No. 24-

IN THE

Supreme Court of the United States

DWAINE COLLYMORE,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAVID C. ESSEKS
Counsel of Record
ELIZABETH M. SULLIVAN
ALEXANDRA B. HARRINGTON
ALLEN OVERY SHEARMAN STERLING US LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000
david.esseks@aoshearman.com

Attorneys for Petitioner Dwaine Collymore

381547

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a district court may impose consecutive terms of imprisonment for convictions of attempt and conspiracy under the Hobbs Act, 18 U.S.C. § 1951(a), that share the same object and arise from the identical course of conduct.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Dwaine Collymore, defendant-appellant below. Respondent is the United States, plaintiff-appellee below. Petitioner is not a corporation. The caption of this case contains the names of all parties.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii).

United States v. Collymore, No. 16-521, United States District Court for the Southern District of New York (Oct. 4, 2023)

United States v. Collymore, No. 23-7333, United States Court of Appeals for the Second Circuit (Feb. 19, 2025)

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

Page

STATUTES:

Page

Page

OTHER AUTHORITIES:

PETITION FOR WRIT OF CERTIORARI

Petitioner Dwaine Collymore respectfully petitions for a writ of certiorari to review the below judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit ("Summary Order") was filed on November 7, 2024 and is reproduced as Appendix ("App.") A. The order denying the petition for rehearing was entered on February 19, 2025 and is reproduced as App. D. The District Court's amended judgment and transcript of the sentencing hearing is reproduced as App. B and App. C.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 2024. *See* App. A. The order denying the petition for rehearing was entered on February 19, 2025. *See* App. D. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS

The Hobbs Act, 18 U.S.C. § 1951(a), provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so

> to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

The question presented in this case is narrow, but it nonetheless addresses a novel question of critical importance following this Court's decision in *United States v. Taylor*, 596 U.S. 845 (2022). May a sentencing court impose consecutive terms of imprisonment for inchoate offenses under the Hobbs Act, 18 U.S.C. § 1951(a), that have the same object and arise from the identical course of conduct? In the absence of clear congressional intent to allow such cumulative punishments for inchoate offenses arising from identical conduct under the same statute, the answer is "no."

This Court's precedent in *Prince v. United States*, 352 U.S. 322 (1957), provides an authoritative framework to reach this conclusion, but the precise question presented was left open by this Court in *Callanan v. United States,* 364 U.S. 587, 595 (1961). And there now are instances, post *Taylor*, of courts within the same district arriving at different conclusions, resulting in sentencing disparities. Further, Courts of Appeals are split in how they interpret the principles articulated in *Prince*, which directs courts to look to the legislative intent of the governing statute, and which necessarily should be applied to deciding this question.

A. Factual Background

In the predawn hours of April 28, 2016, Petitioner Dwaine Collymore entered a Bronx, New York apartment in an attempt to rob the occupants of the apartment, from which the victim sold marijuana. When the victim opened the door to the apartment, Mr. Collymore brandished a revolver, and a struggle ensued. In the course of the botched robbery, Mr. Collymore shot at one man in the apartment, but missed. He then shot the victim, who was on the floor, in the head, killing him. Mr. Collymore then fled the scene. He was arrested on August 3, 2016.

B. Procedural History

On February 1, 2018, Superseding Indictment S3 ("Indictment") was filed in the Southern District of New York, charging Mr. Collymore with four counts: conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951 (Count One); attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951 and § 2 (Count Two); using, brandishing, and discharging a firearm during and in relation to a crime of violence, pursuant to Count 2, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i), (ii), and (iii) and § 2 (Count Three); and causing the death of a person with a firearm during and in relation to a crime of violence, pursuant to Count 2, in violation of 18 U.S.C. §§ 924(j)(1) and (2) (Count Four). The Government made no plea offer to Mr. Collymore, who pleaded guilty to all Counts on February 15, 2018, the week prior to his scheduled trial, pursuant to a *Pimentel* letter. *United States v. Pimentel*, 932 F.2d 1029 (2d Cir. 1991).

The Court sentenced Mr. Collymore on February 25, 2019 as follows: 405 months on Count Four and 120 months

on Count Three, with those sentences to run consecutively, and concurrent 240-month terms on Counts One and Two, to run concurrently with the 525 months imposed on Counts Three and Four. The Court imposed a term of five years' supervised release; five years on each of Counts Three and Four, and three years on each of Counts One and Two, all terms to run concurrently.

Mr. Collymore's appeal was summarily affirmed in 2021. *See United States v. Collymore*, 856 F. App'x 345 (2d Cir. 2021). While Mr. Collymore's convictions were on direct appeal, the Supreme Court held in *United States v. Taylor*, 596 U.S. 845 (2022) that attempted Hobbs Act robbery was not categorically a crime of violence, with the result that this Court vacated Mr. Collymore's judgment and remanded his case to the Second Circuit for further consideration in light of *Taylor*. *See Collymore v. United States*, 142 S. Ct. 2863 (2022). In March 2023, the Second Circuit vacated Mr. Collymore's convictions on Counts Three and Four and remanded his case to the District Court for resentencing on the remaining inchoate Hobbs Act counts. *See United States v. Collymore*, 61 F.4th 295, 297 (2023). The Sentencing Guidelines provided an advisory range on resentencing of 324 to 405 months. *See* App. at 39a.

On resentencing, Mr. Collymore argued that the District Court was precluded from imposing consecutive terms of imprisonment for the attempt and conspiracy offenses. *See* App. at 26–29a. The District Court entered an amended judgment on October 4, 2023, acknowledging that this is an open question of law, and sentenced Mr. Collymore to terms of 240 months for conspiracy and 165 months for attempt, to run consecutively and totaling 405 months in prison. *See* App. B.

Mr. Collymore appealed the procedural reasonableness of his sentence to the Second Circuit, arguing that this Court's precedent as well as precedent from the Second Circuit and other Courts of Appeals precluded consecutive sentences for two inchoate crimes under the Hobbs Act that share the same object and arise from the identical course of conduct. Oral argument was held on November 1, 2024. On November 7, 2024, the Second Circuit affirmed the judgment of the District Court. *See* App. A. In its Summary Order, the Second Circuit improperly relied on *Callanan* and its precedent in *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999).

Following entry of the Summary Order, Mr. Collymore filed a petition for panel rehearing and rehearing *en banc* on January 30, 2025. The petition for rehearing was denied on February 19, 2025. *See* App. D. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

At sentencing, an application of the double jeopardy test articulated in *United States v. Blockburger*, 284 U.S. 299 (1932), is alone insufficient to resolve whether consecutive sentences are permissible for inchoate offenses arising from the same statute based on identical acts. The Court must take a step further, applying *Prince v. United States*, 352 U.S. 322 (1957). This Court's decision in *Prince* provides a roadmap for how to sentence two inchoate offenses, arising from the same statute, that share the same object and arise from identical conduct; it must look to the legislative history behind the statute. Only if explicitly intended by Congress may the offenses be sentenced consecutively. The legislative history of the

Hobbs Act demonstrates no such congressional intent. But Courts of Appeals are split in their application of *Prince*, and the Second Circuit instead wrongly relied on this Court's decision in *Callanan v. United States*, 364 U.S. 587, 595 (1961), which focused on Hobbs Act conspiracy and the completed substantive crime, and left open the precise question presented here. The Second Circuit similarly misapplied its precedent in *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999), which concerned a multi-year, multi-plot bombing conspiracy, with the convictions at issue arising under different statutory provisions. This Court is now asked to answer the applicability of *Prince* and its legislative intent test for inchoate offenses under the Hobbs Act that have the same object and arise from the identical course of conduct.

The question presented uniquely has arisen following this Court's decision in *Taylor*. Prior to *Taylor*, attempt and conspiracy for Hobbs Act robbery typically were sentenced concurrently, with any sentences of imprisonment under § 924(c) and § 924(j) running consecutively. Since *Taylor*, attempted Hobbs Act robbery is no longer a "crime of violence" under 18 U.S.C. § 924(c)(3)(A), and the § 924(c) offenses sentenced alongside attempted Hobbs Act robbery have been vacated. Sentencing courts are now arriving at different conclusions on whether it is permissible to sentence Hobbs Act attempt and conspiracy consecutively. Common sense, logic, and sentencing principles dictate they cannot, but district courts have admitted this is an open question. *See, e.g.*, App. at 40a.

