its personal observations of Wallace's conduct during the original criminal proceedings as a basis for its finding that he lacked remorse. A defendant's lack of remorse is an appropriate

sentencing factor. *Jacobson*, 15 F.3d at 23. The District Court here could properly rely on its observations of Wallace in making this finding, especially since the original criminal proceedings conducted before the District Court were extensive and gave the court ample opportunity to observe Wallace. *See United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012) (explaining that the district court has a "unique factfinding position, which allows it to hear evidence, make credibility determinations, and interact directly with the defendant (and, often, with his victims), thereby gaining insights not always conveyed by a cold record").

Further, contrary to Wallace's contention, the District Court's written opinions regarding his sentencing provide an adequate basis for appellate review. A district court "must explain enough about the sentence for a reviewing court both to understand it and to assure itself that the judge considered the principles enunciated in federal statutes and the Guidelines." *United States v. Corsey*, 723 F.3d 366, 374 (2d Cir. 2013) (internal quotation marks and citation omitted). Here, we have the benefit of the District Court's written rulings in both the *Crosby* and the *Jacobson* remands, in each case explaining its decision not to resentence. The District Court's stated reasoning—that Wallace's conviction of murder warranted a life sentence to protect the public and deter others—is sufficient to permit review. Its decision not to sentence below the applicable Guidelines range was both reasoned and reasonable. *See United States v. Jones*, 878 F.3d 10, 19 (2d Cir. 2017) ("In the overwhelming majority of cases, a sentence within the Guidelines range will fall comfortably within the broad range of sentences that would be reasonable." (internal quotation marks and citation omitted)). We therefore affirm the District Court's order as to Wallace's sentence.

II. Thomas's Sentence

Applying the law of the case doctrine here as well, we do not consider Thomas's new arguments that the District Court erred at his original 2003 sentencing by (1) finding, without holding a hearing on the issue, that Thomas lacked remorse; and (2) failing to consider the parsimony clause. *See Williams*, 475 F.3d at 476. Thomas did not raise either argument in his initial appeal and does not identify any cogent and compelling reason why the Court should depart from applying the law of the case to consider them.

Thomas additionally contends, as he did in his initial appeal, that the law requires the relevant drug quantity to be determined by a jury and not by a district court, as occurred here. Under current Supreme Court precedent, a jury must determine the relevant drug quantity if the quantity raises the statutory maximum sentence. *See Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) ("This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction."). Here, Thomas argues that the court's finding increased the offense level used in his Guidelines calculation, not the applicable statutory maximum.

When it originally sentenced Thomas, the District Court was obliged to apply the Guidelines, and the Supreme Court has since held that "where facts found by a judge by a preponderance of the evidence increased the applicable Guidelines range, treating the Guidelines as mandatory in those circumstances violated the Sixth Amendment." *Pepper v. United States*, 562 U.S. 476, 489 (2011). The import of *Pepper* to Thomas was addressed, however, by virtue of the *Crosby* remand that has already been discussed. *See United States v. Garcia*, 413 F.3d 201, 220 (2d Cir. 2013) (explaining that *Crosby* remands were necessary to determine whether judicial

fact-finding that increased a mandatory Guidelines range constituted plain error by affecting the outcome of the sentencing). Thomas has thus already received the relief to which he is entitled with respect to this argument.

We have considered all of Thomas's and Wallace's remaining arguments and conclude that they are without merit. Accordingly, we **AFFIRM** the orders of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court