No. _____

IN THE

Supreme Court of the United States

MICHAEL F. RAMSEY,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Division, Supreme Court Of New York, Fourth Judicial Department

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

New York's highest court has distinguished criminal possession of a weapon with the intent to use element, Penal Law § 265.03, from other weapon possession crimes defined in Article 265 of the Penal Law by finding that the single act of continuously displaying a weapon before two or more individuals during one criminal transaction can result in being charged with multiple counts that can lead to consecutive punishment.

The questions presented are:

1. Whether New York, by allowing consecutive sentences for the single continuous possession of the same firearm, ignored its own precedent in *Johnson v. Morgenthau*, misapplied decisions from this Court, and misinterpreted the intent of the legislature.
2. Whether a single business robbery where two or more employees are threatened should be prosecuted and punished as a unitary transaction.
3. Whether a post-judgment motion can be summarily denied without articulating a sufficient basis for that denial.

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The opinion of the New York Court of Appeals denying leave to appeal is published at *People v. Ramsey,* 2019 NY Slip Op 97460 (U) (2019). The decision is reprinted in the Appendix of this petition.

The decision of the Appellate Decision affirming the defendant's denial of the motion to set aside the sentence is reported at *People v. Ramsey,* 166 A.D.3d 1520 (2018). The decision is reprinted in the Appendix of this petition.

The decision of the New York State Supreme Court denying the defendant's motion to set aside the sentence is unreported. It is reprinted in the Appendix of this petition.

STATEMENT OF JURISDICTION

This petition for certiorari is filed within 90 days of the decision of the New York Court of Appeals denying leave to appeal, and is therefore timely. Sup.Ct.R. 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V:

"No ...person shall be subject for the same offense to be twice put in jeopardy of life or limb."

* * *

U.S. Const. Amend. XIV:

"No state shall ...deprive any person of life, liberty, or property, without due process of law."

* * *

N.Y. Penal Law § 10.00 (8)

"Possess" means to have physical possession or otherwise to exercise dominion or control over tangible property.

* * *

(Other pertinent statutory provisions are reproduced in the

Appendix to this petition)

STATEMENT OF THE CASE

1. In 1991, Petitioner was charged in state court in Monroe County, New York under Indictment number 337/91, with 13 counts. The charges are based on evidence adduced at trial that on January 17, 1991 at approximately 4:00pm the Petitioner entered a Fish Market and walked up to a male employee who was working the cash register and shot him. The employee fell to the floor and a second female employee ran over and knelt beside the male employee.

2. The Petitioner, then while armed and displaying a firearm, directed the first employee to open the cash register, and then he directed the second employee to open the same cash register. When neither of them could open the register, the Petitioner fled with the gun still in his hand.

3. Approximately 8:00 pm on the same day, a man stopped a police car, pointed out the Petitioner, and told the officers that the Petitioner was armed and had tried to rob him. The Petitioner fled. After a short chase he was tackled by the police are arrested. A gun was recovered which proved to be the same gun that was used in the shooting and attempted robbery at the Fish Market.

4. On January 23, 1991 while appearing in court for a Preliminary Hearing on charges related to the Fish Market incident, the Petitioner

attempted to run out of the Courtroom. As a result additional charges were filed against him. The Petitioner was charged in Monroe County Court under a 13-count Indictment #337/91. The first five counts of the Indictment were pertaining to the male employee at the Fish Market as complainant: Count I: Att. Murder 2nd Degree; Count II: Att. Robbery 1st Degree; Count III: Attempted Robbery 1st Degree; Count IV: Assault 1st Degree; Count V: Assault 1st Degree; Count VI: Criminal Possession of a Weapon 2nd Degree. The next counts related to the female employee at the Fish Market: Count VII: Att. Robbery 1st Degree; Count VIII: Criminal Possession of a Weapon in the 2nd Degree.

5. The next counts were pertaining to the man who flagged down the officers claiming that the Petitioner had a gun and tried to rob him: Count IX: Attempted Robbery 1st Degree; Count X: Criminal Possession of a Weapon 2nd Degree; Count XI: Criminal Possession of a Weapon 3rd Degree was added related to Petitioner's apprehension and being found in possession of same weapon from the previous counts.

6. Count XII: Resisting Arrest was related to the chase by the police to apprehend him, and Count XIII: Attempted Escape 1st Degree was as a result of trying to run out of the courthouse.

7. A bench trial was held before Hon. John J. Connell, Monroe County

Court between October 28 and November 1, 1991. Petitioner was acquitted of one of the counts in the indictment: Count nine Attempted Robbery 1st degree, related to the man who flagged down the police; however, he was convicted of all of the other counts including Count X: Criminal Possession of a Weapon 2nd Degree which was connected to the acquitted attempted robbery count. [App13].

8. The Petitioner was sentenced by Judge Connell on December 4, 1991 to: Count I: 12 ½ to 25 years; Count II: 7 ½ to 15 years; Count III: 7 ½ to 15 years; Count IV: 7 ½ to 15 years; Count V: 7 ½ to 15 years; Count VI: 7 ½ to 15 years; Count VII: 7 ½ to 15 years; Count VIII: 7 ½ to 15 years; Count X: 7 ½ to 15 years; Count XI: 3 ½ to 7 years; Count XII: 1 year; Count XIII: 2 to 4 years. [App. 14-15].