The District Court's original imposition of concurrent sentences for Mr. Collymore's two inchoate offenses reflected the commonsense judgment that the offenses

imposed the same harm and should be addressed together; that the gun and murder charges have fallen away because of developments in the law does not change that judgment or the law set out below. Hobbs Act defendants whose § 924 sentences have been vacated are now in a position where some are being resentenced, with their attempt and conspiracy convictions to run consecutively, while others, within the same district court, are in front of judges who suggest consecutive sentencing in this context is not permissible.

Judge Lewis Kaplan in the Southern District of New York concluded that attempted robbery and conspiracy to rob under the Hobbs Act could not be sentenced consecutively, in a post-*Taylor* case on virtually identical facts to Petitioner's. *See Parkes v. United States*, No. 16-4771, 2023 WL 4865616, at *6 n.58 (S.D.N.Y. July 31, 2023). The defendant there had been charged with Hobbs Act conspiracy and attempt, along with two § 924 gun charges reflecting a murder in the course of the attempted robbery. After concluding that the *Taylor* issue was properly before the district court on a successive habeas petition, the Court concluded that the sentences for the gun charges must fall away, but declined a *de novo* resentencing because the concurrent 20-year sentences on the Hobbs Act charges already imposed were "the statutory maximum" and agreed with the defendant that "he can be sentenced only to 20 years" on counts inclusive of the inchoate Hobbs Act offenses. *Id.* at *6 & n.58.

This confusion within courts inevitably has led to significant disparities in how similar sentences are determined.

A. This Court Should Grant Review to Decide Which of Its Precedents Is the Appropriate Framework for Sentencing Inchoate Crimes Under the Hobbs Act That Have the Same Object and Arise from an Identical Course of Conduct

In determining the permissibility of consecutive sentences for two offenses that arise from the same act, a court typically analyzes three factors: "the language of the statutes, how these statutes fare under the *Blockburger* test, and express congressional intent, if any, on the issue of multiple punishments." *United States v. Gore*, 154 F.3d 34, 44 (2d Cir. 1998) (citing *United States v. Muhammad*, 824 F.2d 214, 218 (2d Cir.1987)); *see Blockburger*, 284 U.S. at 304 ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). Yet *Blockburger* asks "whether convictions under *separate sections* of the federal criminal law arising from the defendant's involvement in a single event or a common series of events violate double jeopardy principles." *Gore*, 154 F.3d 44 (examining *Blockburger*, 284 U.S. at 304) (emphasis added). While attempt and conspiracy offenses pass the *Blockburger* analysis, *see generally United States v. Egan*, 501 F. Supp. 1252, 1261 (S.D.N.Y. 1980), under the Hobbs Act, they are provided for in the same statute, and same subsection of the statute, not separate statutory provisions. *See* 18 U.S.C. § 1951(a). Further, the attempt and conspiracy offenses as charged here encapsulate the same harm: an unsuccessful effort to carry out a single robbery. This requires the Court to look beyond its *Blockburger* analysis to its decision in

Prince, and other principles of sentencing law and practice to evaluate whether imposing multiple punishments for attempt and conspiracy in this circumstance is permissible. *See Gore*, 154 F.3d at 46–47.

1. *Prince* Is the Appropriate Test for Determining the Permissibility of Consecutive Sentences for Inchoate Crimes Under the Hobbs Act

"As a general principle, courts may not mete out multiple punishments for the same criminal conduct unless Congress intended such multiple punishments." *Gore*, 154 F.3d at 43 (citing *Rutledge v. United States*, 517 U.S. 292, 297 (1996)); *Prince*, 352 U.S. at 327–28; *Blockburger*, 284 U.S. at 304; *United States v. Rosario*, 111 F.3d 293, 300–01 (2d Cir. 1997)). The legislative intent test found in *Prince* asks whether Congress, in enacting separate offenses within the same statute, intended "also to pyramid the penalties." 352 U.S. at 327.

This Court in *Prince* held that in the absence of clear congressional intent to multiply penalties for preparatory bank robbery offenses, a defendant could be convicted of both entering a bank with intent to rob and robbery, but could be sentenced only for one of the two. *Prince,* 353 U.S. at 328–29. The defendant in *Prince* had been convicted of two offenses under the Federal Bank Robbery Act, 18 U.S.C. § 2113(a): (i) robbery of a bank, and (ii) entry with intent to rob. *Prince,* 353 U.S. at 324. Underlying the offenses was a single course of conduct: the defendant entered a bank, displayed a firearm, and robbed the bank. *Id.* The defendant was sentenced to 20 years' imprisonment for the robbery and 15 years' for the

unlawful entry, to run consecutively. *Id.* In reaching its conclusion that the convictions were valid but only one punishment was permitted, the Court considered and rejected the *Blockburger* double-jeopardy test, *id.* at 325 & n.4, and instead looked to the wording of the Federal Bank Robbery Act and its legislative history, asking whether Congress, in enacting separate offenses within the same statute that included preparatory offenses with a shared maximum punishment, intended "also to pyramid the penalties." *Id.* at 327–29. This Court declined to read Congress's intent to create separate offenses to capture conduct falling short of a completed robbery as an intent to multiply the punishment for the acts leading up to the robbery. *Id.* at 329; *see Gorman v. United States*, 456 F.2d 1258, 1259 (2d Cir. 1972) (*per curiam*) ("Although *Prince* dealt with consecutive or accumulated sentences, the rationale of the Court made clear that the multiplicity of crimes detailed in the Federal Bank Robbery Act was intended to decrease the possibility of a bank robber not falling within the proscriptions of the statute, and not to increase his maximum punishment. This principle was quickly recognized to apply equally to concurrent sentences."). As Chief Justice Warren explained in *Prince*:

> It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an

> open, public door during normal business hours. Rather the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated. To go beyond this reasoning would compel us to find that Congress intended, by the 1937 amendment, to make drastic changes in authorized punishments. This was [sic] cannot do. If Congress had so intended, the result could have been accomplished easily with certainty rather than by indirection.
>
> We hold, therefore, that when Congress made either robbery or an entry for that purpose a crime it intended that the maximum punishment for robbery should remain at 20 years, but that, even if the culprit should fall short of accomplishing his purpose, he could be imprisoned for 20 years for entering with felonious intent.

Id. at 328–29.

The Second Circuit has recognized that *Prince* can apply to curtail multiple punishments in circumstances where the *Blockburger* test accepts that multiple convictions are permissible: when the offenses at issue arise from the same statute, based on an identical act, a defendant may not face cumulative punishment absent congressional intent. *Gore*, 154 F.3d at 47.

Indeed, the Second Circuit in *Gore*, addressing multiple punishments under 21 U.S.C. § 841(a)(1), "concede[d] that *Blockburger* has not been applied yet

by the Supreme Court in cases such as this because we are not comparing 'separate statutes,' . . . but rather we compare separate clauses within the same statute." *Id.* (citations omitted); *see United States v. Sanchez-Vargas*, 878 F.2d 1163, 1171 n.8 (9th Cir. 1989) ("[T]he Supreme Court has not yet applied the *Blockburger* analysis to offenses contained within a single statutory section as opposed to multiple or scattered statutory provisions."). The Second Circuit looked beyond *Blockburger* to *Prince* to determine whether those separate offenses, which could support multiple convictions, may be punished cumulatively. *Gore*, 154 F.3d at 46–47 (holding that while convictions for distribution of a controlled substance and possession with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) were permissible under the *Blockburger* test, cumulative punishments were not permissible in the absence of congressional intent so to punish a defendant where "the distribution itself is the sole evidence of possession").

The separate offenses subject to this appeal appear in the same clause of the Hobbs Act. Section 1951(a) includes attempt and conspiracy as separate offenses preparatory to the substantive offense of Hobbs Act robbery or extortion:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion **or attempts or conspires so to do**, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall

> be fined under this title or imprisoned not more than twenty years, or both.

(emphasis added). As discussed in *infra* Section A.4, nothing in the legislative history conveys an intent by Congress to allow multiple punishments when the offenses have the same object and are based on an identical act.

2. This Court's Decision in *Callanan* Supports the Application of *Prince*

This Court left open the question of multiple punishments for attempt and conspiracy under § 1951(a) in its decision in *Callanan*, 364 U.S. 587, in which it held that consecutive sentences for the conspiracy and substantive robbery offenses under the Hobbs Act were lawful. Relying on established law that a conspiracy and its object are distinct offenses, the Court upheld a sentence of consecutive terms of imprisonment under that statute. But in response to argument from the petitioner and a vigorous dissent in this 5-4 decision, the Court noted petitioner's concerns "that some of the other provisions of [§] 1951 seem to overlap and would not justify cumulative punishment for separate crimes" were "problems of statutory interpretation not now here," and "[t]hat some of the substantive sections may be repetitive as being variants in phrasing of the same delict, or that petitioner could not be cumulatively punished for both an attempt to extort and a competed act of extortion, has no relevance to the legal consequences of two incontestably distinctive offenses, conspiracy and the completed crime that is its object." *Callanan*, 364 U.S. at 595–96.

