1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3 August Term, 2022
4 (Argued: September 14, 2022 Decided: July 5, 2023)
5 Docket No. 21-279-pr

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7

8 VICTOR CLEMENTE,
9 *Petitioner-Appellant,*

10 v.

11 WILLIAM LEE, WARDEN, EASTERN CORRECTIONAL FACILITY,
12 *Respondent-Appellee.*
13

14

15 Before: POOLER, SACK, AND PARK, *Circuit Judges.*

16 On April 10, 2008, petitioner-appellant Victor Clemente was convicted of
17 murder in the second degree and criminal possession of a weapon in the second
18 degree by a New York state-court jury. The court sentenced him to concurrent
19 indeterminate prison terms of twenty years to life for the murder count and five
20 to fifteen years for the weapon-possession count.

21 Following unsuccessful direct appeals and collateral challenges to his
22 conviction in the state courts, Clemente filed a petition for a writ of habeas
23 corpus in the United States District Court for the Eastern District of New York.
24 Respondent-appellee William Lee, the Warden of the facility in which Clemente
25 is imprisoned, moved to dismiss a subset of the claims in the petition on the
26 ground that they were time-barred under 28 U.S.C. § 2244(d)(1). The district
27 court (Donnelly, *J.*) agreed and entered an order supported by a memorandum
28 decision granting the motion.

29 Clemente filed a notice of appeal and sought a certificate of appealability.
30 On July 14, 2021, we granted a certificate of appealability on an issue of first
31 impression for this Court: "[W]hether the district court properly dismissed some
32 of Appellant's claims as time-barred when it applied 28 U.S.C. § 2244(d)(1) to his
33 individual claims, rather than to his entire petition." Docket No. 25.

1 Clemente contends that under § 2244(d)(1), all the claims raised in his
2 petition were timely because at least one claim asserted therein was timely filed
3 within the applicable one-year limitations period. He argues that the district
4 court erred by analyzing the timeliness of the claims in his petition on a claim-
5 by-claim basis and that it should have applied a single statute of limitations to all
6 his claims.

7 We disagree and conclude that § 2244(d)(1)'s statute of limitations requires
8 a claim-by-claim approach, joining our sister circuits that have addressed the
9 issue. Because we further conclude that the district court correctly determined
10 that the claims at issue in this appeal were therefore time-barred, we

11 AFFIRM the order of the district court.

12 JODI MORALES, The Law Offices of Jodi
13 Morales, Bronx, NY, *for Petitioner-Appellant*;
14
15 WILLIAM H. BRANIGAN (John M. Castellano,
16 *on the brief*), Assistant District Attorneys, *for*
17 Melinda Katz, District Attorney for Queens
18 County, Queens, NY, *for Respondent-*
19 *Appellee*.
20

21 SACK, *Circuit Judge*:

22 On April 10, 2008, petitioner-appellant Victor Clemente was convicted of
23 murder in the second degree and criminal possession of a weapon in the second
24 degree by a New York state-court jury. The court sentenced him to concurrent
25 indeterminate prison terms of twenty years to life for the murder count and five
26 to fifteen years for the weapon-possession count.

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3 is imprisoned, moved to dismiss a subset of the claims asserted in Clemente's
4 petition on the ground that they were time-barred under 28 U.S.C. § 2244(d)(1).
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13 petition were timely because at least one claim asserted therein was timely filed
14 within the applicable one-year limitations period. He argues that the district
15 court erred by analyzing the timeliness of the claims in his petition on a claim-
16 by-claim basis and that it should have applied a single statute of limitations to all
17 his claims.

1 We disagree and conclude that § 2244(d)(1)'s statute of limitations requires
2 a claim-by-claim approach, joining our sister circuits that have addressed the
3 issue. Because we further conclude that the district court correctly determined
4 that the claims at issue in this appeal were therefore time-barred, we affirm the
5 order of the district court.

6 **BACKGROUND**

7 **I. Pre-Trial Proceedings and Conviction**

8 On November 20, 1986, Clemente fatally shot one Wilfredo Drapete.
9 Clemente was charged with murder in the second degree under New York Penal
10 Law § 125.25 and criminal possession of a weapon in the second and third
11 degrees under New York Penal Law §§ 265.02 and 265.03. In January 1988, he
12 moved to dismiss the indictment, arguing that the State failed to provide him
13 with a speedy trial. The state trial court granted the motion and dismissed the
14 indictment on March 22, 1988.

15 The State appealed the order dismissing the indictment to the New York
16 State Supreme Court, Appellate Division, Second Department. Clemente was
17 not represented by counsel during that appeal and did not file an opposing brief.
18 On May 22, 1989, the Appellate Division reversed the trial court's ruling,

1 reinstated the indictment, and remitted the case to the trial court for further
2 proceedings. *People v. Clemente*, 541 N.Y.S.2d 583, 584 (2d Dep't 1989).
3 Clemente was scheduled to appear in court on June 13, 1989. He failed to
4 appear and a warrant was issued for his arrest. Seventeen years later, in
5 December 2006, law enforcement found Clemente in California, arrested him,
6 and returned him to New York to face the charges in Supreme Court, Queens
7 County. On April 10, 2008, a jury convicted Clemente of murder in the second
8 degree and criminal possession of a weapon in the second degree. On April 30,
9 2008, the trial court sentenced him to concurrent indeterminate prison terms of
10 twenty years to life on the murder charge and five to fifteen years on the
11 weapon-possession charge.

12 **II. Direct Appeal**

13 Clemente appealed his conviction to the Appellate Division, Second
14 Department, challenging, among other things, several of the trial court's
15 evidentiary rulings. The Appellate Division affirmed Clemente's conviction on
16 May 3, 2011. *People v. Clemente*, 922 N.Y.S.2d 193, 194 (2d Dep't 2011). He sought
17 leave to appeal to the New York Court of Appeals, which denied his application
18 on June 23, 2011. *People v. Clemente*, 17 N.Y.3d 793 (2011). He then petitioned the

1 United States Supreme Court for a writ of certiorari. It was denied on June 4,
2 2012. *Clemente v. New York*, 566 U.S. 1035 (2012).

3 **III. Motion to Vacate the Conviction**

4 On December 27, 2012, Clemente, proceeding pro se, moved in the state
5 trial court to vacate his conviction as provided by New York Criminal Procedure
6 Law § 440.10, arguing that he was improperly denied the right to appellate
7 counsel in 1989 when the Appellate Division reversed the dismissal of the
8 indictment. The trial court denied Clemente's motion on April 18, 2013,
9 concluding that the Appellate Division, not the trial court, was the proper forum
10 for him to seek the requested relief.

11 **IV. First Writ of Error *Coram Nobis***

12 On September 11, 2013, Clemente, proceeding pro se, sought *coram nobis*
13 relief[1] before the Appellate Division, again arguing that his right to appellate

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[1] Although "the scope of coram nobis has been somewhat expanded beyond its original office, it still remains an emergency measure employed for the purpose for which it was initially designed, of calling up facts unknown at the time of the judgment." *People v. Caminito*, 3 N.Y.2d 596, 601 (1958) (citations omitted).

In New York, the writ became "a proper remedy whereby a court of competent jurisdiction could reopen its judgment of conviction under proper circumstances. The essence of coram nobis is that it is a motion addressed to the very court which rendered the judgment and is not in the nature of a separate proceeding, although often utilized long after the entry of judgment." Peter H. Bickford, *Coram Nobis as Proper Remedy for Testimony Not Perjured and Not Knowingly Used*, 13 BUFF. L. REV. 190, 191 (1963) (footnotes omitted).