9. The Petitioner filed a notice of appeal to the Appellate Division, Fourth Department concerning his conviction on December 6, 1991 raising the issues of sufficiency of the evidence and verdict against the weight of the evidence. On December 28, 1993, the Court affirmed his conviction (*People v. Ramsey,* 199 AD2d 985 (N.Y.App.Div. 4thDep't 1993)). The Petitioner also appealed the judgment of the Monroe County Court in his conviction for Attempted Escape in the 1st degree (count 13) to the Appellate Division, Fourth Department on the ground that the trial court abused its discretion in denying his request for an adjournment to prepare for self-representation. The judgment

was affirmed.

10. On April 18, 2016, the Petitioner filed a *pro se* Motion to Set Aside his sentences pursuant to New York Criminal Procedure Law 440.20. The Petitioner also filed an Affidavit as well as a Memorandum of Law in support of his motion. The Petitioner argued that his sentences were illegally imposed in violation of New York Penal Law 70.25(2) because the sentencing court erroneously imposed consecutive sentences. He carefully outlined that Counts III and VII arose from a single criminal act and he also raised the issue of one count being a material element of the other. Likewise, for Counts VI and VIII, the Petitioner raised the same issue of single criminal act as well as the issue that there was no new intent, nor was there a break in the continuous nature of the crime. For Counts VI, VIII, X, and XI, the Petitioner raised the issue that since these counts related to the same gun possession they constituted a continuous course of conduct and a single criminal act.

11. In the Memorandum of Law, the Petitioner argued his legal points using pertinent facts and citing several relevant Appellate Division cases. The major case that the Petitioner appropriately cited to was *People v. Okafore*, the Court of Appeals case where it was argued that second degree weapon possession is a continuing crime and any successive count must be set aside since it would be barred under the Double Jeopardy Clause of the United States Constitution.

12. The Petitioner also included several requests to be produced for a hearing to determine his motion. The People submitted a written response to the Petitioner's motion. The motion was summarily denied by the Monroe County Court (Randall, J.) in a written decision and order, dated November 22, 2016. [App. 7-10].

13. On December 22, 2016, the Petitioner, through pro bono counsel, filed an application for leave to appeal before the Supreme Court, Appellate Division, Fourth Department. The application was granted. The appeal before the Fourth Department raised the issue that the Petitioner's sentences were illegal and in violation of the Double Jeopardy Clause of the Fifth Amendment made applicable to the states through the Fourteenth Amendment. The appeal was denied. [App. 3].

14. The Petitioner through counsel, sought leave to appeal to the Court of Appeals again raising the issue that the Petitioner's sentences were illegal and in violation of the Double Jeopardy Clause of the Fifth Amendment made applicable to the states through the Fourteenth Amendment. Leave was denied on February 19, 2019. [App. 1]

15. The Petitioner appeals to this Court.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve New York's Inconsistent Rulings Over Whether Criminal Possession of a Weapon in the Second Degree is a Continuing Offense

Contrary to its own rulings and to the holdings of this Court regarding possessory offenses, New York has failed to recognize criminal possession of a weapon in the second degree as a continuing crime. The possession of a single weapon supports a single-count indictment if the charge is criminal possession of a weapon in the third degree or fourth degree; however, New York has ruled that a possession of a single weapon can support multiple counts if the charge is criminal possession of a weapon in the second degree. *People v. Okafore,* 527 N.E.2d 245, 250 (N.Y. 1988) (Kaye, J., dissenting). Treating the second-degree weapon offense as a non-possessory crime instead of as a continuous offense, subjects those who are charged with it to multiple punishments. The confusion that has resulted from the conflicting rulings in the New York courts justifies this Court's review.

In the Circuit Court of Appeals *Armour Packing* case, a "continuing offense" was described as a "continuous unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long it may occupy." *Armour Packing Co. v. United States,* 153 F. 1, 5-6 (8th Cir. 1907), *aff'd,* 209 U.S. 56 (1908). Under New York law, the term "possess" means having physical possession or otherwise exercising "dominion or control over tangible property." N. Y. Penal Law § 10.00(8) (McKinney 2018).

In *United States v. Jones*[1], a case that dealt with the propriety of multiple convictions for single continuous possession of the same firearm, the Sixth Circuit stated that possession is "a course of conduct, not an act." *United States v. Jones*, 533 F.2d 1387, 1391 (6th Cir. 1376). Examples of New York crimes that have been considered continuous as a matter of law are: Remaining in the United States illegally (*United States v. Cores*, 356 U.S. 405 (1958)); unlawful cohabitation with multiple females, (*In re Snow*, 120 U.S. 274 (1887)); and possessing a weapon, *Matter of Johnson v. Morgenthau*, (505 N.E.2d 240 (1987)). See *People v. Brown*, 159 Misc. 2d 11, 16 (N.Y. Sup. Ct. 1993).