In relying on *Callanan*, the Second Circuit misapplied this Court's precedent, and the critical distinction between

sentencing conspiracy with the completed crime and the question before this Court on sentencing two *inchoate* crimes based on the same course of conduct with the same object. This is the very situation that *Callanan* warns about, 364 U.S. at 595–96. This Court is asked now to clarify the application of its precedents and explicitly extend *Prince* to Hobbs Act attempt and conspiracy convictions that share the same object and are based on the identical course of conduct.

3. The Second Circuit's Reliance on *Rahman* Was Misplaced

The Second Circuit incorrectly relied on its ruling in *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999), where it declined to extend 18 U.S.C. § 3584(a)'s consecutive sentences limitation to an attempted bombing offense and various conspiracy offenses arising under separate statutory schemes and from distinct courses of conduct, on the ground that "Congress has not prohibited consecutive sentences for attempts and conspiracies that have the same object." 189 F.3d at 158 n.36. The Second Circuit in *Rahman* did not have occasion to consider the question before this Court now, which concerns the permissibility of consecutive sentences for attempt and conspiracy arising from an identical set of facts and from the same clause of a single statute. In relying on *Rahman* in the instant appeal, the Second Circuit failed to make this crucial distinction, a distinction that is the crux of the question presented.

Rather *Rahman* considered offenses arising from *different* statutory schemes and based on a *pattern* of conduct, not the *same* conduct. The attempt charge that the *Rahman* defendants sought to run concurrently to

the conspiracy charges related to a Spring 1993 bombing attempt, *id.* at 151, 153–154, whereas the conspiracy charges implicated a broader scheme, including but not limited to the Spring 1993 bombing, to orchestrate a "wide-ranging plot to conduct a campaign of urban terrorism." *Id.* at 103. Put simply, the *Rahman* defendants requested that the Court use § 3584(a) to bar consecutive sentences for multiple offenses that concerned different courses of conduct undertaken as part of a greater criminal scheme with different objects. Congress cautioned against this exact scenario in explaining § 3584(a)'s consecutive sentences limitation:

> Of course, if the attempt involved plans for a complex pattern of criminal activity and the defendant was convicted of attempting, conspiring, or soliciting such as pattern of activity, the fact that he was also convicted of completing one or more, but not all, the planned offenses would not preclude, under the provisions of section 3584(a), the imposition of consecutive terms of imprisonment.

Legislative History of the Comprehensive Crime Control Act of 1984 at 123–24: P.L. 98–473: 98 Stat. 1837: Oct. 12, 1984 (1984) ("Legislative History").

This cautionary language is inapplicable to cases where the inchoate offenses did not arise from "a complex pattern of criminal activity," but instead a single course of conduct. Despite *Rahman*'s categorical language ("Congress has not prohibited consecutive sentences for attempts and conspiracies that have the same object," 189 F.3d at 158 n.36), *Rahman* was examining the permissibility of

consecutive sentences for an attempted bombing offense under 18 U.S.C. § 844(i), a seditious conspiracy under 18 U.S.C. § 2384, and a bombing conspiracy under 18 U.S.C. § 371. *See Rahman*, 189 F.3d at 148, 158 n.36. Defendants' argued that consecutive sentences for those offenses were impermissible pursuant to § 3584(a)'s prohibition of consecutive sentences "for an attempt and for another offense that was the sole objective of the attempt." *See id.* Attempt and conspiracy offenses arising from the same statutory provision and consisting of identical events that took place in a continuous, temporally discrete period, cannot be analogized to *Rahman*.

4. Congress Did Not Intend for Hobbs Act Attempt and Conspiracy to Be Consecutively Sentenced

Congress added the separate offenses of attempt and conspiracy to the statutory scheme to severely punish those who endeavor to complete a target offense but are unsuccessful. There is no indication that Congress intended to "pyramid penalties" for those preparatory steps.

The Hobbs Act is grounded in the Anti-Racketeering Act of 1934. *See* PUB. L. NO. 73-376, 48 Stat. 979 (1934), 18 U.S.C. §§ 420a to 420e (1940 ed.), now as amended, 18 U.S.C. § 1951. The purpose of the Anti-Racketeering Act was to "protect trade and commerce against interference by violence, threats, coercion, or intimidation." S. Rep. No. 532, 73d Cong., 2d Sess. p. 1. The original Senate bill, S. 2248, 73d Cong., 2d Sess., was brought without a corresponding conspiracy or attempt offense. Only

after the bill passed the Senate and was pending in the House was a section added criminalizing conspiracy. *See* 78 Cong. Rec. 11403 (Cong. Oliver of New York bringing the bill (S. 2248) for consideration with amendments from the House Judiciary Committee that included an added conspiracy offense); *see Callanan*, 364 U.S. at 590–91 n.4. The amendments were revised into their current form in 1948, in which "the words 'attempts or conspires so to do' were substituted for sections 3 and 4 of the 1946 act." Reviser's Note to the 1948 Code (in doing so, Congress "omit[ed] as unnecessary the words 'participates in an attempt' and the words 'or acts in concert with another or with others,' in view of section 2 . . . which makes any person who participates in an unlawful enterprise or aids or assists the principal offender, or does anything towards the accomplishment of the crime, a principal himself").

Section 1951 is a broad statutory scheme—analogous in scope to the Federal Bank Robbery Act—designed to sweep all preparatory steps leading to the substantive act within the scope of criminality. While Courts of Appeals have applied *Prince* narrowly, extending it beyond the Federal Bank Robbery Act on only a handful of occasions, *see United States v. Weingarten*, 713 F.3d 704, 710 (2d Cir. 2013) (listing cases), they have consistently done so for sweeping statutory schemes when there is no indication from Congress of an intent to impose cumulative punishments for separate offenses with the same maximum punishment. *See Gore*, 154 F.3d at 46–47 (applying *Prince* to possession with intent to distribute and distribution under 21 U.S.C. § 841, where the possession exists "only at the moment of distribution."); *United States v. Valot*, 481 F.2d 22, 27 (2d Cir. 1973)

(same, as to possession of a controlled substance aboard an aircraft under 21 U.S.C. § 955 and illegal importation under 21 U.S.C. § 952(a), as the former was adopted "to cover cases involving unconsummated importation of a controlled substance").

Mr. Collymore's attempt and conspiracy convictions are based on the same unsuccessful effort to rob an apartment. They are based on identical preparatory steps toward the same substantive act. There is no evidence that Congress intended for cumulative punishments in such a circumstance.

5. The Prohibition Against Consecutive Sentences in This Context Is Also Reflected in Federal Sentencing Statutes and Principles

This prohibition on cumulative punishment as articulated in *Prince* is reflected in other defining aspects of federal sentencing law.

The National Commission on Reform of Federal Criminal Laws ("National Commission") in its Final Report, published in 1971, provided the groundwork for Congress's subsequent enactment of the Comprehensive Crime Control Act of 1984. *See* Final Report of the National Commission on Reform of Federal Criminal Laws: Proposed New Federal Criminal Codes (Title 18, United States Code) (1971) ("Final Report"). Within the Final Report is a recommendation by the National Commission that the reformed criminal code contain language prohibiting consecutive terms of imprisonment

for certain inchoate offenses—attempt, conspiracy, and solicitation—that arise from the same course of conduct. *See* FINAL REPORT § 3204. Specifically, the National Commission proposed the following modification to the then-existing statutory sentencing framework:

> (2) Multiple Sentences. *A defendant may not be sentenced consecutively for more than one offense to the extent*:
>
> (a) one offense is an included offense of the other;
>
> (b) *one offense consists only of a conspiracy, attempt, solicitation or other form of preparation to commit, or facilitation of, the other*; or
>
> (c) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

Id. (emphasis added). According to the National Commission, its intent was to "prohibit[] consecutive sentences in three situations where the multiple crimes result from one criminal objective." *Id.* § 3204 (Comment). The National Committee offered "[a]n alternative and more general statement" in support of the proposed language in § 3204(2): "The court shall not impose consecutive sentences for offenses which were committed

as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective." *Id.*

The recommended language in § 3204(2)(b) of the Final Report served as the basis for what became 18 U.S.C. § 3584(a), a codification of limitations on a court's discretion to impose consecutive sentences. *See* Legislative History. In enacting § 3584(a), Congress expressly prohibited consecutive sentences for an attempt and its underlying object, taking a narrower approach to limiting consecutive sentences than recommended by the National Commission. 18 U.S.C. § 3584(a) ("If multiple terms of imprisonment are imposed on a defendant at the same time . . . the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt."); *see* Legislative History ("The exception is that consecutive terms of imprisonment may not, contrary to current law, be imposed for an offense described in section 1001 (Criminal Attempt) and for an offense that was the sole objective of the attempt. This limitation on consecutive sentences follows the recommendation of the National Commission."). Section 3584(a)'s consecutive sentences limitation reflects the principle articulated by the National Commission: consecutive sentences for inchoate crimes based on the same singular conduct are inappropriate.