1 counsel had been violated in 1989. On February 11, 2015, the Appellate Division
2 granted the *coram nobis* application in part and concluded that Clemente's right
3 to appellate counsel had indeed been violated. *People v. Clemente,* 4 N.Y.S.3d 84,
4 84 (2d Dep't 2015). The Appellate Division appointed counsel for Clemente and
5 ordered the State to re-file its 1989 appeal. *Id.* at 84-85.

6 The appeal was fully briefed and the Appellate Division again concluded
7 that the trial court had erred by dismissing the indictment in 1988. *People v.*
8 *Clemente,* 30 N.Y.S.3d 880, 881 (2d Dep't 2016). Accordingly, the court denied
9 Clemente's *coram nobis* application. *Id.* On August 11, 2016, the New York Court
10 of Appeals denied Clemente's motion for leave to appeal the Appellate
11 Division's decision. *People v. Clemente,* 28 N.Y.3d 928 (2016).

12 **V. Second Writ of Error *Coram Nobis***

13 On April 5, 2017, Clemente, proceeding pro se, filed a second application
14 for *coram nobis* relief before the Appellate Division, arguing that he did not
15 receive effective assistance of counsel during the direct appeal from his
16 conviction and during the 2015 rehearing of the State's appeal from the
17 speedy-trial dismissal. On December 13, 2017, the Appellate Division denied the
18 application. *People v. Clemente,* 64 N.Y.S.3d 921, 922 (2d Dep't 2017). On March

1 16, 2018, the New York Court of Appeals denied Clemente's motion for leave to
2 appeal. *People v. Clemente*, 31 N.Y.3d 982 (2018).

3 **VI. Current Federal Habeas Proceedings**

4 On March 28, 2018, Clemente filed a petition for a writ of habeas corpus in
5 the United States District Court for the Eastern District of New York. The district
6 court construed Clemente's petition as raising the same claims that he had
7 advanced in the direct appeal from his conviction, the first and second writs of
8 error *coram nobis*, and the counseled brief in the re-filed 1989 appeal. *Clemente v.*
9 *Lee*, No. 18-cv-1978 (AMD), 2019 WL 181304, at *1-3 (E.D.N.Y. Jan. 9, 2019). The
10 respondent moved to dismiss a subset of the claims raised in the petition as
11 untimely. The respondent argued that the claims challenging Clemente's
12 conviction on the grounds that he raised in his direct appeal were time-barred
13 under 28 U.S.C. § 2244(d)(1)(A) and that Clemente's claim of ineffective
14 assistance of counsel by the attorney who handled his direct appeal was time-
15 barred under § 2244(d)(1)(D). The district court agreed that these claims were
16 untimely and granted the respondent's motion to dismiss. *Id.* at *4-5.

17 Clemente then filed a notice of appeal and sought a certificate of
18 appealability. We granted a certificate of appealability on an issue of first

1 impression for this Court: "[W]hether the district court properly dismissed some
2 of Appellant's claims as time-barred when it applied 28 U.S.C. § 2244(d)(1) to his
3 individual claims, rather than to his entire petition." Docket No. 25.[2]

4 Every federal appellate court to consider this question has concluded that
5 the timeliness of claims raised in a petition for habeas corpus must be analyzed
6 on a claim-by-claim basis. *Zack v. Tucker*, 704 F.3d 917, 918 (11th Cir.) (en banc),
7 *cert. denied sub nom. Zack v. Crews*, 571 U.S. 863 (2013) ("We conclude, based on
8 the text and structure of the statute, Supreme Court precedent, decisions of our
9 sister circuits, and Congressional intent, that [§ 2244(d)(1)] requires a claim-by-
10 claim approach to determine timeliness."); *Davis v. United States*, 817 F.3d 319,
11 327-28 (7th Cir. 2016); *DeCoteau v. Schweitzer*, 774 F.3d 1190, 1192 (8th Cir. 2014);
12 *Prendergast v. Clements*, 699 F.3d 1182, 1186-88 (10th Cir. 2012); *Mardesich v.*
13 *Cate*, 668 F.3d 1164, 1169-71 (9th Cir. 2012); *Bachman v. Bagley*, 487 F.3d 979,
14 982-84 (6th Cir. 2007), *abrogated on other grounds*, *Magwood v. Patterson*, 561 U.S.
15 320 (2010); *Fielder v. Varner*, 379 F.3d 113, 117-22 (3d Cir. 2004); *see also Capozzi v.*

[2] On January 4, 2021, while this appeal was pending, the district court issued a decision and order addressing the merits of the timely claims raised in Clemente's habeas petition. The district court found that Clemente was not entitled to habeas relief on any of his timely claims and entered a judgment dismissing the petition. *See Clemente v. Lee*, No. 18-cv-1978, 2021 WL 25337 (AMD), at *8 (E.D.N.Y. Jan. 4, 2021).

1 *United States*, 768 F.3d 32, 33 (1st Cir. 2014) (per curiam), *cert. denied*, 574 U.S. 1184
2 (2015) (concluding that the parallel limitations period for federal prisoners, 28
3 U.S.C. § 2255(f), applies on a claim-by-claim basis). For the following reasons,
4 we adopt the claim-by-claim approach. Because the district court utilized the
5 claim-by-claim approach and correctly determined that the claims at issue in this
6 appeal are time-barred, we affirm the district court's order.

7 **DISCUSSION**

8 **I. The Timeliness of Claims Raised in a Petition for Habeas Corpus**
9 **Must Be Analyzed on a Claim-by-Claim Basis**

10 Petitions for habeas corpus by individuals "in custody pursuant to the
11 judgment of a State court" are subject to a one-year statute of limitations under
12 the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C.
13 § 2244(d)(1). "This statute of limitations 'quite plainly serves the well-recognized
14 interest in the finality of state court judgments.'" *Zack*, 704 F.3d at 919 (quoting
15 *Duncan v. Walker*, 533 U.S. 167, 179 (2001)); *see also Mayle v. Felix*, 545 U.S. 644, 662
16 (2005) ("Congress enacted AEDPA to advance the finality of criminal
17 convictions. To that end, it adopted a tight time line, a one-year limitation
18 period . . . ." (internal citation omitted)).

19 AEDPA's one-year statute of limitations applies to "an application" for a

1 writ of habeas corpus. 28 U.S.C. § 2244(d)(1). The limitations period runs:

2 from the latest of—

3 (A) the date on which the judgment became final by the
4 conclusion of direct review or the expiration of the time for
5 seeking such review;

6 (B) the date on which the impediment to filing an application
7 created by State action in violation of the Constitution or laws
8 of the United States is removed, if the applicant was prevented
9 by filing from such State action;

10 (C) the date on which the constitutional right asserted was
11 initially recognized by the Supreme Court, if the right has been
12 newly recognized by the Supreme Court and made
13 retroactively applicable to cases on collateral review; or

14 (D) the date on which the factual predicate of the claim or
15 claims presented could have been discovered through the
16 exercise of due diligence.

17 *Id.* § 2244(d)(1)(A)-(D).

