

1 UNITED STATES COURT OF APPEALS

2  
3 FOR THE SECOND CIRCUIT

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6  
7 August Term, 2004

8  
9 (Argued: March 3, 2005

Decided: April 27, 2006)

10  
11 Docket Nos. 03-1777 (L), 03-1778 (CON)

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16 UNITED STATES OF AMERICA,

17  
18 *Appellee,*

19  
20 — v. —

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22 JERKENO WALLACE AND NEGUS THOMAS,

23  
24 *Defendants-Appellants.*

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27  
28 Before:

29  
30 WALKER, *Chief Judge*, CARDAMONE, and B.D. PARKER, *Circuit Judges.*

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35 Defendants-Appellants Jerkeno Wallace and Negus Thomas appeal from judgments of  
36 conviction, in the United States District Court for the District of Connecticut (Thompson, J.).

37 Remanded in part.

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RICHARD S. CRAMER, Wethersfield, CT, *for Defendant-Appellant Jerkeno Wallace.*

DAVID J. WENC, Windsor Locks, CT, *for Defendant-Appellant Negus Thomas.*

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, *for Appellee.*

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B.D. PARKER, *Circuit Judge:*

Defendants-Appellants Jerkeno Wallace and Negus Thomas appeal from judgments of the United States District Court for the District of Connecticut (Alvin W. Thompson, *J.*). They were convicted on various narcotics, conspiracy, firearms and murder charges and were both sentenced principally to life in prison. They challenge their convictions on several grounds, but this opinion deals specifically with one issue raised by Thomas – whether he was inappropriately convicted for two violations of 18 U.S.C. § 924(c)(1)(A) (“§ 924(c)(1)”) based on his committing two predicate offenses with a single use of a firearm.<sup>1</sup> (We treat Appellants’ remaining claims in a separate summary order). As to the dual § 924(c)(1) convictions, we hold that the unit of prosecution is the same for the two separate § 924(c)(1) counts (Counts Thirteen

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<sup>1</sup>Although the argument with respect to the § 924(c)(1) convictions was only raised by Thomas, we remand the convictions for Counts Thirteen and Fourteen with respect to both appellants Thomas and Wallace.

1 and Fourteen). Because a defendant may only be convicted of one violation of § 924(c)(1) for a  
2 single unit of prosecution, we remand the convictions of both Appellants on both Counts  
3 Thirteen and Fourteen to the District Court to exercise its discretion to vacate one of them. As  
4 explained in the separate Summary Order, we affirm as to the remaining challenged counts. Also  
5 in the Summary Order, we remand the sentences of both Appellants for proceedings consistent  
6 with United States v. Crosby, 397 F.3d 103 (2d Cir. 2005).

#### 8 **BACKGROUND**

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

14 Thomas and Wallace – along with eight others – were indicted for conspiring to  
15 distribute cocaine base. With the exception of Thomas and Wallace, the other defendants  
16 pleaded guilty. Thomas and Wallace were tried on a variety of offenses. Of the ones relevant to  
17 this appeal, Count One charged them with conspiracy to distribute cocaine base; Count Four  
18 charged Thomas with aiding and abetting drug distribution; Count Five charged Wallace with  
19 drug distribution; and Count Ten charged Thomas with operating a drug distribution facility. A  
20 number of the counts related to the murder of Torres: Count Eleven charged Thomas and  
21 Wallace with conspiracy to use a firearm in furtherance of a drug trafficking crime (the

1 conspiracy charged in Count One) and/or a crime of violence (the drive by-shooting charged in  
2 Count Twelve) in violation of 18 U.S.C. § 924(o); Count Twelve charged that Thomas and  
3 Wallace violated the drive-by shooting statute, 18 U.S.C. § 36(b)(2)(A); Count Thirteen charged  
4 that they violated the firearm possession statute in relation to a drug trafficking crime (the drug  
5 conspiracy charged in Count One), and, in doing so, murdered Torres in violation of 18 U.S.C.  
6 §§ 924(c)(1)(A)(iii), 924(j)(1), and 2. Finally, Count Fourteen charged that they violated the  
7 firearm possession statute during a crime of violence (the drive-by shooting charged in Count  
8 Twelve), and in doing so, murdered Torres, again in violation of §§ 924(c)(1)(A)(iii), 924(j)(1),  
9 and 2.