Finally, to the extent there is any doubt or ambiguity, § 1951(a) should be read to prohibit consecutive sentences. *See United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952) (Frankfurter, J.) ("But when choice has to be made between two readings of what conduct

Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication."); *United States v. Aleynikov*, 676 F.3d 71, 82 (2d Cir. 2012) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

B. The Court Should Grant Review as Courts of Appeals Are Split on Their Application of *Prince*

Though through its Summary Order the Second Circuit held that the application of *Prince* was "inapplicable" to Petitioner's case, other Courts of Appeals have applied the principle in *Prince* to allow multiple convictions but limit multiple sentences in similar circumstances. Courts of Appeals noticeably are split in their application of this Court's precedent.

The Ninth Circuit has held that cumulative punishments for attempt and conspiracy to possess marijuana with intent to distribute, each arising under 21 U.S.C. § 846, were improper. *United States v. Touw*, 769 F.2d 571, 574 (9th Cir. 1985). Supported by its precedent in *United States v. Palafox*, 764 F.2d 558 (9th Cir. 1985), which examined and relied on the principles articulated in *Prince*, the Ninth Circuit reasoned that the facts underlying the attempt and conspiracy—*i.e.*, joining together in attempting to purchase marijuana from federal agents—represented a single act in furtherance of

the target offense of possession with attempt to distribute. *Touw*, 769 F.2d at 572, 574. The Ninth Circuit pointed to Congress's intent in enacting a broad statutory scheme that "criminalize[d] all aspects of drug trafficking," *id.* (quoting *Palafox*, 764 F.2d at 560), yet noted the lack of suggestion that Congress ever intended "to punish the defendant more than once for the same criminal undertaking," *id.* (citing *Palafox*, 764 F.2d at 562).

The Ninth Circuit applied *Prince* to the distribution and possession with intent to distribute controlled substances, holding that where a "defendant distributes a sample and retains the remainder for purposes of making an immediate distribution to the same recipients at the same place and at the same time, verdicts of guilty may be returned on both counts but the defendant may be punished on only one." *Palafox*, 764 F.2d at 560, 562 ("Following the Supreme Court's interpretation in *Prince* of the Federal Bank Robbery Act, the dominant theme in all of these federal Courts of Appeals' decisions under the Drug Act is a simple one: when more than one offense arises under § 841(a)(1) from a single criminal undertaking involving drugs, and each offense is committed at virtually the same time, in the same place, and with the same participants, the punishments should not be compounded.").

The Second Circuit agreed in *Gore*, applying *Prince*, that while multiple convictions under § 841 may be tolerated, multiple punishments for an identical act under the same statute may not be. 154 F.3d at 47 (agreeing with the Eighth Circuit's decision in *United States v. Mendoza*, 902 F.2d 693, 696–97 (8th Cir. 1990), which relied on *Palafox* in holding that while "a defendant can

be *charged* with multiple *offenses* under this section . . . , Congress did not intend for a defendant to be *cumulatively punished* for two or more offenses based on the *same act*.") (citation omitted).

Other Courts of Appeals have disagreed with the Ninth Circuit's reason in *Palafox* and *Touw* and have declined to extend the holding to a cumulative punishment inquiry concerning attempt and conspiracy. *See, e.g.*, *United States v. Crowder*, 588 F.3d 929, 939–30 (7th Cir. 2009) (applying *Blockburger* to attempt and conspiracy offenses arising under 21 U.S.C. § 846); *see also United States v. Boykins*, 966 F.2d 1240, 1245 (8th Cir. 1992); *United States v. Barrett*, 933 F.2d 355, 360–61 (6th Cir. 1991); *United States v. Savaiano*, 843 F.2d 1280, 1292–93 (10th Cir. 1988) ("No court has held that separate, consecutive sentences may never be imposed. However, the Ninth Circuit has held that there can be only one sentence when the dual convictions arise from a single act, course of conduct, or transaction. . . . That view has resulted in disagreement in that circuit as to the meaning of the rule, and continuing difficulty in ascertaining what is and what is not a single course of conduct.") (internal citations omitted).

None of these courts, however, have addressed the application of *Prince* to Hobbs Act inchoate offenses, and the framework offered by the Ninth Circuit in applying *Prince* appropriately recognizes the history and purpose behind the statute. Congress intended to criminalize preparatory acts leading to Hobbs Act robbery. However, in doing so, Congress never suggested that a defendant

convicted of separate inchoate offenses should be doubly punished for the same course of conduct. Therefore, while conspiracy and attempt under the Hobbs Act when based on an identical course of conduct with the same object may give rise to multiple convictions, consecutive sentences are impermissible.

CONCLUSION

Logic dictates two inchoate offenses arising out of an identical act should not be punished consecutively. The law supports this. When multiple convictions arise from the same statute but an identical act, cumulative punishments are prohibited in the absence of clear congressional intent to the contrary; this Court must look beyond the *Blockburger* test, applying *Prince*, and examine the legislative history.

There is no suggestion in the Hobbs Act's legislative history that Congress intended to allow multiple punishments for the two inchoate crimes of attempt and conspiracy when stemming from the same act. A further examination of the federal sentencing laws and practices supports the same common-sense conclusion: consecutive sentences are unavailable here, for inchoate offenses arising from the same statute with the same object and based on identical conduct. Following *Taylor*, this question will be asked repeatedly by district courts and Courts of Appeals across the country. This petition serves as the vehicle to answer this question and harmonize this Court's precedents, so that they are applied consistently and equitably throughout.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: May 20, 2025

Respectfully submitted,

David C. Esseks
Counsel of Record
Elizabeth M. Sullivan
Alexandra B. Harrington
Allen Overy Shearman Sterling US LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000
david.esseks@aoshearman.com

Attorneys for Petitioner Dwaine Collymore

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED NOVEMBER 7, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

23-7333

UNITED STATES OF AMERICA,

Appellee,

v.

DWAINE COLLYMORE,

Defendant-Appellant.[*]

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 7th day of November, two thousand twenty-four.

Present:

MICHAEL H. PARK,
BETH ROBINSON,
MYRNA PÉREZ,
Circuit Judges.

---

* The Clerk of Court is respectfully directed to amend the caption accordingly.

Appendix A

Appeal from a judgment of the United States District Court for the Southern District of New York (McMahon, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Dwaine Collymore was sentenced consecutively on his convictions for attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery. Collymore now appeals, arguing that Congress did not authorize consecutive sentences for those crimes. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

"When reviewing sentences, we review questions of law de novo." *United States v. Weingarten*, 713 F.3d 704, 709 (2d Cir. 2013). Here, we find no error in the district court's imposition of consecutive sentences. As we have noted in considering a different statute, "Congress has not prohibited consecutive sentences for attempts and conspiracies that have the same object." *United States v. Rahman*, 189 F.3d 88, 158 n.36 (2d Cir. 1999).

In a "narrow" class of cases, consecutive sentences "punish more severely than the language of [Congress's] laws clearly imports." *Prince v. United States*, 352 U.S. 322, 325, 329 (1957). But as we have explained, this "limited rule is inapplicable" when "each offense can be completed without contemplation of the other."

Weingarten, 713 F.3d at 710. This is such a case. One can enter into a "criminal agreement" to commit a robbery, *United States v. Shabani*, 513 U.S. 10, 16 (1994), without taking "a substantial step towards its commission," *United States v. Farhane*, 634 F.3d 127, 145 (2d Cir. 2011). So here, a judge may impose consecutive sentences for attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery.

Our conclusion is not altered by 18 U.S.C. § 3584, which prohibits consecutive sentences only "for an attempt and for another offense that was the sole objective of the attempt." And Collymore's invocation of the rule of lenity is misplaced—that rule "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan v. United States*, 364 U.S. 587, 596 (1961).