In *Matter of Johnson v. Morgenthau*, the Court of Appeals of New York held that the defendant's six-day possession of a handgun in two different counties involved "an offense continuous in its character." *Johnson*, 505 N.E.2d at 243, quoting *Blockburger v. United States*, 284 U.S. 299, 302 (1932). Johnson pled guilty to attempted second-degree weapon possession in his first indictment and moved to dismiss his second indictment for criminal possession of a weapon in the third degree on double jeopardy grounds. *Johnson*, 505 N.E.2d at 241. The New York Court of Appeals unanimously ruled in favor of Johnson (*Id.* at 240) stating that the question of whether a continuing offense exists is a question of statutory construction, and the Legislature did not define this criminal conduct in terms of temporal units. *Johnson*, 505 N.E.2d at 243; *(quoting Brown v. Ohio*, 432 U.S. 161, 169 n.8 (1977)); *accord Jones*, 533 F.2d at 1390. Instead, the Legislature defined

[1] Jones was convicted of three counts of possession for having the same weapon on three separate dates. 533 F.2d 1387 (6th Cir. 1376)

criminal possession, a possessory crime, in terms of dominion and control. Therefore, the Court of Appeals concluded that the defendant was "engaged in an offense which was continuous in nature, and for which he may be prosecuted only once." *Johnson,* 505 N.E.2d at 243.

Approximately one year after the Johnson case was decided, the *Okafore* case came before the New York Court of Appeals. *People v. Okafore,* 527 N.E.2d 245 (N.Y. 1988). Both *Johnson* and *Okafore* dealt with strikingly similar facts and with the same issue: Whether the defendant could be twice prosecuted because of criminal possession of a weapon at different times and in different counties. In *Okafore,* the intervening time period was approximately one hour, while in *Johnson* the time interval was six days. *Okafore,* 527 N.E.2d at 246; *Johnson,* 505 N.E.2d at 241.

Johnson was indicted for criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree in the Bronx County for shooting at his sister with a .25 caliber weapon during an altercation and fleeing the scene. He was arrested six days later in New York County and had the same weapon in his possession. He was now indicted also in New York County for criminal possession of a weapon in the third degree. Johnson pled guilty to attempted criminal possession in the second degree to cover his indictment in the Bronx County and unsuccessfully moved to dismiss the New York indictment on state and federal double jeopardy grounds. The Court of Appeals heard the appeal

and unanimously ruled in Johnson's favor holding "unlawful possession is a continuing offense and that constitutional double jeopardy principles preclude the second prosecution." *Johnson,* 505 N.E.2d at 240-41.

In *Okafore,* the defendant believed his estranged wife and son from a previous marriage were having an affair. Okafore went to his wife's apartment in the Bronx and shot her three times with a .38 caliber pistol and then fled through a window. He was en route to his son's apartment ostensibly to shoot him as well, but abandoned the idea and decided instead to drive to his apartment in Manhattan to kill himself. An hour later he arrived at his apartment where the police were waiting to arrest him. In an attempt to escape, Okafore pulled out his gun and aimed it at one of the officers. Before firing, he was shot and wounded by the police and placed under arrest. *Okafore,* 527 N.E.2d at 246.

> Bronx County authorities indicted defendant [Okafore] for murder in the second degree, criminal use of a weapon in the second degree and criminal possession of a weapon in the second degree for the shooting of his wife. He was convicted after trial of second degree manslaughter and second degree criminal possession of a weapon and sentenced to a 5-to-15-year term of imprisonment. The judgment was affirmed by the Appellate Division. While the Bronx County case was proceeding, defendant was indicted in New York County for second and third degree criminal possession of a weapon based on his threatened use of the handgun against the police officers at his Manhattan apartment. After he was convicted of second degree possession in Bronx County, defendant moved to dismiss the New York County prosecution claiming that it was barred by the double jeopardy protections of the Federal Constitution and CPL article 40. His motion was denied and he pleaded guilty to criminal possession of a

> weapon, second degree, and was sentenced to a 2-to-6-year term to run consecutively with the term imposed on the Bronx County conviction. The Appellate Division affirmed.
>
> *Id.* at 245, 246

When *Okafore* reached the Court of Appeals, a sharply divided 4-3 ruling put new limits on Penal Law § 265.03 that resulted in the opposite holding to the *Johnson* case. Judge Simons writing for the majority in *Okafore* stated that because criminal possession of a weapon in the second degree required an intent to use a weapon unlawfully against another, the second degree offense was continuing only as long as defendant was pursuing the first intent (to kill his wife and his son in one county); however, when he returned to the second county (with the intention of taking his own life), that new intention provided a break in the continuing nature of the crime. *Okafore*, 527 N.E.2d at 248-49.

In her dissent, Judge Kaye, reiterated that the Legislature defined possessory crimes in terms of dominion and control and not in terms of temporal units, and quoting this Court, stated that the "Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Id.* at 251; *Brown v. Ohio*, 432 U.S. 161, 169.