10 The trial resulted in the convictions of both defendants on all counts. Wallace was  
11 sentenced principally to life imprisonment on both Counts One and Twelve, 240 months on both  
12 Counts Five and Eleven, all to be served concurrently, and 120 months imprisonment on Count  
13 13 (which was combined with Count Fourteen). Thomas was sentenced to life imprisonment on  
14 both Counts One and Twelve, 240 months on both Counts Four and Ten, all to be served  
15 concurrently, and 120 months imprisonment on Count 13 (which was combined with Count  
16 Fourteen). This appeal followed.

## 18 DISCUSSION

### 19 I.

20 Thomas argues that the evidence was insufficient to support his convictions for two  
21 violations of § 924(c)(1), which criminalizes the use of a firearm during either a crime of

1 violence or a drug trafficking offense, because that section does not authorize multiple  
2 convictions when those two predicate offenses are committed with a single use of a firearm.  
3 Though he presents it as a sufficiency of the evidence issue, we think it is more appropriately  
4 reviewed for legal error. Regardless of how the error is characterized, the standard of review is  
5 de novo. See United States v. Rodriguez, 356 F.3d 254, 257-58 (2d Cir. 2004) (errors of law);  
6 United States v. Geibel, 369 F.3d 682, 689 (2d Cir. 2004) (sufficiency of the evidence).

## 8 II.

9 We begin by reviewing the statutes underlying the relevant charges. Counts Thirteen and  
10 Fourteen charged violations of §§ 924(c)(1)(A) and 924(j)(1) in connection with Counts One  
11 and Twelve. 18 U.S.C. § 924(c)(1)(A) provides:

12 any person who, during and in relation to any crime of violence or drug trafficking crime  
13 ... for which the person may be prosecuted in a court of the United States, uses or carries a  
14 firearm, or who, in furtherance of any such crime, possesses a firearm, shall ... be  
15 sentenced to a term of imprisonment of not less than 5 years....

16 Section 924(j)(1) provides:

17 [a] person who, in the course of a violation of subsection (c), causes the death of a person  
18 through the use of a firearm, shall ... if the killing is a murder ... be punished by death or  
19 by imprisonment for any term of years or for life....  
20

21 Count Thirteen charged that Thomas used a firearm in connection with the drug  
22 trafficking conspiracy charged in Count One. The drug trafficking conspiracy charge in Count  
23 One alleged a violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(iii) and 846. Those statutes  
24 provide in part that “it shall be unlawful for any person knowingly or intentionally” to conspire to  
25 “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or

1 dispense . . . 50 grams or more of a mixture or substance . . . which contains cocaine base.” 21  
2 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(iii), 846. Accordingly, in order to sustain its burden of proof  
3 against Thomas for the firearm possession count in Count Thirteen, the government was required  
4 to prove three elements: (1) that Thomas committed the predicate drug trafficking offense, (2)  
5 that during and in relation to that underlying offense Thomas knowingly used or carried a firearm  
6 and, (3) that in the course of using that firearm Thomas murdered Torres.

7 Count Fourteen charged that Thomas used a firearm in connection with the crime of  
8 violence alleged in Count Twelve, the drive-by shooting. The drive-by shooting charge in Count  
9 Twelve was for a violation of 18 U.S.C. § 36(b), which prohibits the firing of a weapon, in  
10 furtherance of a major drug offense, into a group of two or more people with the intent to injure.

11 The statute provides in part:

12 A person who, in furtherance ... of a major drug offense and with the intent to intimidate,  
13 harass, injure, or maim, fires a weapon into a group of two or more persons and who, in  
14 the course of such conduct, kills any person shall, if the killing . . . (A) is a first degree  
15 murder (as defined in section 1111(a)), be punished by death or imprisonment for any  
16 term of years or for life, by fine under this title, or both . . . .

17  
18 18 U.S.C. § 36(b)(2)(A). Section 36(a) in turn defines “major drug offense” as, among other  
19 things:

20 . . .  
21 (2) a conspiracy to distribute controlled substances punishable under section 406  
22 of the Controlled Substances Act ...; or  
23 (3) an offense involving major quantities of drugs and punishable under section  
24 401(b)(1)(A) of the Controlled Substances Act.

25 . . .  
26  
27 18 U.S.C. § 36(a). Thus, with respect to Count Fourteen, charging use of a firearm in connection  
28 with the drive-by shooting charged in Count Twelve, the government was required to prove three

1 elements: (1) that Thomas committed the predicate offense by firing a weapon in furtherance of a  
2 major drug offense into a group of two or more people with the intent to injure, as well as the  
3 second and third elements required to establish the violation alleged in Count Thirteen, (2) that  
4 Thomas knowingly used or carried the firearm during and in relation to the underlying offense,  
5 and (3) that in the course of using that firearm, Thomas caused the murder of Torres.

