

1 19 (2d Cir. 2018), *both vacated*, 139 S. Ct. 2774 (2019); *United States v.*
2 *Barrett* (“*Barrett II*”), 937 F.3d 126 (2d Cir. 2019); *United States v. Barrett*
3 (“*Barrett III*”), 102 F.4th 60 (2d Cir. 2024), *reversed in part and remanded*,
4 146 S. Ct. 482 (2026) (“*Barrett IV*”). We assume familiarity with these
5 opinions and the underlying facts that they detail.

6 Barrett’s case is again before this court on remand from the
7 Supreme Court, which recently clarified that—notwithstanding its
8 recognition in *Lora v. United States*, 599 U.S. 453 (2023), that a § 924(c)
9 firearms crime is punishable under a different sentencing scheme
10 than a § 924(j) murder committed in the course of a § 924(c) crime—
11 “Congress has not authorized convictions under both 18 U.S.C.
12 §§ 924(c)(1)(A)(i) and (j) for one act that violates both provisions.”
13 *Barrett IV*, 146 S. Ct. at 497. Insofar as this court concluded otherwise
14 and ordered the district court to resentence Barrett on remand on *both*
15 his § 924(c)(1)(A)(i) conviction and his § 924(j) conviction (Counts Six
16 and Seven of the underlying indictment), *see Barrett III*, 102 F.4th at
17 88–96, the Supreme Court has now reversed that “part of the
18 judgment” and “remanded for further proceedings,” *Barrett IV*, 146 S.
19 Ct. at 497. Heedful of that ruling, we now withdraw Part III.A.2.c.
20 from our opinion in *Barrett III*, and we remand this case to the district
21 court for resentencing consistent with the Supreme Court’s decision.

22 Because the discussion in *Barrett IV* does not permit the district
23 court on remand to sentence Barrett on, or to enter judgments of
24 conviction for, both Counts Six and Seven, the district court should
25 “exercise its discretion to vacate one of the convictions.” *Ball v. United*
26 *States*, 470 U.S. 856, 865 (1985). In doing so, it should give due weight
27 to the government’s view as to which count should be vacated,

1 mindful that (1) the government’s charging discretion permits it to
2 charge conduct under different statutory “provisions . . . even though
3 the defendant could not in the end stand convicted of both offenses,”
4 *id.* at 860 n.8; *see Barrett IV*, 146 S. Ct. at 495 (citing *Ball*); (2) the
5 government here carried its burden of proof on both counts; and (3)
6 neither *Lora* nor *Barrett IV* had been decided when this case went to
7 trial.

8 Barrett further urges us to withdraw from our *Barrett III*
9 opinion Part III.B, which concludes that the aggregate 50-year
10 sentence imposed in this case was substantively reasonable. *See*
11 *Barrett III*, 102 F.4th at 96–97. We decline to do so. In remanding for
12 resentencing in *Barrett IV*, the Supreme Court did not consider, much
13 less reverse, this conclusion. Our denial of rehearing and rehearing
14 *en banc* thus stands as to that portion of the opinion. *See Order, Barrett*
15 *III*, No. 21-1379, Doc. 165 (2d Cir. July 19, 2024). Nevertheless, we do
16 not foreclose Barrett from arguing on remand for resentencing that an
17 aggregate 50-year sentence is unwarranted in light of the
18 circumstances presented on remand, which may or may not differ
19 from those evident at the time of the now-vacated sentence. *See*
20 *generally United States v. Hertular*, 562 F.3d 433, 445–46 (2d Cir. 2009);
21 18 U.S.C. § 3553(a).

22 Finally, Barrett requests reassignment of this case to a different
23 judge on remand. The request appears to be grounded in the
24 mistaken assumption that Judge Sullivan participated in this court’s
25 July 19, 2024 decision to deny rehearing *en banc*. *See Appellant’s Mar.*
26 *17*, 2026 Letter Br. at 6–8. As the court has recently clarified, Judge
27 Sullivan did *not* participate in that vote. *See Order, Barrett III*, No. 21-

1 1379, Doc. 191 (2d Cir. Mar. 27, 2026). Therefore, Barrett's request for
2 reassignment to a different judge is denied.

3 To conclude, the court hereby

4 (1) WITHDRAWS Part III.A.2.c. of our May 15, 2024 opinion,
5 *see Barrett III*, 102 F.4th at 88–96;

6 (2) VACATES in part the May 15, 2024 judgment of this court
7 insofar as it vacated the district court's May 21, 2021
8 amended judgment of conviction as to sentence and
9 remanded with instructions to impose separate sentences
10 on Count Six and Count Seven, *see id.* at 97–98;

11 (3) VACATES in part the district court's May 21, 2021 amended
12 judgment of conviction only as to its sentence;

13 (4) REMANDS with instructions that the district court vacate
14 the judgment of conviction as to either Count Six or Count
15 Seven and resentence Barrett consistent with the Supreme
16 Court's decisions in *Lora v. United States*, 599 U.S. 453 (2023),
17 and *Barrett v. United States*, 146 S. Ct. 482 (2026); as well as
18 this opinion; and, to the extent not modified by this opinion,
19 the court's May 15, 2024 opinion, *see Barrett III*, 102 F.4th 60
20 (2d Cir. 2024);

21 (5) DENIES Barrett's request for reassignment to a different
22 judge on remand; and

23 (6) AFFIRMS the district court's May 21, 2021 amended
24 judgment in all other respects.