Judge Kaye also insisted that the majority ignored both the *Brown* and *Johnson* precedents, misapplied *Blockburger*, and based their decision on a "strained construction of the statutory definitions of the various possessory crimes."

Okafore, 527 N.E.2d at 251. Although the "intent to use" element makes the second degree possession more serious than the third degree possession, as Judge Kaye stated "without the proscribed act or course of conduct—the unlawful possession—there is no crime." *Id.*

After *Okafore*, the lower courts in New York struggled with understanding how to apply the continuous offense doctrine especially in light of the conflicting rulings from the Court of Appeals. One lower court stated that determining overall whether even any crime is continuous has become difficult for New York courts. *People v. Brown*, 159 Misc. 2d at 15-16.

According to the dissent, *Okafore's* new rule was "incorrect" and also "unworkable," and this decision could lead to defendants being subject to multiple punishments for second-degree possession. "It surely could not have been the intention of the Legislature to allow one continuous possession of a weapon to be punished more severely than, for example, homicide." *Okafore,* 527 N.E.2d at 253. Petitioner Ramsey is a case on point. Three years after the *Okafore* decision the Petitioner received three consecutive sentences of 7½ to 15 years each for three counts of criminal possession of a weapon in the second degree and one consecutive sentence of 3½ to 7 years for criminal possession of a weapon in the third degree all for possession of one handgun in one day (two second-degree counts for the uninterrupted display of the weapon during the business robbery and the remaining consecutive counts when he was arrested in the same county hours later in

possession of the same gun). The prosecutor was not able to prove any other intent other than the intent to get the proceeds of the cash register at the Fish Market.

By contrast, in *Murphy,* a case with almost identical facts and heard in the same court as Petitioner Ramsey's case, the Supreme Court of New York, Appellate Division, Fourth Department, concluded that consecutive sentences for second-degree weapons possession could not be imposed for the use of a gun during an attempted robbery of two store employees where one employee was killed and the other employee was threatened with the gun. The court reversed the lower court and ordered the criminal possession of a weapon second degree counts to run concurrently. The court's rationale was that since "at no time during the attempted robbery did the gun leave defendant's hand, defendant's possession of the gun was a single and continuous act motivated by a continuing intent to commit larceny." *People v. Murphy,* 115 A.D.2d 249 (N.Y. App. Div. 1985).

The facts in *Murphy* are as follows. Murphy was convicted of murder in the second degree, attempted robbery in the first degree, and other crimes arising out of an attempted armed robbery of a grocery store in the City of Buffalo. When the store clerk questioned defendant's demands to open the cash register, defendant shot and killed him. Defendant then pointed the gun at the slain clerk's girlfriend, *who was also present in the store,* and ordered her to open the cash register. When she claimed she did not know how, defendant left. The two convictions for criminal possession of a weapon in the second degree (Penal Law § 265.03) were based upon

defendant's intent to use a loaded firearm against not only the store clerk, but also the clerk's girlfriend. The sentencing court imposed consecutive sentences on defendant's second weapon conviction. On appeal, Murphy claimed that the sentence was improper because his actions against the clerk and girlfriend were but a single act for which he could not be sentenced consecutively. The Appellate Division, Fourth Department agreed. *People v. Murphy*, 115 A.D.2d 249, 249 (App. Div. 1985) (emphasis added).

The court's rationale in *Murphy* was not consistently applied to Petitioner Ramsey. The court admitted that the two cases appeared identical, but instead the court upheld the consecutive sentences for the Petitioner. According to the court, the distinction in the Petitioner's case was that after the first employee near the cash register was shot, his mother (the second employee) came to his aid. Petitioner demanded that the first employee open the cash register, but he was unable due to being shot. A demand was then made to his mother but she had trouble figuring out how to open the register. The Petitioner left empty handed. The court decided that *Murphy* did not apply, despite the fact that the second employee was present in the fish market when her son was shot, and despite the fact that upon hearing the gun shot she moved closer to her son where she would be seen by the Petitioner. The court's rationale for upholding the consecutive sentences in the Petitioner's case was that the second witness was not in the Petitioner's visual range at the time the shot was fired. According to the Fourth Department, actually being inside the fish market during the robbery and being within earshot of the shooting was not enough

to be "present." [App. 3-6] Therefore, displaying the weapon before the second employee was a separate and distinct act from displaying it before the first employee. According to the Fourth Department, this distinction was enough to distinguish *Murphy* and uphold consecutive sentences. [App. 3-6]

How courts determine whether to treat a crime as a continuing offense or as a non-continuous offense will impact each stage of the criminal case. Charging continuing conduct as multiple counts instead of as a single act results in the likelihood of multiple punishment and raises concerns of fundamental fairness. As Chief Justice Warren admitted the "problem of multiple punishment is a vexing and recurring one." See Jeffrey M. Chemerinsky, *Counting Offenses,* 58 Duke L.J. 709 (2009). The failure of the courts to describe a particular legal rule for when an act should be charged as one or multiple offenses has resulted in a lack of a consistent approach in this matter. *Id.* at 711.