18 Clemente contends that this statute, properly interpreted, provides that *all*
19 claims raised in a habeas petition are timely so long as at least one claim asserted
20 therein is timely under the one-year statute of limitations.[3] In other words, he

[3] The respondent contends that Clemente "failed to raise" "the issue of whether the separate claims should be assessed for time bar purposes." Appellee's Br. at 13. Even assuming Clemente forfeited this argument, we exercise our discretion to consider it on appeal. *See United States v. Graham*, 51 F.4th 67, 80 (2d Cir. 2022) ("Forfeiture, a mere failure to make the timely assertion of a right when procedurally appropriate, allows a court either to disregard an argument at its discretion (in civil cases) or otherwise subject it to plain-error review (in criminal cases)." (citations and internal quotation marks omitted)).

argues that courts must determine whether habeas petitions as a whole are timely and are not permitted to conclude that certain claims asserted in a petition should be dismissed as time-barred while others may proceed as timely. Therefore, according to Clemente, the district court erred by dismissing his time-barred claims because he raised them in a petition that also asserted claims that are undisputedly timely. However, we reject Clemente's construction of § 2244(d)(1).

A.

Our analysis begins, as it must, with § 2244(d)(1)'s text and structure. "In statutory interpretation, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Seife v. U.S. Food & Drug Admin.*, 43 F.4th 231, 239 (2d Cir. 2022) (citation and internal quotation marks omitted). "If, however, the statute is ambiguous, we focus upon the broader context and primary purpose of the statute." *Gordon v. Softech Int'l, Inc.*, 726 F.3d 42, 48 (2d Cir. 2013) (citation and internal quotation marks omitted).

We agree with our sister circuits that it is not immediately apparent from § 2244(d)(1)'s text whether a claim-by-claim approach or Clemente's proposed approach is appropriate. *See Mardesich*, 668 F.3d at 1170 (considering the "statute

1 as a whole" because "the ambiguous language in § 2244(d)(1) [does] not provide
2 sufficient guidance"); *DeCoteau*, 774 F.3d at 1192 ("The language in § 2244(d)(1) is
3 susceptible to more than one interpretation."). It is clear, however, that
4 Clemente's proposed interpretation of § 2244(d)(1) is incompatible with the
5 structure of AEDPA's statute of limitations framework.

6 Clemente's proposed interpretation of § 2244(d)(1) "reads the statute in
7 such a way that under certain circumstances it will be impossible for courts to
8 identify the applicable statute of limitations." *Zack*, 704 F.3d at 922. This
9 problem was illustrated by the habeas petition that the Third Circuit considered
10 in *Fielder*. There, the petitioner raised two claims in his petition—one alleging
11 prosecutorial misconduct and one seeking a new trial based on newly discovered
12 evidence. *Fielder*, 379 F.3d at 114. Under § 2244(d)(1)(D), the one-year statute of
13 limitations for these claims ran from "the date on which the factual predicate of
14 *the claim or claims presented* could have been discovered through the exercise of
15 due diligence." *Id.* at 117 (quoting 28 U.S.C. § 2244(d)(1)(D)). Then-Circuit Judge
16 Alito, writing for the court, explained that while the "factual predicate of the
17 prosecutorial misconduct claim was presumably known to [the petitioner] at the
18 time of trial, . . . the factual predicate of the after-discovered evidence claim was

1 not reasonably discoverable until years later." *Id.* at 118. If AEDPA's statute of
2 limitations provision applied on a claim-by-claim basis, then "there [would be]
3 no problem" as each claim's timeliness could readily be calculated based on
4 when the factual predicates underlying each claim could reasonably have been
5 discovered. *Id.* If a single statute of limitations period were applied to the entire
6 petition, however, it would be impossible for courts to determine which of the
7 two dates controls. "[T]here is nothing in § 2244(d) that suggests that a court
8 should . . . select the *latest* date on which the factual predicate of any claim
9 presented in a multi-claim application could have been reasonably discovered. It
10 would be just as consistent with the statutory language to pick the *earliest* date."
11 *Id.* [4]

12 The problems with Clemente's approach are not confined to multi-claim
13 petitions analyzed under § 2244(d)(1)(D). Consider, as the Eleventh Circuit did,
14 a "circumstance where an applicant presents a petition for relief that seeks
15 review under two separate constitutional rights newly recognized by two

[4] As then-Circuit Judge Alito explained for the Third Circuit, § 2244(d)(1)'s reference to "the latest" date "does not tell a court how to identify the date specified in [§ 2244(d)(1)(D)] in a case in which the application contains multiple claims." *Fielder*, 379 F.3d at 118. That language only "tells a court how to choose from among the four dates specified in subsections (A) through (D) *once those dates are identified*." *Id.*

1 separate Supreme Court decisions." *Zack*, 704 F.3d at 922. In such a case, under
2 § 2244(d)(1)(C), the statute of limitations runs from "the date on which the
3 constitutional right asserted was initially recognized by the Supreme Court." *Id.*
4 (quoting 28 U.S.C. § 2244(d)(1)(C)). Under the claim-by-claim approach, the
5 applicable statute of limitations for each claim can be ascertained and runs "from
6 the date of each relevant Supreme Court decision." *Id.* But if a court were to
7 attempt to apply a single statute of limitations to the entire petition, then the
8 statute would be silent as to whether the one-year statute of limitations runs
9 from the date of the earlier Supreme Court decision or the later one. "Nothing in
10 the text of [§ 2244(d)(1)(C)] resolves that question." *Id.*

11 Clemente argues that irrespective of the difficulties caused by his
12 proposed interpretation of § 2244(d), the statute forecloses the claim-by-claim
13 approach because it refers to the period within which an "application," rather
14 than a "claim," must be filed. We disagree for the same reasons that the Third
15 Circuit rejected an identical argument:

> 16 [T]here is nothing unusual about the [use of the word "application"
> 17 in] § 2244(d)(1). It is common for statute of limitations provisions to
> 18 be framed using the model of a single-claim case. For example, the
> 19 general statute of limitations for federal claims, 28 U.S.C. § 1658,
> 20 prescribes the date by which "a civil action" must be commenced.

1 State statutes often use similar wording. . . .
2
3 Although these provisions are framed on the model of the one-claim
4 complaint, it is understood that they must be applied separately to
5 each claim when more than one is asserted. . . . [N]o one, we assume,
6 would argue that, in a civil case with multiple federal claims, the
7 statute of limitations must begin on the same date for every claim.
8 Rather, each claim must be analyzed separately.

9 *Fielder*, 379 F.3d at 119 (citations omitted). We conclude that § 2244(d)(1) should
10 be applied in a similar fashion.

11 Clemente's reliance on the statute's use of the word "application" is
12 further undermined by the Supreme Court's decision in *Pace v. DiGuglielmo*, 544
13 U.S. 408 (2005). There, the Court "cited several provisions in AEDPA where a
14 reference to an 'application' nevertheless requires a claim-by-claim analysis."
15 *Zack*, 704 F.3d at 923 (citing *Pace*, 544 U.S. at 415-16). Recognizing that AEDPA's
16 statute of limitation period applies to an "application" for a writ of habeas
17 corpus, the Supreme Court explained that § 2244(d)(1) "then provides one means
18 of calculating the limitation with regard to the 'application' as a whole,
19 § 2244(d)(1)(A) (date of final judgment), *but three others that require claim-by-claim*
20 *consideration*, § 2244(d)(1)(B) (governmental interference); § 2244(d)(1)(C) (new
21 right made retroactive); § 2244(d)(1)(D) (new factual predicate)." *Pace*, 544 U.S. at
22 416 n.6 (emphasis added). Although this language was not necessary to the