We have considered Collymore's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

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

/s/ Catherine O'Hagan Wolfe

APPENDIX B — AMENDED JUDGMENT IN A CRIMINAL CASE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, FILED OCTOBER 4, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

DWAINE COLLYMORE

Date of Original Judgment: 2/25/2019
(Or Date of Last Amended Judgment)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: S3 16 CR 521-01 (CM)
USM Number: 77977-054
David Esseks & Elizabeth Sullivan
Defendant's Attorney

THE DEFENDANT:
☒ pleaded guilty to count(s) S3-1 and S3-2.

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

Appendix B

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. § 1951	Conspiracy to Commit Hobbs Act Robbery	4/28/2016	S3-1
18 U.S.C. § 1951	Attempted Robbery	4/28/2016	S3-2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) and instruments open ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Appendix B

10/3/2023
Date of Imposition of Judgment

/s/ Colleen McMahon
Signature of Judge

Colleen McMahon U.S.D.J.
Name and Title of Judge

10/3/2023
Date

Appendix B

DEFENDANT: DWAINE COLLYMORE
CASE NUMBER; S3 16 CR 521-01 (CM)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of :

FOUR-HUNDRED FIVE (405) MONTHS

(Defendant is sentenced to 240 months on Count S3-1, and 165 months on Count S3-2; those sentences to run CONSECUTIVE.).

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that defendant be incarcerated in the Northeast United States to facilitate family visitation.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

Appendix B

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

Appendix B

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

THREE (3) YEARS

(Defendant is sentenced to concurrent 3-year terms of SR on each of Counts S3-1 and S3-2.).

MANDATORY CONDITIONS

1 You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

    ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☐ You must make restitution in accordance with 18 U.S.C. § 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer, (check if applicable)

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

Appendix B

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation

officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not

knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

Appendix B

ADDITIONAL SUPERVISED RELEASE TERMS

The Court recommends that the defendant be supervised in the district of residence. The standard conditions of supervised release apply.

APPENDIX C — TRANSCRIPT OF SENTENCING, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED OCTOBER 30, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16 Cr. 521 (CM)

UNITED STATES OF AMERICA,

v.

DWAINE COLLYMORE,

Defendant.

Sentence

New York, N.Y.
October 3, 2023
2:00 p.m.

Before:

HON. COLLEEN MCMAHON,

District Judge

Appendix C

* * *

[2](Case called)

MR. LENOW: Good afternoon, your Honor. Jared Lenow and Hagan Scotten for the government.

MR. SCOTTEN: Good afternoon, your Honor.

THE COURT: Good afternoon, gentlemen.

MR. ESSEKS: David Esseks and Elizabeth Sullivan for the defendant, your Honor, who is present.

THE COURT: Good afternoon, everyone. Have a seat. This matter is on for resentencing. The Supreme Court, in its infinite wisdom, has decided standing over a man with a gun and shooting him in the face is not a crime of violence. So here we are. This matter is on for resentencing under docket 16 Cr. 521, *United States of America v. Dwaine Collymore*. Mr. Collymore is going to be resentenced on, I believe, Counts One and Two.

MR. LENOW: Yes, Judge.

THE COURT: One Count of conspiracy to commit Hobbs Act robbery, a class C felony, in violation of 18 United States Code, Section 1951, and one count of attempted robbery under also 18 United States Code, Section 1951, also a class C felony. Both of these are crimes that carry a statutory maximum term of 20 years imprisonment, not more than three years supervised release, a fine of up to $250,000, and a $100 special assessment.

Appendix C

In connection with today's proceedings, I have [3] reviewed the supplemental presentence report prepared by a United States Probation Officer Nichole Brown-Morin, and attached to it was the original presentence report which was prepared by United States Probation Officer Specialist Colleen Tyler. I have a sentencing memorandum from the United States Attorney's Office for the Southern District New York. From the defendant, I have a sentencing memorandum from the law form of Allan & Overy. Attached to it are Exhibits A through F which are separately bound, thank you very much. I have a letter under cover of an Allan & Overy letter dated October 2, 2023, from Mr. Collymore himself. I have a letter on letterhead of Allan & Overy dated September 29, 2023, with a letter from a Ryan McCreesch attached to that.

Is there anything else I should have seen in writing prior to today's sentencing?

From the government?

MR. LENOW: No, your Honor.

THE COURT: From the defendant?

MR. ESSEKS: No, your Honor.

THE COURT: Has the government reviewed the supplemental resentencing report?

MR. LENOW: We have, Judge.

Appendix C

THE COURT: Any additions, deletions, or corrections?

MR. LENOW: None.

THE COURT: Mr. Lenow, I assume you want to be heard [4]on sentencing?

MR. LENOW: Judge, I don't think we have anything more to add. I think your Honor captured the most important facts of this case in your verbal reasoning for the sentence in the prior proceeding before your Honor, where you said that you couldn't think of a more -- you were hard-pressed to think of a more heinous, cold-blooded act in your time on the bench. You were surprised there was not a mandatory life sentence for this sort of conduct.

THE COURT: OK. Mr. Esseks or Ms. Sullivan, will you speak here?

MR. ESSEKS: I will if it's OK, your Honor.

THE COURT: Fine. Have you reviewed the supplemental presentence report with your client?

MR. ESSEKS: Yes, we have.

THE COURT: Any additions, deletions, or corrections?

MR. ESSEKS: No.

THE COURT: I will hear you on resentencing.

MR. ESSEKS: Thank you, Judge. If it is all right, Judge, I will work from back here.

THE COURT: Wherever you like, Mr. Esseks. It is nice to see people standing at the real podium.

MR. ESSEKS: Every once in a while, Judge.

Judge, I recognize that I have quite a burden today. And I understand that the Court, understandably, has strong [5]feelings about the case. I want to start by saying that we have been appointed to take care of Dwaine. We spent a bunch of time with him, with the file, with his family. His family and friends are here today in the courtroom. I wanted to introduce them. His mother, Christine Charles, his sister, Raean Ryan Collymore, his sister, Tanya Haynes, his aunt, Marjorie Phillip, two friends, Jermaine Cameron and Ryan McCreesch, and his mother's pastor, Pastor Carmon Corannante, who has attended with Mr. Collymore in prison last time he was here. He hasn't been able to have visits successfully yet on his return to the district, Judge.

Resentencing of this type is a rare thing, Judge. It doesn't happen often. I am sure it has happened in the course of your Honor's career before but it certainly is a rare thing and it is an opportunity, obviously, for the Court to see what became of the defendant after he left your courtroom. What has happened as he has been serving

the sentence imposed by the Court? Is there anything new, anything to learn from it, anything that should be taken account of at the time of resentencing? And we recognize that the Court, at the original sentencing, was very concerned about the conduct and with good reason.

At the same time, your Honor, I have read through what the court said at sentencing. And in the course of rendering sentence, you observed that you saw in Mr. Collymore that he [6]had started to put his life back together and you observed that he would not go above the guideline range because you saw the beginnings of that. So you made a balance at the time between the truly awful conduct and the beginnings of rehabilitation that you saw. Now, four years on, we have more to show and the Court has to weigh that balance again, to weigh it anew. It has been four years, four years and change. In the context of a 43-year sentence, Judge, that is just about a tenth of the sentence; it is not very long. In the course of a life, four years is a lot, Judge. It is birth to preschool or all of high school or all of college. A period in which profound development and learning and perspective can be gained and is gained by all people as they go through those four years of growth.

What we have here, then, is time that the Court can see now, for education, perspective, and the beginnings of redemption. Any sentence, of course, is a balance and recognizing the harm caused and the sentence necessary to address the harm caused, it is still a balance for the Court to strike. So I would like to address that balance before the Court today. The crime is still awful. Mr. Vargas is not here. He lost his life. His family lost a father, a son, a

nephew, and more. We acknowledge that. And Dwaine has made clear in his letter to the Court, and his statements last time, and as he will speak today, he acknowledges that, he accepts it [7]he understands it, and he bears that truth every day and the consequences of it every day, the acceptance of his fault.

On the other side of the ledger, what do we have? Remorse, self-improvement, resolve, and potential. In the nature of things, Judge, when the man has spent four years in jail, appropriately, I have got limited tools and limited ability to show you clearly in broad daylight what a change there has been in this man. I am going to do my utmost to do that, but I recognize that we are all handicapped in understanding what he's like and what has happened and how he has changed over these four years.