Courts have been inconsistent in charging criminal possession of a weapon in the second degree when there are multiple victims. In *People v. Hamilton,* the defendant possessed one handgun with the intention of shooting two people. He shot both, killing one and injuring the other but was only charged and convicted of one count of criminal possession of a weapon (830 N.E.2d 306, 307 (N.Y. 2005)). In *People v. Wright,* the defendant was charged with shooting and killing two people. He was found guilty of killing one person and was acquitted of killing the other. He was charged and convicted of only one count of criminal possession of a weapon in the second degree (971 N.E.2d 358 (N.Y. 2012)). At trial, the People claimed that

the defendant possessed the gun with unlawful intent, to wit, to "use the gun unlawfully against two others." *Id.* at 367.

This Court has acknowledged that the Double Jeopardy Clause protects against multiple punishment for the same offense. See *Ex parte Lange,* U.S. (18 Wall.) 163, 168-73 (1873). See also *Ball v. United States,* 470 U.S. 856, 861 (1985).

Courts have employed several approaches for determining the unit of prosecution. One of them is to examine the legislative intent. Chemerinsky at 711. The 1974 version of the criminal possession of a weapon in the second degree statute, which was the statute in effect on the day of Petitioner's incident [App. 20], differed from the version of the statute amended in 1998 and from the current version. As worded in 1974, "A person is guilty of criminal possession of a weapon in the second degree when he possesses a machine-gun or loaded firearm with intent to use the same unlawfully against another." The word "possesses" precedes the phrase "intent to use."[2] [App. 20]

In the current version of the law, the "intent to use" phrase precedes the "possesses" clause. See App. 19] It is clearly established by the plain reading of the statute as it existed on the day the crime occurred in Petitioner's case. There is no room for ambiguity: On the day of the incident, Criminal Possession of a Weapon in the second degree was a possessory crime, and therefore, a continuing offense.

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[2] Senate Bill 10431-A was introduced with the stated goal to "increase the penalty for the illegal possession of firearms and to provide for a mandatory sentence of imprisonment in certain cases."

The relevant statute, N.Y. Penal Law § 265.03 does not set forth a temporal parameter; rather, it is the *Okafore* court that construes one. LaFroscia, *Twice in Jeopardy* n. 53. As explained succinctly by Judge Kaye: "The New York Penal Code indicates the necessity of an 'act' in the articulation of crimes. A culpable mental state affects the degree of punishment, but is not a valid substitute for the requisite act." *Okafore,* 527 N.E.2d at 252 (Kaye, J. dissenting). Another strong statement from this Court came from Justice Marshall in *Missouri v. Hunter,* "When multiple charges are brought, the defendant is 'put in jeopardy' as to each charge... The number of convictions is often critical to the collateral consequences that an individual faces." *Missouri v. Hunter,* 459 U.S. 359, 372-73 (1983) (Marshall, J. dissenting).

II. New York and Other Jurisdictions Have Been Inconsistent in Punishing Individuals Convicted of Robbing or Attempting to Rob a Business Establishment While Threatening More Than One Employee.

In addition to consecutive weapons charges, the Petitioner also received consecutive sentences for the two Attempted Robbery convictions stemming from the same transaction at the Fish Market. How the crime of robbing a business is charged and punished varies widely among the states, which raises questions about the appropriateness of the resulting punishment. H. Mitchell Caldwell & Jennifer Allison, *Counting Victims and Multiplying Counts: Business Robbery, Faux Victims,*

and Draconian Punishment, 46 Idaho L. Rev. 647, 648-649 (2010). Personal robbery, as distinguished from business or commercial robbery, has as an objective to relieve the victims of personal property in their custody by force or threat of force. If the robbery is unsuccessful and there is no property loss for the victim, then it is an attempted robbery. National Criminal Justice Information and Statistics Service, *Crimes and Victims: A Report on the Dayton-San Jose Pilot Survey of Victimization,* p. 4 (1974). Commercial crimes differ from personal crimes in that a business or commercial establishment is the victim. For both personal robbery and business robbery there must be a confrontation and a threat or use of force. *Id.* at 5-6.

There is a significant split among the fifty states and the jurisdiction of the District of Columbia about the appropriateness of imposing multiple punishments when there is only a demand made for the property of a single business entity. H. Mitchell Caldwell & Jennifer Allison, *Counting Victims and Multiplying Counts: Business Robbery, Faux Victims, and Draconian Punishment,* 46 Idaho L. Rev. 661. See *Borchardt v. State,* 786 A.2d 631, 663 (Md. 2001). To determine the appropriate unit of prosecution of an offense, i.e., whether a particular course of conduct constitutes one or more counts, is usually determined by the intent of the legislature. *Brown v. State,* 311 Md. 426 at 432 (Md. 1988); *Missouri v. Hunter, supra; Bell v. United States,* 349 U.S. 81 (1955).