1 Supreme Court's holding in *Pace*, and is therefore not binding upon us, "we have
2 an obligation to accord great deference to Supreme Court *dicta*." *Newdow v.*
3 *Peterson*, 753 F.3d 105, 108 n.3 (2d Cir. 2014) (per curiam) (citation and internal
4 quotation marks omitted). That obligation is particularly compelling here
5 because the Court addressed one of the provisions directly at issue in this case—
6 § 2244(d)(1)(D)—and expressly found that it "require[s] claim-by-claim
7 consideration." *Pace*, 544 U.S. at 416 n.6.[5]

8 B.

9 In addition to being incompatible with § 2244(d)'s structure, Clemente's
10 interpretation of the statute undermines Congress's purpose and intent in

[5] Clemente contends that in *Magwood v. Patterson*, 561 U.S. 320 (2010), the Supreme Court effectively ruled that the claim-by-claim approach is inconsistent with § 2244(d). We disagree. *Magwood* concerned the proper interpretation of 28 U.S.C. § 2244(b)(1) and (2), which provide that a "claim presented in a second or successive habeas corpus application" should be dismissed unless certain other conditions are satisfied. *Id.* at 330 (quoting 28 U.S.C. § 2244(b)). The Supreme Court concluded that a habeas petition challenging a "death sentence, imposed as part of resentencing in response to a conditional writ from the District Court," *id.*, was not a "second or successive" application because there was a "new judgment intervening between the two habeas petitions," *id.* at 341 (quoting *Burton v. Stewart*, 549 U.S. 147, 156 (2010) (per curiam)). In so holding, the Supreme Court rejected the respondent's argument that the phrase "second or successive" in § 2244(b) should be read to modify "claims," not "application," and explained that such an interpretation of the statutory text would "elid[e] the difference between an 'application' and a 'claim.'" *Id.* at 334 (alteration in original) (citation and internal quotation marks omitted). But the Supreme Court also recognized that "many of the rules under § 2244(b) focus on claims." *Id.* at 334-35. Because the *Magwood* Court interpreted the text of two provisions not at issue in this case and explicitly confined its holding to those subsections, *Magwood* is inapposite.

1 enacting AEDPA. "[W]e will not interpret a statute in a way 'that apparently
2 frustrates the statute's goals, in the absence of a specific intention otherwise.'"
3 *Gordon*, 726 F.3d at 51 (alteration in original) (quoting *United States v. Livecchi*, 711
4 F.3d 345, 351 (2d Cir. 2013)).

5 Congress enacted AEDPA's statute of limitations to reduce "the potential
6 for delay on the road to finality by restricting the time that a prospective federal
7 habeas petitioner has in which to seek federal habeas review." *Duncan*, 533 U.S.
8 at 179; *see also Zack*, 704 F.3d at 925 ("The Supreme Court has also observed that
9 the purpose of the habeas statute of limitations is to end delays in criminal
10 cases." (citing *Woodford v. Garceau*, 538 U.S. 202, 206 (2003))). To "advance the
11 finality of criminal convictions," Congress "adopted a tight time line" within
12 which state prisoners may file habeas petitions. *Mayle*, 545 U.S. at 662.

13 As the Ninth Circuit observed with respect to the petition then before it,
14 "stretched to its logical extreme," Clemente's proposed interpretation of
15 § 2244(d)(1) "would hold that AEDPA's statute of limitations never completely
16 runs on *any* claim so long as there is a possibility of a timely challenge for *one*
17 claim. There is no evidence that Congress intended such a result when
18 it . . . enact[ed] a one-year statute of limitations." *Mardesich*, 668 F.3d at 1171; *see*

also Fielder, 379 F.3d at 120 (noting that rejection of the claim-by-claim approach would have "the strange effect of permitting a late-accruing federal habeas claim to open the door for the assertion of other claims that had become time-barred years earlier. . . . We cannot think of any reason why Congress would have wanted to produce such a result."); *Zack*, 704 F.3d at 925 (observing that adoption of an application-based approach "allows for the resuscitation of otherwise dormant claims and effectively rewards petitioners for waiting years after their convictions become final to file federal habeas petitions that mix new and timely claims with stale and untimely claims. Such a result contradicts the well-recognized interest in the finality of state court judgments that Congress sought to achieve in enacting the habeas statute of limitations.").

We are "'confident Congress did not want to produce' a result in which a timely claim 'miraculously revive[s]' untimely claims." *Zack*, 704 F.3d at 926 (alteration in original) (quoting *Fielder*, 379 F.3d at 120)); *accord DeCoteau*, 774 F.3d at 1192.

II. Clemente's Claims Are Time-Barred Under 28 U.S.C. § 2244(d)(1)(A)

As noted, Clemente brought claims in his habeas petition that were predicated on arguments that he advanced in the direct appeal from his

1 conviction. The district court concluded that these claims were untimely under
2 28 U.S.C. § 2244(d)(1)(A). Clemente contends that even if the district court did
3 not err by utilizing the claim-by-claim approach, it should not have concluded
4 that these claims were time-barred. He argues that the district court erred in
5 calculating the statutory tolling period for these claims and by finding that
6 Clemente was not entitled to equitable tolling.[6] For the following reasons, we
7 agree with the district court that Clemente's claims are time-barred.

8 A.

9 Clemente contends that the district court erred in calculating the statutory
10 tolling period for the claims arising from the direct appeal of his conviction and
11 that these errors caused the district court to mistakenly rule that Clemente was
12 not entitled to equitable tolling. We agree with Clemente that certain parts of the
13 district court's statutory tolling calculations were erroneous. Nonetheless, his

[6] The respondent argues that we should not address these arguments because they are outside the scope of the certificate of appealability. As noted, the certificate of appealability was granted on the issue of "whether the district court properly dismissed some of Appellant's claims as time-barred when it applied 28 U.S.C. § 2244(d)(1) to his individual claims, rather than to his entire petition." Docket No. 25. Because these arguments go to whether the "district court properly dismissed some of Appellant's claims as time-barred," we construe the certificate of appealability to encompass these issues. In any event, even if we were to accept the respondent's narrow reading of the certificate of appealability, we have the discretion to "expand a petitioner's [certificate of appealability] when appropriate," *Green v. Mazzucca*, 377 F.3d 182, 183 (2d Cir. 2004) (per curiam), and would choose to do so here.

1 claims remain time-barred under the proper application of AEDPA's statutory
2 tolling provisions and the equitable tolling doctrine.

3 As relevant here, AEDPA's one-year limitations period runs from the date
4 on which a petitioner's conviction became final. 28 U.S.C. § 2244(d)(1)(A); *Smith*
5 *v. McGinnis*, 208 F.3d 13, 15 (2d Cir. 2000) (per curiam). A petitioner's conviction
6 becomes "final" under AEDPA "after the denial of certiorari or the expiration of
7 time for seeking certiorari." *Williams v. Artuz*, 237 F.3d 147, 151 (2d Cir. 2001).

8 Clemente's conviction became "final," then, when the Supreme Court
9 denied his petition for a writ of certiorari on June 4, 2012. *Clemente*, 566 U.S. at
10 1035.

11 B.

12 AEDPA's statutory tolling provision provides that the "time during which
13 a properly filed application for State post-conviction or other collateral review
14 with respect to the pertinent judgment or claim is pending shall not be counted
15 toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).
16 "[A] state-court petition is 'pending' from the time it is first filed until finally
17 disposed of and further appellate review is unavailable under the particular

1 state's procedures." *Bennett v. Artuz*, 199 F.3d 116, 120 (2d Cir. 1999), *aff'd*, 531
2 U.S. 4 (2000).