So, when the government says, as it does in its papers, self-serving statements of remorse and rehabilitation, I think that is just not fair. Are the statements self-serving? Of course they are, by definition. Does that mean they shouldn't be paid attention to? No. To be clear, what we are talking about and asking for today is not that he not be punished. He should be punished, should be severely punished. No matter what the court does today, he will be severely punished. The question is how much is necessary now.

The government's approach is really quite simple. It rewinds back four years, the heinous facts of the crime, the pleading just before trial, all of those facts that were vivid to the Court at the time, they just rewind and say that's [8]enough. I fear the government doesn't believe in

redemption but the law, of course, does. It is a very premise of sentencing, and the Supreme Court in the *United States v. Pepper* has made clear that post-sentence rehabilitation is something that the Court can look to and it should look to when the time comes for resentencing, when that rare event happens.

So more specifically, what do we point to? Repaired relationships with his mother and his sisters. His relationship with his mother was difficult. He has written to your Honor about that. And his relationship with his mother has improved immensely since he has been in prison. Mr. Charles has written to the Court about that and he has written to the Court about the past and he will speak today to where he is now. His sister, Tanya Haynes, she wrote to the Court and I am going to read, with the Court's permission, an excerpt of that. She writes, after starting with the definition of the word rehabilitation, she writes, "Over the past six years I have witnessed true progression. Dwaine's character has developed tremendously. Not only does he remain remorseful of his actions, but he appears to have a more positive outlook on life. This has led him to better himself, physically, mentally, and spiritually. By attending various educational and self-enrichment courses and securing meaningful employment, he has made extreme efforts to dedicate himself to focus on educational and professional development. He [9]continues to display an increased work ethic."

And his sister, Raean, with whom -- they share a father, your Honor -- wrote, to the Court about her conversations with Dwaine about their father. And he has

written to your Honor about his difficult relationship with their father. And Raean wrote to the Court about how Dwaine has urged her to reconcile with their father, as the result of reflections that he has had and contemplations he has had about his life and his development while in prison.

Why do I talk about these, Judge? These are bits of evidence that he has connected with the world. He has committed to being connected with the world and having relationships with those outside the prison, not withstanding his 43 years in. He is committed to thinking about returning to the world, finding a place in it in the future.

It is meaningful his family is here showing support. It is meaningful that he has repaired and rebuilt relationships with his family in the course of being in prison.

What else do we point to? Education. As he wrote to your Honor, when he came to this country at age 11, he could not read. He dropped out of school in the ninth grade, he wasn't learning anything. I am not sure how much he could read at ninth grade. Now he is one course away from his GED. He has taken countless courses in prison. He has engaged in self-improvement in every way that he can. And again, this [10]shows he is committed to engagement with the world in any way that he can, looking forward to a point at which he can return to the world, whenever that may be, and play an active and positive role in society.

I would also point to mental health. He has written to your Honor, again, about the voices he heard in his head, the difficulties he had including not understanding

the burdens he was laboring under as he grew up. By his own admission, he ignored his mental health. He didn't understand it, and to the extent he did, he ignored it not to his benefit or anyone else's. He is now seeking treatment. He is on medication, and he is coming, more importantly, to a better understanding of himself and his issues. He doesn't keep things to himself anymore.

I have mentioned his letter to the Court. We asked him, what do you want to say to the Judge. And this is what he wanted to say. He will have a little more to say today.

He is remorseful every day, Judge. His letter gives the Court a glimpse of his past. It is not meant as certainly not an excuse and it is not even meant as much of a particular explanation. It is a glimpse into his history, his childhood, the influences on him, different factors that led him to be standing to the door on that apartment on that fateful night where everything went wrong.

It gives the Court more insight, I hope, to who he is, [11]and what he is than you had at the last sentencing four years ago, because it wasn't in the PSR. He is focused now on how he can help people, and he has limited ability to do that in prison. He is focused on the concept of being a role model to children who need guidance in the way that he needed guidance. He can't act on that directly yet, but he is hoping to be able to as and when he is returned to society. Again, he doesn't expect that to be soon, but he is hoping for less than the maximum.

My essential point, and your Honor has this, is he has used the time in prison, the four plus years to do

everything in his power to improve himself and reflect on his conduct. He has stayed out of trouble that whole time. He has taken every available course.

I would like to address the question of how long. How long should the Court, how long need the Court keep him in prison? And, Judge, I have been focused, I hope, on trying to persuade the Court that there is not a need for the maximum. I understand the instinct. I don't quarrel with that. I say on the evidence, there is not a need for the maximum. When we just sort of work through the process of figuring out, OK, these are the charges, how should the Court think about sentencing? I do want to focus briefly on the point that we put in our papers about concurrent versus consecutive sentence.

So, if you just bear with me, Judge, the gun charges [12]are gone, maybe they shouldn't be gone. They are not in the case anymore.

THE COURT: Well, there is a gun charge that is not in the case and there is a murder charge that is not in the case.

MR. ESSEKS: Yes, Judge.

THE COURT: Because, I'm sorry, that is what Count Four is, it is a murder charge. It's just because we are in federal court and not next door where they could have charged him with murder and gotten him sentenced to 25 to life, this has to be during and in relation to a crime of violence. This crime of violence, I won't say the word, but it is not a nice word that Judges should say in court,

jurisprudence is just hideous. It is not two gun charges, it is a murder charge and a gun charge.

MR. ESSEKS: Yes, Judge. I apologize for my language.

THE COURT: No, you don't have to apologize. I just want everybody to be real clear about where I am. It is that as a hyper-technical matter, a murder charge has been held to be not a categorical crime of violence. I am with Judge Raggi who, in a recent opinion, gave the lie to that concept.

MR. ESSEKS: Your Honor, thankfully, I have no dog in that fight today.

THE COURT: You don't. You don't.

MR. ESSEKS: That die was cast before I got into the case. Here we are. I am simply then approaching it, OK, we [13]have two inchoate Hobbs Act robbery counts before the Court. The question is how do we deal with that. And if the court would just bear with me, when you imposed sentence on those counts four years ago, you gave one concurrent 20-year sentence -- or two concurrent 20-year sentences for one 20-year sentence. And leaving aside the gun and murder charges, just thinking about those offenses, it makes sense. It makes sense. It is an attempted and conspiracy with the same object. And leave these particular facts aside, you would start with concurrent sentences.

THE COURT: I started with concurrent sentences because it was inconsequential to the result. Can I be real clear about that?

MR. ESSEKS: You are clear, Judge.

THE COURT: It made no difference to the result. Today, it makes a difference to the result. So for me, the issue is, do I have to give concurrent sentences?

MR. ESSEKS: Judge, here is where we are on that. We think that the better view of the law is that you cannot give consecutive sentences. I acknowledge that the Second Circuit in *Rhaman* said something that looks like it is different than that. We have sought to distinguish that. We think it is a fair distinguishing point. The facts are quite different here than they were there. And, so what we point to is the principle embodied in 3584 which explicitly only says attempt [14]and the underlying object.

THE COURT: Right.

MR. ESSEKS: So, there is a report that we referenced and might have submitted -- I hope we did -- that expands the advisory committee's thinking on that and says what I think is perfectly logical which is multiple inchoate defenses with the same object should be subject to the same rule. Do I have a case that says you can't? No. Can I tell your Honor that I have arguments that say you at least shouldn't and perhaps can't? I do, and that is our position. But let me, Judge, having made the point, move

past that. The guidelines are now 324 to 405 months. That is using the murder guidelines. That is taking account, as the guidelines do, of the essential nature of the facts here.

THE COURT: Right, as relevant conduct.

MR. ESSEKS: That is taking full account of how the guidelines look at these two charges with these facts. That is a lot of time, Judge. And the other fact that we wanted to draw your attention to is empirically, looking at the Sentencing Commission's website, of the 372 cases in this courthouse between 2015 and 2022, using the murder guidelines, the average sentence is 209 months and the median is 180. And if you filter it down to just the defendants in criminal history category I, as Mr. Collymore is, those numbers are 189 months and 138 for the median. Now, we are not asking for [15]any of those numbers, Judge. But I point them out simply to say that the defendants are sentenced for murder in this courthouse on a fairly regular basis and the average and the median are under 20 years.

Now, this is not an average case. I am not suggesting it is an average case. I am not suggesting it is a median case. I recognize that it is an outlier on the facts. But when the question is, against the record of what this man has been able to do in the four years that he has had in prison to reflect and to reform himself, in light of that and the support of his family for him while in prison and for him whenever he gets out of prison, is a guideline sentence not enough? We submit that it is, Judge. It is still at the bottom of the guidelines range, Judge. It will be more than

100 months longer than the average murder sentence in this district.