In *Blockburger,* multiple punishments for the same offense are prohibited under the Double Jeopardy clause. Justice Brennan described Blockburger's test[3] as "simple-sounding" but "extraordinarily difficult to administer in practice." *Texas v. Cobb*, 532 U.S. 162, 185 (Brennan, dissenting 2001). The goal of the Blockburger test was for determining whether two offenses are "sufficiently distinguishable" to permit cumulative punishment. *Brown v. Ohio*, 432 U.S. at 168. Blockburger held that there was no double jeopardy violation where there was a conviction for violating two separate offenses for one single act of sale of narcotics, since both statutes each contained an element that the other did not contain, no double jeopardy violation occurred. *Blockburger,* 284 U.S. at 304. See also William S. McAninch, *Unfolding the Law of Double Jeopardy* , 44 S. C. L. Rev. 411, 506 (1993).

The double jeopardy issue that is raised by Petitioner Ramsey is not one of successive prosecutions or one where consecutive sentences were applied to two separate statutes. The issue to be resolved here is whether multiple-count indictments are being improperly charged instead of single-count indictments and whether consecutive punishments are being improperly imposed in business robbery cases involving multiple victims. This Court has established that the Double Jeopardy Clause forbids the imposition of "multiple punishment" for a single offense. *A Definition of Punishment for Implementing the Double Jeopardy Clause's*

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[3] "(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." *Blockburger,* 284 U.S. at 304."

Multiple-Punishment Prohibition, 90 Yale L.J. 632, 633 (1981); *See Ex parte Lange*, 85 U.S. (18 Wall.) at 173. *See also North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The Petitioner's case presents the ideal opportunity for this Court to resolve the existing conflicts among the various courts and to settle this important constitutional question.

Oklahoma is a state that allows for a single count when multiple victims are involved in a business robbery. *Keeling v. State*, held that taking money from two cash drawers belonging to the same store during the same incident constituted only one act of robbery. The original conviction on two robbery counts violated double jeopardy. 810 P.2d 1298 (Ok. Crim. App. 1991). In a case from Hawaii, a defendant was convicted of five counts of robbery in the first degree. On appeal, the Supreme Court of Hawaii held that since there was only one theft from a single owner, defendant could only be convicted and sentenced for one robbery although he threatened force against five people. *State v. Faatea*, 648 P.2d 197 (Haw. 1982). Similarly, in Indiana, the court held that only one robbery occurred when two armed men threatened employees of a credit union and took money from two tellers. All that was taken was titled in one entity. *Allen v. State*, 428 N.E.2d 1237 (Ind. 1981). Caldwell & Allison, at 648-649.

In another case from Indiana, *Williams v. State*, 395 N.E.2d 239, 241 (Ind. 1979), during the course of a robbery, a defendant ordered four tellers to fill a pillowcase with money and fled to a get-away car. The court found that the

defendant's conduct consisted only of one offense of armed robbery, not four. The court reasoned that only one bank was robbed, even though four tellers were involved. Other courts that have reached the same results in similar situations where the defendant threatened the use of force against several persons to commit one act of theft are North Carolina and Illinois. In *State* v. *Potter*, 204 S.E.2d 649 (N.C. 1974), the North Carolina Supreme Court held that when the lives of all employees of a store were threatened and endangered by the use or threatened use of a firearm incident to the theft of their employer's money or property, a single robbery is committed. In *People* v. *Nicks*, 319 N.E.2d 531 (Ill.App.Ct.4th 1974), the defendant robbed a storeowner and two cashiers, separately, but all in one transaction. The court held that he could only be convicted of one count of armed robbery. In Arkansas, an armed defendant entered a pharmacy and forced two clerks to lie on the floor while the pharmacist gathered the money and narcotics into a bag. Only the property of the pharmacy was taken and there was no effort made to take any personal property belonging to the pharmacist or the clerks. The court reasoned that there "can be no doubt that if each of the two clerks had been forced to give over some property belonging to her, separate offenses of aggravated robbery would have been committed with respect to each clerk." See *Britt* v. *State*, 549 S.W.2d 84 (Ark. 1977) Caldwell & Allison, at 648-649.

Federal courts have also dealt with this issue especially in cases involving federal bank robberies. In *United States v. Canty*, 469 F.2d 114 (D.C. Cir. 1972) the

defendant had been charged with one count of robbery for each of four tellers from whom he received money. The court said:

> Although there seem to be no cases precisely on point, we cannot agree with the Government's position that the robbery of each teller constitutes a separate 'taking' within the meaning of the statute. While it may be true that under general theft and robbery statutes, a defendant may be punished under separate counts for taking money from different people in the same transaction, the statute here is not for theft or robbery against the person generally. The crime is *bank* robbery, and the statute is entitled 'Bank Robbery and Incidental Crimes.' There is no doubt here that only one transaction took place and that only one bank was robbed.

Id. at 126 [emphasis in original].

The *Canty* case establishes that a defendant cannot be convicted on several counts when he takes money from one bank. This same reasoning should be applied to business robberies where no demand for personal property is made. Under bank robbery statutes and more general criminal laws, the federal courts have applied the "rule of lenity" as provided in *Bell v. United States, supra,* where this Court held "[i]t may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell,* 349 U.S. at 83.