3 To repeat, the one-year statute of limitations applicable to Clemente's
4 claims predicated on the arguments that he raised in his direct appeal started to
5 run on June 4, 2012. On December 27, 2012—206 days later—Clemente filed a
6 § 440.10 motion to vacate his conviction in state court. Therefore, on December
7 27, 2012, AEDPA's statute of limitations paused with 159 days remaining on the
8 clock.

9 The state trial court denied Clemente's motion to vacate on April 18, 2013.
10 The district court concluded the "AEDPA limitations started running again" on
11 that date. *Clemente*, 2019 WL 181304, at *4. We disagree. Because state court
12 applications are "pending" for the purposes of AEDPA's tolling provisions "until
13 finally disposed of *and* further appellate review is unavailable under the
14 particular state's procedures," *Bennett*, 199 F.3d at 120 (emphasis added), the
15 limitations period did not begin to run again until May 18, 2013—the date on
16 which Clemente's time to seek a discretionary appeal in the Appellate Division
17 expired, *see* N.Y. Crim. Proc. Law §§ 450.15(1), 460.10(1).

1 On September 11, 2013—116 days after May 18, 2013—Clemente filed his
2 first *coram nobis* petition in the Appellate Division. AEDPA's statute of
3 limitations clock was paused again on that date, at which point 322 days of
4 Clemente's one-year limitations period had expired.

5 The Appellate Division denied Clemente's first *coram nobis* petition on May
6 4, 2016. The district court concluded that the "limitations began to run again" on
7 that date. *Clemente*, 2019 WL 181304, at *4. In so holding, the district court relied
8 on caselaw that predated relevant amendments to New York Criminal Procedure
9 Law § 450.90. *Id.* at *4 n.4 ("AEDPA's statute of limitations is not tolled during
10 the interval when a petitioner seeks leave to appeal an Appellate Division's
11 denial of a *coram nobis* motion because the *coram nobis* motion ceases to be
12 'pending' when it is denied by the Appellate Division." (quoting *Clark v. Barkley*,
13 51 F. App'x 332, 334 (2d Cir. 2002) (summary order))). After November 1, 2002,
14 New York Criminal Procedure Law § 450.90, as amended (*see* 2002 N.Y. Sess.
15 Laws ch. 498 (amending § 450.90)), affords petitioners the opportunity to seek
16 leave to appeal from the Appellate Division's denial of a petition for writ of error
17 *coram nobis* alleging wrongful deprivation of appellate counsel to the Court of
18 Appeals. *See* N.Y. Crim. Proc. Law § 450.90; *People v. Jones*, 100 N.Y.2d 606, 607

1 (2003). Accordingly, the AEDPA clock did not restart until August 11, 2016—the
2 date on which the Court of Appeals denied Clemente leave to appeal the
3 Appellate Division's ruling.[7]

4 On August 11, 2016, Clemente had 43 days remaining to timely file his
5 federal habeas corpus petition. Those 43 days passed on September 23, 2016, and
6 Clemente's time to comply with the statute of limitations thus expired as to those
7 claims. He did not file a federal habeas corpus petition until March 28, 2018.
8 Accordingly, under AEDPA's statute of limitations and statutory-tolling
9 provisions, any habeas claim predicated on the arguments that Clemente raised
10 in his direct appeal then became, and now remains, untimely.

11 C.

12 Clemente asks that we nonetheless vacate the district court's decision
13 dismissing his claims and remand for the court to reconsider its conclusion that
14 he is not entitled to equitable tolling.

[7] Although Clemente had 90 days after the Court of Appeals's order to seek certiorari from the Supreme Court, he did not file a petition for any such writ. AEDPA's statute of limitations therefore restarted immediately after the Court of Appeals's order. *Smaldone v. Senkowski*, 273 F.3d 133, 138 (2d Cir. 2001) (explaining that we "exclude from tolling under 28 U.S.C. § 2244(d)(2) the ninety-day period during which a petitioner could have but did not file a certiorari petition to the United States Supreme Court from the denial of a state post-conviction petition.").

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: July 05, 2023
Docket #: 21-279pr
Short Title: Clemente v. Lee

DC Docket #: 18-cv-1978
DC Court: EDNY (BROOKLYN)
DC Judge: Donnelly
DC Judge: Bloom

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

____

and in favor of

____

for insertion in the mandate.

Docketing Fee ____________________

Costs of printing appendix (necessary copies _____________) ____________________

Costs of printing brief (necessary copies _____________ ____) ____________________

Costs of printing reply brief (necessary copies _____________) ____________________

(VERIFICATION HERE)

____
Signature

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-- X

VICTOR CLEMENTE, :

Petitioner, :

: **MEMORANDUM**

- against - : **DECISION AND ORDER**

18-CV-1978 (AMD) (LB)

WILLIAM LEE, :

Respondent.

-- X

ANN M. DONNELLY, United States District Judge.

On March 28, 2018, the petitioner, currently incarcerated at Eastern New York Correctional Facility, brought this action seeking habeas corpus relief pursuant to 28 U.S.C. § 2254. The petitioner claims that he was denied his Sixth Amendment right to a speedy trial and that one of his appellate lawyers was ineffective. For the following reasons, the petitioner's motion is denied.

BACKGROUND

I. Arrest & Indictment

On November 20, 1986, the petitioner shot and killed Fred Drapete. He was arrested and charged with murder in the second degree and criminal possession of a weapon in the second and third degrees. (ECF No. 13 at 14.) Over the next year, the prosecutors repeatedly announced that they were not ready for trial because they could not find two eyewitnesses—the petitioner's mother and sister. On January 26, 1988, the petitioner, who was released on bond, moved to dismiss the indictment pursuant to Section 30.20 of the New York Criminal Procedure Law ("C.P.L."). (ECF No. 13 at 57.) He claimed that he had been materially prejudiced by the delay in bringing his case to trial because a potentially exculpatory witness had moved away. (*Id.* at 58-59.) The prosecution responded that the defendant consented to multiple adjournments, that

it was working diligently with the FBI to locate the witnesses and that the proffered testimony of the missing witness was not exculpatory. (*Id.* at 62-64.) On March 22, 1988, the Honorable Seymour Rotker dismissed the indictment, finding the petitioner was denied his right to a speedy trial. (*Id.* at 69-72.)

II. Appeal

The prosecution appealed the dismissal on April 12, 1988. (*Id.* at 73.) At that point, the petitioner's trial lawyer was no longer representing him, and no brief was filed on the petitioner's behalf. The Appellate Division reversed and reinstated the indictment, ruling that the 14-month delay "was not an extraordinarily long time, given the seriousness of the charge, which, by necessity, requires careful preparation." *People v. Clemente*, 541 N.Y.S.2d 583, 584 (2d Dep't 1989). Noting that the petitioner was at liberty, the court also found that the prosecution's effort to locate witnesses was "a valid reason for delay." *Id.* The court remitted the case for further proceedings on the indictment. *See id.* When the petitioner failed to appear for his June 13, 1989 court date, a warrant was issued for his arrest.

III. Trial

More than 15 years later, in December of 2006, detectives arrested the petitioner in California, where he had been since 1988. After the petitioner was returned to New York, he moved to dismiss the indictment pursuant to C.P.L § 30.20, arguing that the prosecutors did not exercise due diligence in searching for him after the warrant issued in 1989. (ECF No. 13-3 at 55-56.) The Honorable Robert Hanophy denied the motion, finding that the petitioner had avoided apprehension and was thus not deprived of his right to a speedy trial. (ECF No. 13-2 at 351.)

The petitioner went to trial before the Honorable Richard L. Buchter and a jury on March 31, 2008. (ECF No. 13-3 at 238.) The prosecution established the following facts.