So, anywhere in the guidelines range, Judge, is a significant outlier to the average. Recognizing that it is a murder case and using the murder guidelines and recognizing that you would be sentencing him significantly above what your colleagues give to the average murder defendant -- so we take all of that together and ask the Court to consider what is necessary now and ask for leniency.

And if the Court has no questions, Mr. Collymore has something to say.

THE COURT: I will talk to Mr. Collymore in a moment. [16]Let me ask the government if wants to say anything further.

MR. LENOW: Thank you, Judge.

To start on the guidelines point where counsel left off, the guidelines do not account for numerous facts of this case. There is no enhancement for the particularly depraved crime where someone is shot in the face after which they commit another crime. This actually was an attempted double murder where only one of the attempts was successful. So, to the guidelines point, there are numerous facts here that are wholly unaccounted for by those guidelines.

The second point I want to raise is Mr. Collymore's letter was quite revealing and disturbing. The end of the

letter, the last page of it, I think, almost all of the letter is spent talking about things that have nothing to do with offense conduct. When Mr. Collymore finally gets to the offense conduct, what he says is bizarre. I don't know what to describe it as apart from that. He says, the night before I committed this crime, I had gotten some mollies from a friend who told me that they were weak. I made a mistake of taking too many of them. He then said he watched a YouTube video called money and violence, and being intoxicated with an excessive amount of mollies, I began to have -- it's cut off -- thoughts that then led him to make a bad decision. Then he says he had no plans on hurting anyone when he barged into this apartment with the gun, that you will recall was called the [17]Judge, which shot shotgun shells, which Mr. Collymore pointed at an unconscious man's face and pulled the trigger. Again, this, he points to, as being the product of taking mollies and watching a YouTube video.

It has been some time since we have been before the Court. I do not recall those facts having ever been proffered before. I could be wrong. But I have no recollection of that being brought up at the first sentencing. And if these facts were the cause, I would imagine, your Honor would have heard about that. As bizarre as they are, if that was the true reason, I think your Honor would have heard about it.

This one paragraph in this written submission, I submit, is the most telling data point that your Honor has from the past four years. Even four years later, Mr. Collymore cannot come here and give any explanation for his actions that are, in any way, credible, make any sense,

and should give this Court any comfort he has reformed in any capacity and he feels genuine remorse.

Your Honor may recall that Mr. Collymore, as we note in our submission, pled on the eve of trial after getting the Jencks Act material showing that his co-robber and a friend and an eyewitness would all be there to testify against him. In other words, he was sunk. That is why he pled guilty.

On these facts, your Honor, I submit that many people who do horrible, horrible things are nonetheless good with [18]their family. I am not a good psychologist. I cannot opine why that is the case. But What Mr. Esseks has pointed to, quite eloquently, his presentation was the best presentation --

THE COURT: It was superb.

MR. LENOW: Superb. And it was the best you could make on these facts. But the facts, unfortunately, just don't give him much to work with. I think, just this one paragraph, is so telling and really counsels in the other direction and, I really think, contradicts the weight that any of these other factors should be given. The fact someone has in some way reconnected with their family, has engaged in educational courses, these are the things we should expect of anyone, of any prisoner. There is nothing substantially out of the ordinary or positive about this.

I take Mr. Esseks' point that there are limited data points he can bring before your Honor. That is true. But

I think that this one data point that we have in front of us, this letter, tells you more than you need to know about what is truly going on in Mr. Collymore's mind, whether there has been substantial redemption. Your Honor, we do believe in redemption. There are many cases -- some cases, I shouldn't say many, where we see someone genuinely does seem to have reformed or grown. This is not that case.

MR. ESSEKS: May I respond, Judge?

THE COURT: Of course, Mr. Esseks.

[19]MR. ESSEKS: First, Judge, on the guidelines point, I thought the government had no objections to the calculations in the PSR.

THE COURT: It doesn't have an objection. I think it is suggesting that the guideline understates the offense level of the crime -- the offensiveness of the crime.

You don't dispute the guideline calculation; right?

MR. LENOW: No, Judge. We don't.

THE COURT: You would like to see an upward variance actually.

MR. LENOW: That's correct, Judge.

THE COURT: That is what I thought he was saying.

MR. ESSEKS: Fine, Judge. I heard him say it doesn't include adjustments for -- then he didn't finish the

thought. I think the guidelines are properly calculated to encompass the entirety of the conduct. One can look at it and say not average and maybe the Court should think about it differently, which is what the government is submitting and what the Court has thought in the past, although the Court gave a guideline sentence last time. I am glad to hear the government does believe in redemption, your Honor. But mostly what I hear is pled on the eve of trial, bad facts, all about in the past and then a concern about the explanation that Dwaine gave about what he recalls about what happened that night. He said he was using drugs. He said he was using drugs and there was violence [20]on television. He will explain to you, he is not excusing what happened. He is simply trying to explain what was happening to him then, for whatever value it may be.

But to go from that, and to say the fact that he can write those words today erases four years of education and rehabilitation and improving his mental health is, frankly, your Honor, inappropriate and even, I'd say, ridiculous. He's worked for four years not for this day, but he has worked for four years because that's what was in front of him. And he wrote to your Honor saying, this is what I remember about that night, I was on drugs. I don't see how the government goes from that paragraph to, throw it all out, there is no redemption here, your Honor.

We stand by all that we have said, Judge. The guidelines encompass the conduct. It is awful conduct. He should be sentenced seriously. He will be. And the question, again, is what is necessary, what is necessary to be sufficient now? Thank you.

THE COURT: Mr. Collymore, I gather you have something you want to say to me before I sentence you. You can remain seated but use that microphone.

THE DEFENDANT: Yes, your Honor. Can you hear me? I just wanted to write it down.

THE COURT: It's OK. You can write it down, you can read it. Pull the mic down so we can really here you. The [21]court reporter needs to hear you.

THE DEFENDANT: First of all, I want to say good afternoon to your Honor. Good afternoon to everyone that is here today.

I would like to start off by apologizing to the Mr. Vargas' family. I am truly sorry for taking the life of Carlos. I have an undying remorse.

I am a little nervous, as you can tell.

THE COURT: It is OK.

Take your time.

THE DEFENDANT: Those words might not mean much coming from me but it would be remiss if I didn't say I was sorry. I ask myself, how did I get to the point of committing murder. And what I have learned was that it was something in the making for a long time. You see, I always lived in my head. When something bad would happen, I would just bury it, self-medicate, and act like it never happened at all. But I learned that when we don't

talk about our problems, we suffer in silence and the pain will find a way out just like steam from a pressure cooker. And when it does, someone will get hurt.

Now that I know this, I want to be proactive and make sure something like that never happens again. So I sought out psych classes like traumatic stress, self-awareness, anger management. I also took class from the chapel, house of [22]healing, mind strength, just to name a few. I was taught at an early age by my grandmother to always have empathy. So, I wanted to try to experience what victims might go through. So, I took classes like victim impact, stop the violence. I wanted to take control of my mental health and retrain my mind. I wanted to feel good about myself so I worked on my mind, body, and soul. I would love to have the opportunity to work with kids that might not have a safe place to go to after school or just need someone to talk to. I want to be a pillar in whatever community I might be returning to. So, I came up with the idea to start a nonprofit organization, Fortitude.

Please don't judge me wrong. I was young. I'm sorry. I was weak and committed that crime. I'm sorry I committed that robbery out of desperation. But now, I am much stronger than I was before. I now have the necessities to make it in life. The things I know today, I wish I knew before I committed this crime. Because if I did, I promise you, I wouldn't be sitting in this courtroom today.

I was guessing my way through life. I wasn't thinking, I was reacting through situations. To say "ignorance is bliss" is an understatement when it comes to me. My

knowledge was minute. I am surprised I was able to make it this far in life on my own. God knows how sorry I am, and Carlos, because I ask him for forgiveness every chance I get. But anyone can say sorry. But it means nothing if actions [23]don't follow. I would love the opportunity to pay my debt to society.

I touched on my relationship with my mother, when I first came to live with my mother, you know. Today me and my mother and my sister, we have a beautiful relationship. But back when I first came to live with my mother, we just didn't take time to actually know one another. And growing up with my grandmother, I was looking for what I was getting back in Trinidad. So, I went on the outside looking for it.