The supreme court of West Virginia examined cases from various jurisdiction in their attempt to render a decision in their own "novel" double jeopardy issue involving a defendant being convicted of multiple counts of attempted aggravated robbery of a store where the property belonged to one owner—the store. *State v. Collins,* 329 S.E.2d 839, 840 (W. Va. 1984). The court stated,

> We have examined cases from other jurisdictions involving the robbery of stores or banks where more than one clerk or employee was present. It is sometimes argued that since each clerk or employee, through his employment, exercises constructive possession over his employer's property, a separate robbery conviction can be established for each employee present in the store or bank during a robbery. However, this theory has been rejected by most of the courts addressing the issue. The rationale commonly advanced by these courts is that because the property taken is owned by only one entity, i.e., the store or bank, there is only one larceny and, therefore, only one robbery. *Id.* at 844.

In characterizing courts who reach the opposite conclusion, West Virginia stated that these courts "failed to recognize that at common law, robbery was considered to be aggravated larceny. By allowing multiple robbery convictions when only one larceny was committed, these courts in effect altered the substantive definition of robbery as developed at common law without addressing their authority to do so." *Collins,* 329 S.E.2d at 844-45. The court further stated that unless there is a clear intent to allow multiple punishments expressed by the Legislature, the "doubt will be resolved against turning a single transaction into multiple offenses." *Id.* at 845. In its conclusion in *Collins,* West Virginia's position is on point with Petitioner's attempted robbery case brought before this Court for review:

> In the final analysis, we believe that it is impossible to conclude from either the common law or [statutory law], that an attempt to rob a store by presenting a firearm and leaving without taking any property can, in light of double jeopardy principles, result in multiple convictions of attempted aggravated robbery for each clerk present in such store. If this were the rule, then separate convictions of attempted aggravated robbery could also be obtained for every other person who was present in the store. We decline to extend the law of attempt to

> justify such a result without a more precise and detailed statute than [the West Virginia Code]. *Collins,* 329 S.E.2d at 846.

Delaware is considered a multi-count state. Under Delaware law, each employee from whom money is taken along with the branch manager are separate robbery victims. In Delaware, for example, a single bank robbery may produce many robbery victims. Not only bank tellers whose cash is taken, but Delaware allows that mere bystanders who are threatened at gunpoint during a bank robbery are now considered robbery victims. *State v. Bridgers*, 988 A.2d 939, 940 (Del. Super. Ct. 2007). In *People v. Wakeford,* the Michigan Supreme Court found that the robbery of two cashiers in one grocery store constitutes two separate and distinct offenses; however, unlike the sentencing judge in Petitioner's case, Wakeford was sentenced concurrently. The Michigan policy requires "concurrent rather than consecutive sentencing in the absence of specific legislative authorization" to avoid the principal harshness that might otherwise result from multiple convictions." *Wakeford,* 341 N.W.2d 68 (Mich. 1983).

California is a state on the opposite end of the spectrum from the states that hold that a business robbery should be charged in a single count regardless of the number of employees present under the rationale that there was only one taking. In California, the standard is to charge as many robbery counts as there are individuals in joint possession of the property (actual or constructive). In the *Scott* case, California held "all employees have constructive possession of the employer's property while on duty and thus may be separate victims of a robbery of the

employer's business, assuming the other elements of robbery are met as to each employee." *People v. Scott*, 200 P.3d 837 (Cal. 2009).

The critical issue of consecutive versus concurrent sentencing becomes the paramount concern when jurisdictions charge multi-counts for a business robbery or attempted business robbery. Some jurisdictions provide exceptions and allow concurrent sentencing if the same evidence is used to convict on each count. Other jurisdictions may allow judicial discretion. Some may have complicated sentencing schemes relative to multi-count business robberies with California probably having the most complicated sentencing scheme. California was not always a multi-count state. Originally under section 654 of the California Penal Code multiple punishment was prohibited. However, the California Supreme Court over the years began to carve out exception after exception. In a 1977 case, the California Supreme Court carved out an exception specifically for armed robbery, thus making it official: California became a multi-count state. Caldwell & Allison, pp.665-66. See *People v. Miller,* 558 P.2d 552, 561 (Cal. 1977). "Accordingly, a defendant convicted of three counts of robbery for threatening three employees while robbing a business could be sentenced to three consecutive six-year prison sentences. This result represents a longer prison term than the base sentence in California for a second-degree murder conviction." Caldwell & Allison, at 666. This is the precise incongruity facing Petitioner who has been incarcerated since 1991, with about half of his maximum sentence still left to serve as a result of his consecutive sentences. [App. 14-15].

New York is actually considered to be a state that allows for a single count when multiple victims are involved in a business robbery, similar to Oklahoma and Indiana, for example. Yet the Petitioner's case deviated from the state's tradition. In particular, his case deviated from *People v. Murphy* that, other than the fact that *Murphy* was a homicide case. And yet, the only consecutive sentencing that was imposed on Murphy by the sentencing court was for the two counts of criminal possession of a weapon in the second degree. The sentencing court in Murphy correctly sentenced him concurrently for the two counts of attempted robbery, unlike the sentencing court for Petitioner. Murphy only had to appeal the consecutive sentences for the weapons charges, and he won. Murphy appeared before the same Appellate Division court as the Petitioner, but the Petitioner despite relying on Murphy as a precedent, left the court with no change in his sentence. Despite the fact that a major part of the oral argument questions by the court focused on *Murphy,* particularly the court seemed intent on figuring out a way to distinguish this almost identical case. However, in its decision to affirm all of the consecutive sentences, the Appellate Division never cited to nor mentioned *Murphy.*

Instead, the Appellate Division based its decision to affirm on its own unique rationale: (1) The Petitioner did not initially see the second employee upon entering the Fish Market. (2) The Petitioner did not initially see the second employee when he fired the one shot that hit the first employee who was standing near the store's only cash register in the front of the store. (3) The Petitioner's lack of vision was

significant enough to make the counts separate and distinct thereby upholding consecutive sentences.

According to the Appellate Division, if the Petitioner could not see her, then she was not present in the Fish Market. It did not matter to the Appellate Division that the evidence was unrefuted that the second employee was in fact onsite. The evidence was uncontroverted that she was also within earshot. She heard the shot and ran to her son who had been hit and had fallen to the floor. But to the Appellate Division, for sentencing purposes, she was not "present," because to admit that she had been present would mean that *Murphy* applies. Instead, the Appellate Division, Fourth Department is stretching the facts to permit multiple punishment for what would otherwise be a unitary transaction having a similar result as cases before other New York appellate courts. *See People v. Hoe,* 130 A.D.2d 509 (N.Y. App. Div. 2d Dep't 1987) (two first-degree robbery counts run concurrently); *People v. Lebron,* 261 A.D.2d 299 (N.Y. App Div. 1st Dep't 1999) (directing that sentences on multiple counts of first-degree robbery run concurrently and reducing those sentences to the statutory minimum); *People v. Walls,* 199 A.D.2d 292 (N.Y. App. Div. 2d Dep't 1993) (directing that the sentences on five robbery counts, each of which involved a separate robbery, run concurrently).

In light of the confusion surrounding business robbery cases across the nation, this case is a good vehicle to set standards regarding business robbery and attempted business robbery cases. This Court also has the opportunity to remedy

the error created when the Appellate Division, Fourth Department did not follow its own precedent in an almost identical case.

III. Summary Denial of a Post-Judgment Motion Without Articulating a Sufficient Basis for the Denial Violates the Right to Due Process.

The Petitioner's *pro se* post-judgment motion was captioned under Criminal Procedure Law Crim. Proc. Law 440.20 [App. 17] asserting that his sentence was unauthorized, illegal or invalid as a matter of law. He submitted an affidavit in support of his *pro se* motion to set aside sentence. In addition, a Memorandum of Law was annexed as part of the moving papers. In his affidavit and in the accompanying Memorandum of Law, the Petitioner argued sound legal principles relying on statutory law, binding authoritative case law, and relevant persuasive case law to support his position. His legal argument set forth in the Memorandum of Law included major points and sworn allegations of plausible claims of illegal sentencing.

The trial court denied his *pro se* motion without a hearing stating without much elaboration, "After reviewing the defendant's motion, the court concludes that the defendant's arguments do not set forth grounds to determine that the defendant's sentence is unauthorized, illegal or invalid as a matter of law (*see* Crim. Proc. Law 440.20) Therefore, this court *must* deny the defendant's motion to set aside the sentence" *emphasis added.* (App. 7-10] The decision ended with the

statement, "Accordingly, the court denies the defendant's motion to set aside sentence in all respects." [App. 7-10]

To determine the merits of a motion to set aside a sentence pursuant to Crim. Proc. Law 440.20, a trial court *may* deny the motion without a hearing only according to specific criteria. *See* N.Y. Crim. Proc. Law 440.30 [App 18]. The decision incorrectly stated the law quoting incorrectly that "the trial court *must* deny the motion without a hearing." This trial court's summary denial was a bare denial without much explanation. The court remained mostly silent as to its reasoning and gave little basis for its denial Much of the decision was verbatim repetition of the statutory language, mixed with incorrectly quoting the law.

A summary denial at the bare minimum should include a detailed explanation of the court's findings and reasoning. New York courts review the summary denial of an Article 440 motion under an abuse of discretion standard. *People v. Wright*, 54 N.E.3d 1157, 1160 (N.Y. 2016). However, for a court to dispose of post-judgment motions without an articulated explanation, denies movants like this Petitioner of a true and reasonable opportunity to be heard. *See Huff v. State*, 622 So. 2d 982 (1993). *See also Rimmer v. Secretary, Florida Dept. of Corrections*, 864 F.3d 1261, 1270 (11th Cir. 2017). This Court should intervene as the violation of the opportunity to be heard violates the core principles of 14th Amendment due process rights.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and reverse the Supreme Court, Appellate Division, Fourth Department's decision below.

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Respectfully submitted,

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