On November 20, 1986, officers responding to a reported shooting at 160-16 79th Avenue Flushing, New York found Fred Drapete in the first floor apartment; he was lying face down and had nine bullet holes in his body. (ECF No. 13-4 at 143-145.) The petitioner, who lived in the first floor apartment with his family, was sitting next to the victim. (*Id.* at 162-63.) As officers escorted the petitioner to the patrol car, he looked down at the victim and said, "I have no regrets about that. I have no regrets." (*Id.* at 203.) Detective Peter Fiorello told the petitioner to stop talking and took him to the 107th precinct. (*Id.*) Detective Frank Ahearn questioned the petitioner when he arrived at the precinct. (*Id.* at 231.) The petitioner said that he fought with the victim, who had a gun, and that the victim shot himself. (*Id.* at 255.)

Another officer found the victim's two daughters, who were three and four-years-old, hiding in the basement apartment where the victim lived with his wife and two girls. (*Id.* at 52, 146.) When the victim's wife arrived shortly thereafter, her younger daughter told her, "Uncle June shot poppa." (*Id.* at 76-77.) The girl said that "Uncle June" shot the mirror in the basement, then shot the victim in the arm and followed him upstairs where the children heard more gunshots. (*Id.*)

Detectives found a 9-millimeter caliber Smith and Wesson semi-automatic pistol lying near the victim's body; the slide on the gun was pulled back and there were no bullets in the gun's clip or in the chamber. (*Id.* at 106-09.) There were multiple deformed bullets and shell casings in the basement apartment, the foyer and in the first floor apartment; testing proved that all the ballistics evidence came from the Smith and Wesson. (*Id.* at 106-109, 221.) An autopsy of the victim established that he was shot nine times. (*Id.* at 262-63.) Six of the bullets entered

his body through the back; the fatal wound, which also entered the victim's back, perforated his lung and aortic arteries. (*Id.* at 262-65, 274-75.)

The defense did not call any witnesses.

On April 8, 2008, the jury convicted the petitioner of second degree murder and weapons possession. (ECF No. 13-5 at 26.) Judge Buchter sentenced the petitioner to concurrent indeterminate prison terms of twenty years to life for murder and five to fifteen years for the weapons possession. (*Id.* at 53.)

PROCEDURAL HISTORY

I. Direct Appeal

The petitioner, represented by counsel, appealed his conviction to the Appellate Division, Second Department. (ECF No. 13 at 81.) He argued that he was denied his Sixth Amendment right to a speedy trial. (*Id.* at 108.) He also challenged the trial court's evidentiary rulings, the prosecutor's comments in summation, and the court's charge to the jury. (*Id.* at 142-63.) Finally, the petitioner claimed that his trial counsel was ineffective for asking the victim's wife about a civil settlement. (*Id.*)

On May 3, 2011, the Appellate Division affirmed the petitioner's conviction, finding that the trial court "properly determined that the defendant's constitutional right to a speedy trial was not violated." *People v. Clemente*, 84 A.D.3d 829, 830 (2d Dep't 2011). The Appellate Division rejected the petitioner's claims about the prosecutor's summation, the trial court's evidentiary rulings, and the jury charge. *Id.* at 830-31. Finally, the court concluded that the petitioner's trial lawyer provided him with effective representation. *Id.* at 831.

The Court of Appeals denied the petitioner's application for leave to appeal on June 23, 2011, and denied his motion for reconsideration on August 31, 2011. *People v. Clemente*, 17 N.Y.3d 793 (2011), *reh'g denied*, 17 N.Y.3d 814 (2011).

On June 4, 2012, the United States Supreme Court denied the petitioner's petition for a writ of certiorari. *Clemente v. New York*, 566 U.S. 1035 (2012).

II. 440.10 Motion to Vacate Judgment

On December 27, 2012, the petitioner moved *pro se* to vacate the conviction under C.P.L. § 440.10. (ECF No. 13 at 307-14.) He argued that he was denied his right to counsel when the Appellate Division decided the prosecution's appeal of Judge Rotker's speedy trial dismissal without hearing from the petitioner. (*Id.*)

Judge Buchter denied the petitioner's motion on April 18, 2013, ruling that "[the trial] court [was] not the proper forum for the relief requested," and that "the proper forum for the relief defendant requests is the Appellate Division." (ECF No. 13-1 at 10-12.)

III. First Writ of Error *Coram Nobis*

On September 11, 2013, the petitioner moved *pro se* for *coram nobis* relief in the Appellate Division on the same ground—that his conviction should be vacated because he was not represented in the 1989 appeal. (*Id.* at 21-32.)

On February 11, 2015, the Appellate Division granted the petitioner's writ of error *coram nobis* in part, concluding that the petitioner's right to appellate counsel was violated. *People v. Clemente*, 125 A.D.3d 786, 786 (2d Dep't 2015) (citation omitted). The court appointed counsel to represent the petitioner, set a briefing schedule, and held the petitioner's application in abeyance.[1] *Id.* The petitioner, represented by counsel, argued that the trial court properly

[1] The Court of Appeals denied the petitioner's application for leave to appeal on June 15, 2015. *People v. Clemente*, 25 N.Y.3d 1161 (2015).

dismissed the indictment based on a violation of the petitioner's Sixth Amendment right to a speedy trial. (ECF No. 13-2 at 210.) On May 4, 2016, the Appellate Division found that "there [wa]s no basis to vacate [the] original determination in the decision and order dated May 22, 1989 . . . reversing the order dismissing the indictment, and thereupon reinstating the indictment." *People v. Clemente*, 139 A.D.3d 751, 753 (2d Dep't 2016). The court also denied the "remaining branches of the [petitioner's] application" for a writ of error *coram nobis*. *Id.* at 752. On August 11, 2016, the Court of Appeals denied the petitioner's application for leave to appeal. *People v. Clemente*, 28 N.Y.3d 928 (2016).

IV. Second Writ of Error *Coram Nobis*

On April 5, 2017, the petitioner filed his second *pro se* motion for *coram nobis* relief, arguing that he did not receive effective representation on his direct appeal or on the rehearing of the prosecutor's appeal of the speedy trial dismissal. The petitioner argued that his attorney on direct appeal should have challenged Judge Buchter's response to a jury note. He also claimed that his lawyer on the rehearing was ineffective because she did not argue that the Appellate Division should have vacated his conviction instead of ordering a new appeal. (ECF No. 13-2 at 39-56.)

The Appellate Division denied the petitioner's application on December 13, 2017, because the petitioner "failed to establish that he was denied the effective assistance of appellate counsel." *People v. Clemente*, 156 A.D.3d 716, 717 (2d Dep't 2017). On March 16, 2018, the petitioner's application for leave to appeal was denied. *People v. Clemente*, 31 N.Y.3d 982 (2018).

V. Federal Habeas Proceedings

On March 3, 2017, the petitioner filed a petition for writ of habeas corpus, and made the same arguments that he made on his direct appeal. *Clemente v. Lee*, No. 17-CV-1278 (E.D.N.Y. Mar. 1, 2017), ECF No. 1. About a week after the filing the Court dismissed the petition without prejudice at the petitioner's request. *Clemente v. Lee*, No. 17-CV-1278 (E.D.N.Y. Mar. 22, 2017), ECF Nos. 4, 5.