I care about how I am going to be remembered and I don't want this to be the last people hear about me. I believe in legacy and stuff like that. So I want to leave a legacy, your Honor. I want to be remembered for something good, and not something bad. I want to make my people proud of me. I lost track of that. You know, just like I said, I was reacting to a lot of situations. I wasn't really thinking. And that might not sound right to some people, like, how are you just react to certain situations. But like I said, my knowledge was minute.

The past four years, the stuff that I learnt, I should have known 20 years ago. You know, and I am not just saying that to just say it. Everything I wrote in that letter, I didn't exaggerate one line. I wanted to actually talk about them all. But, I don't want to sound like I am making excuses for my actions because I am not.

[24]When I said that I was high, I was high. And that don't take away what I did. I am just telling the truth. I had intrusive thoughts, and I became those thoughts. And I made the mistake of committing murder.

I'm sorry. I will forever be sorry. And I am not trying to get away with a slap on the wrist, because like I tell my mom, if the shoe was on the other foot, what would she want? So, I get it. And I am sincerely remorseful for my actions.

Thank you for giving me the opportunity to speak.

THE COURT: When Mr. O'Neil told me that this case was coming back, I was angry. I was angry because I thought justice had been done and I was angry because I was going to have to revisit one of the worst memories I have as a judge, which is the memory of Carlos Vargas lying on the floor, knocked his head against a wall or against your gigantic gun. He can't move. The other guy is playing dead, he can't move. Nobody can move, you can leave. And in a cold and calculated maneuver which can only be explained by, I got to be sure the witness can't be around to identify me, you shot him in the face. I can't forget that. It is one of the crimes where the details are just seared into my brain. And I can really count on one hand the number of cases that have haven't left me. Your case is just one of those cases that hasn't left me. I don't think it is ever going to leave me. The horror of it.

[25]I meant what I said the first time around, which is I just did not understand why life in prison was not the guideline sentence for what you did. I don't agree with

this hyper technical jurisprudence about categorical crimes of violence. I had a real hard time, if I think about it from the perspective of the murder victim, imagining a murder that is not a crime of violence, just have a real hard time. Categorically, killing somebody, seems to me like it is a crime of violence. But they federalized this one. So, they had to charge it in some funny way that doesn't use the word murder and that now is deemed not to be a categorical crime of violence.

Oh boy, forget about categorical, this was a real crime of violence. It was really violent. And whether I consider your explanation for why you did what you did that night or your behavior immediately following the crime, which is also left me -- you went to Hawaii.

You know, Mr. Collymore, and I know that there is no possible justification for this. You were a 30-year-old man, you were not a child. This was not your first rodeo. You didn't have convictions but you had some history with violence. And you may have been high, but you knew what you were doing.

So, yeah, I was pretty pissed off when I found out that this case was coming back. Now, superb lawyers. I know that. I agree with Mr. Lenow that they have done everything [26]that's conceivably possible to present you in the best possible light because I have to sentence the you of today, not the you of four years ago. And by the way, I don't give a rat that you pled on the eve of trial. That was never a big factor in my thinking. I intuited at the time I originally sentenced you, that you seemed to be trying

to make a difference in your life. I agree with Mr. Esseks that what you have done over the last four years seems to be the first steps of trying to take control of your life.

Four years ago, when I thought that might be the direction in which you might be heading, it caused me to give you a guideline sentence which was 43 years. And seeing that that is how it appears to be working out, I am not inclined to sentence you above the guidelines although I am well aware I could do that. But I am also not inclined, given the nature of this crime and the horror of it, to sentence you at the low end of the guidelines. The only sentence to me that seems just is the maximum sentence I can give you. That is why I asked Mr. Esseks if the law was such that I had to run the sentencing on Count One and Two concurrently. And the real answer to that question is probably, but we don't know for sure. I am sure this case will resolve the question. Because I know you will be taking an appeal. But if I am to sentence you concurrently, it will only be because The Second Circuit tells me I must, not by choice, because that is not what I choose, because I do not [27]believe that is just.

So I have read everything. I have read your letter several times, I have read everything that has been submitted to me, and it is my conclusion that because legally I am not required to run the sentences concurrent, that they should be run consecutively given the nature of the ultimate crime that was committed here which was murder. And if I am wrong about that as a matter of law, someone will tell me so.

As for the progress that you have made -- there has undeniably been some -- it is just too soon for that to weigh very heavily against the facts of this case. So, I believe that the appropriate sentence is a sentence at the top end of the guidelines, and that is what I am going to sentence you to. It is 405 months. So, it will be 240 months on one count and 170 some months on the other count.

And I hope that won't discourage you from continuing to make strides. Mr. Esseks was wrong about one thing: Resentencings have become quite routine. They are a big piece of life for any federal judge these days. Between retroactive technical rulings and the First Step Act, we see a lot of them.

Who knows, we may meet again, Mr. Collymore.

I have reviewed the presentence report and the supplemental presentence report, which really doesn't add anything substantive to the resentence report. I continue to adopt as my findings the description of the offense and the [28]offense conduct. The calculation of the guidelines is different now because of the elimination of the Counts Three and Four. The base offense level is 20. We applied the specific offense characteristic for firearm involvement which is 7 levels, and the Chapter 3 adjustments in the original presentence report. So, the new total offense level is correctly calculated at 41. The defendant's criminal history category is I. The guideline range is 324 to 405 months. I accept and adopt as my findings the description of the offender characteristics in the original presentence report and the information that

Mr. Esseks has placed in the record because it is real, it is there, it is undeniable. And maybe it makes me feel a little bit better about what I am doing. But I still think that the sentence that is sufficient but not greater than necessary to carry out the ultimate goal of sentencing which is to make the punishment fit the crime with a top of the guideline sentence.

Would you please stand, sir?

Under docket 16 Cr. 521, I hereby sentence you, Dwaine Collymore, on Count One to 240 months in the custody of Attorney General of the United States and the Bureau of Prisons. I want to be absolutely sure I get the math done right. It is 165 months I believe; is that correct? The government is nodding its head.

MR. LENOW: Yes, Judge.

[29]THE COURT: To be followed by a consecutive term of 165 months on Count Two, and to a term of three years supervised release on the same terms and conditions that were pronounced at your original sentence. Following your release, I, again, am not imposing a fine. Restitution is not applicable. I don't know if Mr. Collymore has paid a $400 special assessment. If he has, he is owed $200. But the special assessment is $200. So, I don't have any idea whether that has been satisfied.

THE DEFENDANT: It is paid in full.

MR. ESSEKS: Apparently, it was paid in full, Judge. We will look into the details.

THE COURT: Let's look into the details because he may be entitled to have some money back.

MR. ESSEKS: Thank you, Judge.

THE COURT: OK. You may be seated, sir. You may be seated.

So, Mr. Collymore, you have a right to take an appeal from the sentence that has been imposed upon you. You have the right to counsel in connection with any appeal that you might choose to file. And if you cannot afford a lawyer, one will be appointed to represent you without charge. I want to be very clear, it is my reading of the *United States v. Rhaman* that I can sentence the defendant to consecutive terms, and I want to make it abundantly clear, if I haven't already done so, that [30]Counts One and Two are kind of the tail wagging the dog that the defendant was sentenced originally on Counts Three and Four, and One and Two were run concurrent to each other because there was absolutely no reason to run them any other way since they weren't going to add any time to anything, since they were irrelevant to the ultimate decision on sentencing.

Is there anything else from the government?

MR. LENOW: No, your Honor.

THE COURT: Mr. Esseks?

MR. ESSEKS: One point, your Honor. Before being returned to the district, Mr. Collymore was in Louisiana.

His family is based in the New York area and we ask if the Court could recommend that he be designated somewhere in the northeast.

THE COURT: I am happy to recommend he be designated in the northeast. I am not sure that there is a facility that wants him in the northeast. But I am happy to make that recommendation. It would be best for all concerned if Mr. Collymore could, on occasion, see his family.

MR. ESSEKS: Thank you, Judge. Nothing further.

THE DEFENDANT: Thank you.

THE COURT: Mr. Esseks and Ms. Sullivan, thank you very much for the presentation that you put together and that you gave today which was most eloquent.

MR. ESSEKS: Thank you, Judge. It is our pleasure.

THE COURT: These proceedings are closed.

MR. LENOW: Thank you, your Honor.

(Adjourned)

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED FEBRUARY 19, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 23-7333

UNITED STATES OF AMERICA,

Appellee,

v.

DWAINE COLLYMORE,

Defendant-Appellant.

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 19th day of February, two thousand twenty-five.

ORDER

Appellant, Dwaine Collymore, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe