

SCOTUS NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

NEGUS THOMAS

Petitioner

V.

UNITED STATES of AMERICA

PETITION FOR A WRIT OF CERTIORARI

Petitioner, NEGUS THOMAS, respectfully prays that a writ of certiorari issue to review the order issued by the United States Court of Appeals for the Second Circuit on November 13, 2018 with a mandate issued on December 4, 2018.

PARTIES TO THE PROCEEDING

All parties to the proceedings in the Court whose order is sought to be reviewed are contained in the caption of the case before the Court.

QUESTIONS PRESENTED FOR REVIEW

On a *Crosby* remand, the district court decided not to resentence the defendants. On a *Jacobson* remand, the district court again decided not to resentence the defendants. The United States Court of Appeals for the Second Circuit reviewed a decision not to resentence for reasonableness. Did the Court of Appeals err when it decided that the district court acted reasonably when it declined to resentence the defendant-Petitioner?

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OPINION BELOW

The Second Circuit's Summary Order is attached as Appendix-A.

JURISDICTION

The United States District Court for the District of Connecticut (Thompson, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Following the remand by the Second Circuit (in the appeals docketed under 14-1728 and 14-1980) pursuant to *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), on April 18, 2017, the district court issued written rulings denying the resentencing requests of defendant-appellant Negus Thomas and Jerkeno Wallace. The defendant-appellant and Jerkeno Wallace thereafter filed a timely notice of appeal (docketed under 17-1190 and 17-1196) pursuant to Fed. R. App. P. 4(b). The Second Circuit then reinstated the appeals docketed under 14-1728 and 14-1980 and consolidated them with the appeals docketed under 17-1190 and 17-1196. The Second Circuit had appellate jurisdiction over all the consolidated appeals pursuant to 18 U.S.C. § 3742(a).

The Summary Order of the Second Circuit was issued on November 13, 2018 with a Mandate on December 4, 2018. The Petition is filed within the time granted by this Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254(l).

STATEMENT OF THE CASE

On July 9, 2002, a federal grand jury returned a superseding indictment in which (1) Wallace, Thomas, and eight additional co-defendants (each of whom pleaded guilty) were charged with various drug offenses based on their involvement in a large-scale narcotics trafficking operation and (2) Wallace and Thomas were charged with several offenses based on their involvement in a drive-by shooting. See *United States v. Wallace*, 447 F.3d 184, 186 (2d Cir. 2006). The Second Circuit previously described the shooting as follows:

On May 16, 2001, in Hartford, Connecticut, Thomas and Wallace pulled their vehicle near to another one that was carrying three men who had just robbed Thomas of crack cocaine. Thomas and Wallace had followed the three men, and as the cars were caught in traffic, Thomas fired several shots into the other car. One of the bullets hit Gil Torres in the neck, paralyzing him immediately and ultimately causing his death.

On May 13, 2003, a jury convicted Wallace and Thomas on all counts. The district court (Thompson, J.) subsequently sentenced each defendant to an effective term of life imprisonment, followed by a consecutive term of ten years of imprisonment.

On direct appeal, the Second Circuit largely upheld the defendants' convictions, but remanded for consideration of whether resentencing was warranted under *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). See *United States v. Wallace*, 178 Fed. Appx. 76, 81 (2d Cir. Apr. 27, 2006) (summary order). On May 14, 2014, the district court issued written rulings declining to resentence the defendants (the "*Crosby* rulings"). On July 17, 2014, amended judgments entered for each defendant.

The defendants appealed the district court's *Crosby* rulings. On this second appeal, the Second Circuit expressed concern about "language in the District Court's *Crosby* orders tending to suggest that it may have impermissibly considered post-sentence remorse and rehabilitation, or a perceived lack thereof, in determining that full resentencing was not required." *United States v. Wallace*, 617 Fed. Appx. 22, 24 (2d Cir. June 22, 2015) (summary order). The Second Circuit therefore remanded "in accordance with the procedures set forth in *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir.1994), with directions to the District Court that it issue orders clarifying whether, without considering the absence of evidence of post-sentence remorse and rehabilitation, it would have reached the same decisions not to resentence defendants." *Wallace*, 617 Fed. Appx. at 25 (emphasis in original).

On this *Jacobson* remand, the district court again declined to resentence the defendants. On April 18, 2017, the district court issued rulings in which it confirmed “that, without considering the absence of evidence of post-sentence remorse and rehabilitation, the court would have reached the same decision not to resentence” the defendants. (the “*Jacobson* rulings”).

The defendants filed new notices of appeal. The Second Circuit reinstated the prior appeals and consolidated them with these new appeals. The Second Circuit also denied the Government’s motion for summary affirmance and clarified that “the parties are directed to file briefs addressing (1) all remaining challenges raised in the prior appeals and (2) any challenges arising from the district court’s April 18, 2017 rulings.” No. 14-1728(L), Dkt. No. 149 at 2.

In response to the Second Circuit direction, the petitioner, Thomas, argued that the District Court erred when it originally sentenced Thomas. The errors occurred when (1) the District Court found that Thomas lacked remorse without holding a hearing on the issue; and (2) failed to consider the “parsimony” clause. In addition, Thomas argued that a jury, not the District Court, should have determined the relevant drug quantity at the original sentencing.