On March 28, 2018, the petitioner filed this habeas petition. He did not make claims in the petition itself; instead, he referenced the filings in connection with his direct appeal, his first and second writs of error *coram nobis*, and the counseled brief in the re-filed 1989 appeal. (ECF No. 1 at 1-15.) Construing the petitioner's filing to raise the strongest arguments it suggests, I interpreted his petition to raise the claims he raised in state court and argued in the referenced briefs. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

On January 9, 2019, I granted the respondent's motion to dismiss some of the petitioner's the claims as untimely—his challenges to the trial court's evidentiary rulings, the prosecutor's comments in summation, the court's charge to the jury and the court's decision not to dismiss the indictment on speedy trial grounds, as well as challenges to the effectiveness of his trial counsel and his counsel on direct appeal. (ECF No. 14.) On March 8, 2019, the respondent opposed the remaining claims—the ineffective assistance of appellate counsel and speedy trial claims. (ECF No. 15.) For the reasons that follow, I deny the petition for a writ of habeas corpus.

DISCUSSION

A federal court reviewing a habeas petition must not "review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v.*

Thompson, 501 U.S. 722, 729 (1991). That is true whether the state court's decision is based on substantive or procedural state law grounds. *Id.* at 729-30.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires a federal court reviewing a state prisoner's habeas petition to give deference to a state court's decision on the merits. 28 U.S.C. § 2254(a). A federal court may not issue a writ of habeas corpus unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Johnson v. Williams*, 568 U.S. 289, 292 (2013); *Chrysler v. Guiney*, 806 F.3d 104, 116-17 (2d Cir. 2015).

For the purposes of federal habeas review, "clearly established law" means "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state court decision is "contrary to" or an "unreasonable application of" clearly established law if the decision: (1) is contrary to Supreme Court precedent on a question of law; (2) arrives at a conclusion different than that reached by the Supreme Court on "materially indistinguishable" facts; or (3) identifies the correct governing legal rule but unreasonably applies it to the facts of the petitioner's case. *Id.* at 412-13. The court reviews the last reasoned state court decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991); *Jones v. Stinson*, 229 F.3d 112, 118 (2d Cir. 2000). The state court's factual determinations are presumed to be correct, and the petitioner bears the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A petitioner can seek federal habeas corpus relief only after he exhausts state court remedies and gives the state courts a fair and full opportunity to review the merits of the

claim. 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). In other words, a petitioner must present "the essential factual and legal premises of his federal constitutional claim to the highest state court capable of reviewing it." *Jackson v. Conway*, 763 F.3d 115, 133 (2d Cir. 2014) (quoting *Rosa v. McCray*, 396 F.3d 210, 217 (2d Cir. 2005)).

I. State Court Remedy

As explained above, in 1988 the prosecution appealed the trial court's dismissal of the indictment on speedy trial grounds. At that point, the petitioner's trial lawyer was no longer representing him, and the petitioner filed no opposition to the prosecution's appeal. The Appellate Division reversed the lower court decision and reinstated the indictment. The petitioner moved for *coram nobis* relief claiming that his conviction should be vacated because he was denied his right to appellate counsel; while the Appellate Division agreed that he had been denied the right to counsel, it did not vacate the conviction. Rather, the court ordered *de novo* review of the prosecution's appeal from the trial court's order dismissing the indictment. The Appellate Division appointed counsel for the petitioner, and reserved judgment on the merits until both sides briefed the appeal. The Appellate Division ultimately concluded that its original decision reinstating the indictment was correct. The petitioner argues that the Appellate Division should have vacated the conviction and released him from custody. The respondent opposes.

First, the respondent argues that the petitioner's claim does not present a federal constitutional issue. *Estelle v. McGuire*, 502 U.S. 62, 71 (1991) ("[I]t is not the province of a federal habeas court to reexamine state court determinations on state-law questions. In conducting habeas corpus review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *see also Ashby v. Senkowski*, 2003 WL 21518841, at *4 (E.D.N.Y. July 3, 2003) ("[F]ederal habeas corpus relief is not

available for state law errors that do not amount to federal constitutional violations."). Federal law sets "certain minimum requirements that States must meet but may exceed in providing appropriate relief." *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008) (quoting *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987)). The "remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law." *Id.* A federal court should reverse a state court remedy only if the "chosen remedy [was] so inadequate that it amounted to a violation of defendant's constitutional rights." *Tyson v. Keane*, 159 F.3d 732, 738 (2d Cir. 1998).

The Appellate Division's decision to undertake a *de novo* review did not violate the petitioner's constitutional rights. "Where the state court has violated a defendant's due process rights, the Supremacy Clause mandates that the defendant be given another appeal pursuant to a federal writ of habeas corpus even if state law does not procedurally provide for such." *Restivo v. Walker*, 2000 WL 1375587, at *2 (W.D.N.Y. Sept. 20, 2000). That is what the Appellate Division did. After determining that the petitioner's rights were violated, the court assigned him a lawyer, ordered new briefing on the prosecutor's appeal, and considered the issue anew. As the respondent points out, federal courts have ordered similar remedies under similar circumstances. For example, in *Taveras v. Smith*, the Second Circuit Court of Appeals affirmed a district court order denying habeas corpus on the condition that the Appellate Division reinstate the appeal. 463 F.3d 141, 151 (2d Cir. 2006). Thus, the Appellate Division's remedy was not "contrary to," or "an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d).

II. Ineffective Assistance of Counsel

The petitioner also renews the claim that he made to the Appellate Division—that the lawyer who represented him on the prosecution's appeal of the trial court's speedy trial dismissal was ineffective. A petitioner claiming that his lawyer was ineffective must meet the two-pronged test articulated in *Strickland v. Washington*: (1) "that counsel's representation fell below an objective standard of reasonableness," and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 694 (1984). The Supreme Court has advised that in state habeas petitions this inquiry is "different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). Rather, state courts must be granted a "deference and latitude that are not in operation when the case involves a review under the Strickland standard itself." *Id.* A federal court "must determine what arguments or theories supported, or . . . could have supported, the state court's decision," and must then determine "whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the Supreme Court. *Id.* at 102. The standard was "meant" to be an exacting one; a state habeas petitioner must demonstrate that the state court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement." *Id.* at 102-03; *see also Shinn v. Kayer*, 592 U.S. ___ (2020) ("The prisoner must show that the state court's decision is so obviously wrong that its error lies beyond any possibility for fairminded disagreement." (quotation and citation omitted)).

Under the first prong of Strickland, "[a] convicted petitioner . . . must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional

judgment." *Strickland*, 466 U.S. at 690. "Judicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "[R]elief may be warranted when a decision by counsel cannot be justified as a result of some kind of plausible trial strategy." *Jackson v. Leonardo*, 162 F.3d 81, 85 (2d Cir. 1998) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986)).

To satisfy the second prong, the petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "The level of prejudice the [petitioner] need demonstrate lies between prejudice that 'had some conceivable effect' and prejudice that 'more likely than not altered the outcome in the case.'" *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001) (quoting *Strickland*, 466 U.S. at 693). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

The petitioner argues that his lawyer should have asked the Appellate Division to vacate his conviction rather than ordering new briefing on the speedy trial dismissal. Counsel did make that argument to the Court of Appeals in separate leave applications, first after the Appellate Division ordered new briefing on the prosecution's appeal and again after the Appellate Division adhered to its original decision reinstating the indictment.[2] (ECF No. 13-1 at 270; ECF No. 13-2 at 24.) In both applications, counsel urged the Court of Appeals to "grant leave to clarify the proper remedy for when a defendant establishes a violation of his federal and state constitutional

[2] The petitioner also filed *pro se* applications for leave to appeal.

right to counsel on appeal," and to resolve a split between the Appellate Divisions. (ECF No. 13-1 at 273; ECF No. 13-2 at 27.)