### 6 7 **III.**

8 The question we address here is whether the two § 924(c)(1) counts, Counts Thirteen and  
9 Fourteen, were based on a single “unit of prosecution.” We hold that they were, and that  
10 therefore the multiple § 924(c)(1) convictions were improper. In determining the appropriate  
11 unit of prosecution under a criminal statute, we look to Congress, asking whether it clearly  
12 manifested an intention to punish a defendant twice for continuous possession of a firearm in  
13 furtherance of co-terminous predicate offenses involving essentially the same conduct. See  
14 United States v. Finley, 245 F.3d 199, 207-08 (2d Cir. 2001); United States v. Coiro, 922 F.2d  
15 1008, 1014 (2d Cir. 1991). Where ambiguity or doubt exists about Congressional intent  
16 regarding the unit of prosecution, we apply the rule of lenity, which dictates that “if Congress  
17 does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be  
18 resolved against turning a single transaction into multiple offenses.” Finley, 245 F.3d at 207  
19 (internal quotation marks and citations omitted).

20 In Finley, we found ambiguity with regard to § 924(c)(1) and concluded that the rule of  
21 lenity applied. Id. There, we invalidated one of two § 924(c)(1) convictions that arose from two

1 predicate offenses and a single gun continually possessed. The defendant was charged with both  
2 drug distribution and drug possession with intent to distribute drugs after an undercover officer  
3 purchased drugs from the defendant (the distribution count) and, in the raid that followed  
4 immediately, law enforcement officials discovered the remainder of the defendant's stash (the  
5 possession count). Because the police also discovered that the defendant had stored a firearm  
6 near his distribution operation, the defendant was charged in two counts with using a firearm in  
7 furtherance of drug trafficking crimes (the possession with intent to distribute count and the  
8 distribution count). Id. at 201-02.

9 On appeal, we ruled that § 924(c)(1) “does not clearly manifest an intention to punish a  
10 defendant twice for continuous possession of a firearm in furtherance of simultaneous predicate  
11 offenses consisting of virtually the same conduct.” Id. at 207. We reasoned that the defendant  
12 only chose to “possess” the firearm once, albeit in a continuing fashion, and that the “predicate  
13 offenses were simultaneous or nearly so, they consisted of virtually the same conduct with the  
14 same criminal motivation and one of them (possession of a drug with intent to distribute) was a  
15 continuing offense.” Id. We held that “continuous possession of a firearm in furtherance of  
16 simultaneous predicate offenses consisting of virtually the same conduct” amounts to a single  
17 unit of prosecution. Id. Application of this principle to this case means that the violations  
18 charged in Counts Thirteen and Fourteen are unauthorized multiple convictions for a single unit  
19 of prosecution because a defendant who commits two predicate offenses with a single use of a  
20 firearm may only be convicted of a single violation of § 924(c)(1).



1           The Fifth Circuit’s approach in United States v. Phipps, 319 F.3d 177 (5th Cir. 2003) is  
2 also instructive. The court, while adopting a narrower reading of § 924(c)(1) than our own,  
3 concluded, on similar facts, that multiple § 924(c)(1) convictions could not be based on two  
4 violent predicate crimes arising from a single use of a firearm. Id. In Phipps, the defendants  
5 used a single firearm to commit two crimes of violence that could be construed as part of the  
6 same criminal act: a carjacking during which the defendants kidnaped their victim. Id. at 186-88.  
7 The indictment charged two separate § 924(c)(1) violations, one in relation to the carjacking and  
8 one in relation to the kidnaping. The defendants were convicted on both § 924(c)(1) counts and  
9 the predicate offenses. Id. at 180-81. The Fifth Circuit observed that it was unclear whether §  
10 924(c)(1) authorizes multiple convictions for a single use of a single firearm based on multiple  
11 predicate offenses. Applying the rule of lenity, the court concluded the statute did not. Id. at  
12 184-85. Accordingly, the court ordered that one of the two § 924(c)(1) convictions be dismissed.  
13 Id. at 194.<sup>2</sup>

14           The government contends that Phipps and Finley do not apply here because Thomas used  
15 the firearm first to further a drug trafficking crime, that is to maintain and support an extensive,

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<sup>2</sup>The Fifth Circuit has rejected our approach in Finley and adopted a narrower definition. See Phipps, 319 F.3d at 188 n. 11. In that Circuit, “the unit of prosecution is the use, carriage, or possession of a firearm during and in relation to a predicate offense.” Id. at 184-85. Although we do not adopt the Fifth Circuit’s definition of the unit of prosecution, we do agree with the Fifth Circuit that § 924(c)(1) “does not unambiguously authorize multiple convictions for a single use of a single firearm based on multiple predicate offenses.” Id. at 187-88. The Fifth Circuit explicitly questioned our reading of § 924(c)(1) in Finley, 245 F.3d at 207, expressing the view that the predicate offenses in Finley were not simultaneous, and protested that our “test creates more ambiguity than it resolves by importing a temporal concept into § 924(c)(1).” Phipps, 319 F.3d at 188 n.11. We disagree and continue to adhere to the standard we fashioned in Finley.

1 ongoing crack cocaine distribution operation on Edgewood Street, and second to commit a drive-  
2 by shooting one day during the existence of the drug trafficking conspiracy. The government  
3 focuses on the fact that Thomas had to retrieve his firearm in order to commit the second  
4 predicate act, the crime of violence. Consequently, the government argues, the predicate offenses  
5 were not simultaneous, did not consist of virtually the same conduct, and were not borne of the  
6 same criminal motivation. We disagree. Count Thirteen is predicated on the government  
7 proving that Thomas knowingly used a firearm during and in relation to a drug trafficking  
8 offense, and in the course of using it, caused the murder of Gil Torres. Count Fourteen is  
9 predicated on the government proving that Thomas fired a weapon, in furtherance of a major  
10 drug offense, into a group of two or more people with the intent to injure, and in the course of  
11 doing so, caused the murder of Gil Torres. The relevant conduct underlying the offenses  
12 predicating Counts Thirteen and Fourteen consists of the same shooting.

13 The government also argues that if there was error here it was harmless, since the District  
14 Court combined Counts Thirteen and Fourteen for sentencing purposes. Again, we disagree.  
15 The Government misinterprets Lindsay, 985 F.2d at 677, as allowing separate § 924(c)(1)  
16 convictions to be sentenced concurrently. That case held that where one § 924(c)(1) conviction  
17 relates to a lesser-included offense, and the greater offense also carries with it a 924(c)(1)  
18 conviction, the two § 924(c)(1) convictions can be combined for sentencing purposes. Id.  
19 However, Lindsay also held that where two distinct § 924(c)(1) violations occur, the sentences  
20 cannot run concurrently. See id. at 674 (holding that where the government charges multiple §  
21 924(c)(1) counts linking multiple firearms to a single crime, only one § 924(c)(1) violation

1 occurs because “the statute requires § 924(c)(1) convictions to be imposed consecutively to all  
2 other convictions” and “if [C]ongress intended to impose such a draconian penalty ... surely it  
3 would have said so in clear language”). Here, Counts Thirteen and Fourteen involve a single use  
4 of a firearm “in furtherance of simultaneous predicate offenses consisting of virtually the same  
5 conduct,” Finley, 245 F.3d at 207, and, consequently, the crimes are distinct. Count Thirteen is  
6 not a lesser-included offense under Count Fourteen because the two § 924(c)(1) violations relate  
7 to distinct underlying crimes. We conclude that where two § 924(c)(1) violations relate to  
8 simultaneous but distinct crimes consisting of virtually the same conduct, the sentences cannot  
9 run concurrently. See Lindsay, 985 F.2d at 674.

10 In addition, were we to allow the two § 924(c)(1) convictions to be sentenced  
11 concurrently, we would run afoul of § 924(c)(1)(D)(ii), which states that “no term of  
12 imprisonment imposed on a person under [subsection 924(c)(1)] shall run concurrently with any  
13 other term of imprisonment imposed on the person, including any term of imprisonment imposed  
14 for the crime of violence or drug trafficking crime during which the firearm was used, carried, or  
15 possessed.” Furthermore, a “second” § 924(c)(1) conviction carries a mandatory and consecutive  
16 25-year prison term. 18 U.S.C. § 924(c)(1)(C)(i). Moreover, we have observed that “[a]  
17 defendant suffers consequences of conviction apart than the sentence actually served. Such  
18 collateral consequences may include enhanced penalties under a recidivist statute, the future use  
19 of the conviction for impeachment of credibility, and the social stigma resulting from  
20 conviction.” Coiro, 922 F.2d at 1015. For these reasons, the error was not harmless.