The Second Circuit rejected each argument and affirmed the District Court’s April 18, 2017 orders. Currently, the petitioner is serving his life sentence.

REASONS FOR GRANTING THE WRIT

A. The Law-Of-The-Case Doctrine Should Not Apply Where There Is an Intervening Change in Controlling Law, New Evidence, Or the Need to Prevent A Manifest Injustice.

The Second Circuit refused to consider the petitioner's arguments that the District Court erred at the original sentencing by (1) finding, without holding a hearing on the issue, that the petitioner lacked remorse; and (2) failing to consider the "parsimony" clause. See, Addendum, *Summary Order* at page 5. The Second Circuit stated that the petitioner did not raise either argument in his initial appeal. As a result, the "law of the case" doctrine precluded consideration of these issues. *Id.*

The principle that an appellate court's decision on a legal issue is binding on both the trial court on remand and an appellate court on a subsequent appeal in the same case and with substantially the same facts. That is, under the "law of the case" doctrine, questions of law decided on appeal to a court of last resort usually govern the case throughout its later phases. The law of the case is meant to ensure that lower courts comply with the rulings of higher courts and prevent re-litigation of settled issues.

However, the doctrine typically does not apply to questions of fact, dicta, clearly erroneous earlier holdings and a later stage of litigation that presents different parties, issues, or facts. The application of the doctrine is within the court's discretion. Appellate courts have discretion to depart from the “law of the case” doctrine in exceptional circumstances.

The Supreme Court has described the “law of the case [a]s an amorphous concept,” “[a]s most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Arizona v. California*, 460 U. S. 605, 618 (1983). This doctrine “directs a court’s discretion, it does not limit the tribunal’s power.” *Ibid*. Accordingly, the doctrine “does not apply if the court is ‘convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.’” *Agostini v. Felton*, 521 U. S. 203, 236 (1997) (quoting *Arizona*, 460 U. S., at 618, n. 8; alteration in original)

The "law of the case" doctrine is one of policy only and will be disregarded when compelling circumstances call for a redetermination of a point of law on prior appeal. This is particularly true where an intervening or a contemporaneous change in law has occurred where former decisions have been overruled or new

precedent has been established by controlling authority. *Ryan v. Mike-Ron Corp.*, 259 Cal.App.2d 91, 96 (1968).

The “law of the case” doctrine does not preclude reconsideration of an issue where (i) a subsequent trial produces substantially different evidence, (ii) controlling case law subsequently made a contrary decision of law applicable to that issue, or (iii) a prior decision was clearly erroneous and would work manifest injustice. *United States v. Davis*, No. 15-15227, 2016 WL 3997209, *1 (11th Cir. 2016) (per curiam) (citing *United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996) (per curiam)); *This That & The Other Gift & Tobacco*, 439 F.3d at 1283-84 (same).

In the case at bar, the District Court originally sentenced Mr. Thomas on December 15, 2003. Thereafter, Mr. Thomas took a direct appeal to the Second Circuit. After those two events, federal sentencing law was transformed. In 2005, the federal Sentencing Guidelines were no longer binding and mandatory. *United States v. Booker*, 125 S. Ct. 738 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). In 2006, the Second Circuit remanded pursuant to *Crosby*.

At the time of the original sentence, the federal Sentencing Guidelines precluded the District Court from considering any act of contrition by Mr. Thomas that would have resulted in an adjustment for acceptance of responsibility. If the

District Court could have considered Mr. Thomas' expression of remorse at the time of the original sentencing, it might have resulted in a materially different sentence, especially since the District Court appeared to place significant weight on its perception that Mr. Thomas showed "no remorse".

At the time of the direct appeal, the issues of remorse, post-sentence rehabilitation and the directives of the "parsimony clause" requiring the sentencing court to impose a sentence "sufficient, but not greater than necessary," to promote the purposes of fair sentencing were precluded by the mandatory federal sentencing guidelines.

The Second Circuit should have considered the petitioner's arguments relating to remorse, post-sentencing rehabilitation and the reference to the "parsimony clause" in that these factors became relevant after the original sentence and the direct appeal. The Second Circuit's decision to employ the "law of the case" doctrine as a basis to refuse to consider these issues worked a "manifest injustice" on the petitioner and impeded a full consideration as to whether the district court acted reasonably when it declined to resentence the defendant-Petitioner.

CONCLUSION

For the reasons stated, the petitioner by and through his attorney prays that this Petition for A Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,
NEGUS THOMAS,

By: /s/ **David J. Wenc**

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February 2019, I served the within PETITION upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001 and the Office of the United States Attorney, Michael Gustafson AUSA, 157 Church Street, Floor 25, New Haven, CT 06510. In addition, a copy was mailed to the defendant-appellant Register Number: 14591-014, USP CANAAN U.S. Penitentiary, P.O. Box 300, Waymart, PA 18472.

By: /s/ **David J. Wenc**

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APPENDIX “A”

Mandate 12/04/2018