There is no merit to the petitioner's claim that counsel should have made these arguments to the Appellate Division on the rehearing of the prosecutor's appeal of the speedy trial dismissal. As counsel explained in her affirmation when the petitioner made this claim in state court, the scope of her assignment was "limited to representing the [petitioner] on the People's appeal from the 1988 dismissal order" and she could not argue in the respondent's brief that the Appellate Division's *coram nobis* remedy was "inadequate or inappropriate." (ECF No. 13-2 at 335.)

Even if counsel had advanced the argument to the Appellate Division, she would not have succeeded. The Appellate Division's remedy was the correct one. As counsel explained, "[t]he Court of Appeals . . . has consistently held that when a criminal defendant is deprived of appellate counsel, the appellate decision must be vacated and the case remanded for a *de novo* appeal." (ECF No. 13-2 at 336.) Thus, she had "no basis to argue that [the petitioner's] case should be dismissed entirely." (*Id.* at 337.) *See, e.g.*, *People v. Johnson*, 43 A.D.3d 1453, 841 (4th Dep't 2007) (because the defendant was denied the effective assistance of appellate counsel, the appropriate remedy was to vacate and consider the appeal *de novo*); *People v. LeFrois*, 151 A.D.2d 1046 (4th Dep't 1989) (same); *People v. Vasquez*, 70 N.Y.2d 1, 4 (1987) (same); *Torres v. McGrath*, 407 F.Supp.2d 551, 562 (S.D.N.Y. 2006) (the "failure to make a meritless argument does not amount to ineffective assistance.'" (quotation omitted)). "To establish prejudice in the appellate context, a petitioner must demonstrate that there was a reasonable probability that his claim would have been successful" before the state's highest court. *Hemstreet v. Greiner*, 367 F.3d 135, 142 (2d Cir. 2004), *vacated on other grounds*, 378 F.3d 265 (2d Cir. 2004); *see also*

Sellan v. Kuhlman, 261 F.3d 303, 317 (2d Cir. 2001) ("[The] process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." (internal quotation marks omitted)). Appellate counsel was not ineffective for failing to advance a meritless claim.

III. Speedy Trial

Finally, the petitioner argues that the Appellate Division's 2016 decision to adhere to its original 1988 decision reinstating the indictment was contrary to or an unreasonable application of clearly established federal law. As explained above, following *de novo* review of the trial court's decision to dismiss the petitioner's indictment for speedy trial act violations in 1988, the Appellate Division found that "there [wa]s no basis to vacate [the] original determination in the decision and order dated May 22, 1989 . . . reversing the order dismissing the indictment, and thereupon reinstating the indictment." *People v. Clemente*, 139 A.D.3d 751, 753 (2d Dep't 2016).

The Supreme Court has enumerated a four-factor balancing test for a court to consider in assessing whether a defendant has been denied his right to a speedy trial: the length of the delay, the reasons for the delay, the defendant's assertion of his right, and the extent of prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. McGrath*, 622 F.2d 36, 40 (2d Cir. 1980). The Court emphasized that these factors have no "talismanic qualities," and none is "either a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial." *Barker*, 407 U.S. at 533. Rather, they are "related factors" that "must be considered together with such other circumstances as may be relevant." *Id.*

The Appellate Division, which cited *Barker* in its decision, properly applied the *Barker* factors in determining that the petitioner was not denied his right to a speedy trial. First, the

petitioner's indictment had been pending for about 14 months when the trial court dismissed it. While there is no bright-line rule for what constitutes an unconstitutional delay, courts have held that significantly longer delays did not violate a defendant's right to a speedy trial. *See United States v. Fitzpatrick*, 437 F.2d 19, 26 (2d Cir. 1970) (30 month delay did not violate the defendant's right to a speedy trial); *Flowers v. Warden, Connecticut Corr. Institution, Somers*, 853 F.2d 131, 133 (2d Cir. 1988) (17-month delay, "while lengthy, is nevertheless considerably shorter than those in other cases where we have found no speedy trial violation.") (citing *McGrath*, 622 F.2d at 36 (24 months); *United States v. Lane*, 561 F.2d 1075, 1078 (2d Cir. 1977) (58 months)); *United States v. Fasanaro*, 471 F.2d 717 (2d Cir. 1973) (no violation despite a delay of over four years); *United States v. Saglimbene*, 471 F.2d 16, 17 (2d Cir. 1972) (no violation despite a delay of six years).

Second, the Appellate Division's conclusion that there was a valid reason for the delay—the need to locate witnesses—was correct. *See Barker*, 407 U.S. at 531 ("[A] valid reason, such as a missing witness, should serve to justify appropriate delay."); *see also Brown v. Perez*, 2013 WL 5913306, at *12 (S.D.N.Y. Oct. 31, 2013), *report and recommendation adopted*, 2014 WL 5343309 (S.D.N.Y. Oct. 21, 2014) (the government's search for the only two witnesses who identified the defendant in a lineup was a justifiable delay); *Mallet v. Miller*, 432 F. Supp. 2d 366, 383 (S.D.N.Y. 2006) (the inability to locate the chief prosecution witness was a valid cause for delay). Moreover, there is no suggestion that the delay was "attributable either to deliberate procrastination or even negligent inaction on the part of the Government." *United States v. Lane*, 561 F.2d 1075, 1079 (2d Cir. 1977). The prosecution coordinated with Interpol and the F.B.I. to attempt to locate two eyewitnesses to the murder—the petitioner's mother and sister—who they

believed had moved to the Philippines, and the petitioner has not presented any evidence that the prosecution was dilatory in these efforts.[3]

Finally, the Appellate Division concluded that the petitioner was not prejudiced by the delay. The petitioner argued that while the case was pending an allegedly material witness "moved without leaving a forwarding address or any other contact information." (ECF No. 13-1 at 394.) According to the petitioner, this witness, a bar owner, "could have verified that someone had tampered with [the petitioner's] drink" and that the petitioner was "experiencing psychotic delusions" on the night of the murder. (*Id.* at 395.) Even assuming that the bartender could have offered such testimony, or that a court would have admitted it, courts have held that the unavailability of witnesses does not outweigh the other *Barker* factors. *See, e.g.*, *U.S. ex re. Spina v. McQuillan*, 525 F.2d 813, 818 (2d Cir. 1975) (no speedy-trial violation even though defendant alleged that some of his witnesses became unavailable for trial); *United States v. Lasker*, 481 F.2d 229, 237 (2d Cir. 1973) (prejudice was "insubstantial" where defendant alleged "general claims of prejudice, such as damage to reputation . . . and the dulling of witnesses' memories," and two character witnesses for defendant died); *United States v. Infanti*, 474 F.2d 522, 528 (2d Cir. 1973) (no speedy trial violation from 28-month delay even though defendant alleged that two witnesses critical to his case had died).

In short, the Appellate Division's decision to reverse the trial court's dismissal of the indictment was not contrary to or an unreasonable application of established federal law.

CONCLUSION

Accordingly, the petition for a writ of habeas corpus is denied in its entirety and the case is dismissed. A certificate of appealability will not be issued. *See* 28 U.S.C. § 2253(c). The

[3] There is no dispute about the third factor—whether the petitioner asserted his right. He did.

Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962). The Clerk of Court is respectfully directed to enter judgment and close this case.

SO ORDERED.

s/Ann M. Donnelly
ANN M. DONNELLY
United States District Judge

Dated: Brooklyn, New York
January 4, 2021