

App. 1

865 F.3d 48

United States Court of Appeals,
Second Circuit.

Israel WEINGARTEN, Petitioner-Appellant,

v.

UNITED STATES of America, Respondent-Appellee.

Docket No. 15-923

|
August Term 2016

|
Argued: May 15, 2017

|
Decided: July 27, 2017

Appeal from the United States District Court for
the Eastern District of New York

Attorneys and Law Firms

TODD W. BURNS, Burns & Cohan, San Diego, CA
(Jodi D. Thorp, Clarke, Johnston, Thorp & Rice, San Di-
ego, CA, on the brief), for petitioner-appellant.

JENNIFER M. SASSO, Assistant United States Attor-
ney (Jo Ann M. Navickas, Assistant United States At-
torney, on the brief), for Bridget M. Rhode, Acting
United States Attorney for the Eastern District of New
York, Brooklyn, NY, for respondent-appellee.

Before: Parker, Wesley, and Droney, Circuit
Judges.

Opinion

Wesley, Circuit Judge:

In 2008, petitioner-appellant Israel Weingarten was indicted on five counts of violating 18 U.S.C. § 2423 for sexually abusing his then-sixteen-year-old daughter on three international trips in 1997. Weingarten was convicted on all counts following a jury trial, and he was sentenced on four of those counts after one was vacated on direct appeal. He now appeals from a March 8, 2016 order of the United States District Court for the Eastern District of New York (Gleeson, *J.*) denying relief under 28 U.S.C. § 2255. Weingarten's § 2255 petition argued, *inter alia*, that his trial counsel failed to provide constitutionally effective assistance when they conceded before trial that the charges were timely under the applicable statute of limitations, 18 U.S.C. § 3283 (2003). Weingarten contends his counsel should have argued that (1) the 2003 version of § 3283 does not apply retroactively to his 1997 offense conduct and, alternatively, (2) under the categorical approach, § 2423 charges are subject to the default five-year federal criminal limitations period, 18 U.S.C. § 3282, rather than the extended limitations period for child sexual abuse offenses, § 3283. Because counsel's decision to forgo these arguments was not objectively unreasonable, we AFFIRM the order of the District Court.¹

¹ Weingarten also argues (1) his trial counsel provided ineffective assistance because they were unprepared, (2) his sentencing counsel provided ineffective assistance by failing to object to

I.

The facts and procedural history surrounding Weingarten’s case are discussed in detail in our opinions in his direct appeals, *United States v. Weingarten* (“*Weingarten I*”), 632 F.3d 60, 62-63 (2d Cir. 2011), and *United States v. Weingarten* (“*Weingarten II*”), 713 F.3d 704, 707-08 (2d Cir. 2013). We relate here only the events relevant to the narrow statute of limitations issue before us in this opinion.

A.

Weingarten and his now-ex-wife have eight children. Jane Doe, the victim in this case and their eldest daughter, was born in 1981.

The Weingartens lived in Antwerp, Belgium for much of Doe’s early life. When Doe was nine or ten years old, Weingarten began to abuse her sexually. Doe started resisting her father’s advances when she was thirteen or fourteen years old and eventually complained to her school principal about the abuse.

In April 1997, Weingarten moved his family to Bet Shemesh, Israel as a result of his daughter’s compliant. Weingarten continued to abuse Doe in Israel.

In late July 1997, Weingarten took Doe, who was sixteen at the time, on a trip from their home in Israel

a sentencing consideration, and (3) the Government committed prosecutorial misconduct. We AFFIRM the District Court’s rejection of these arguments in a summary order issued simultaneously with this opinion.

App. 4

to visit his ailing father in Brooklyn, New York. Weingarten and Doe stayed in Brooklyn for roughly one month. Weingarten sexually abused Doe during that time.

In August 1997, Weingarten transported Doe from Brooklyn to the old family home in Antwerp, where they remained for approximately a month. While in Belgium, Weingarten sexually abused Doe “night and day, every day.” *Weingarten I*, 632 F.3d at 63 (quoting Trial Tr. 290:14).

Doe returned to Israel in September of 1997 and told her mother of her father’s abuse shortly after returning home. Doe’s mother helped Doe move to a boarding school in England for the remainder of her secondary education, but no one reported Weingarten’s conduct to relevant law enforcement authorities.

Doe eventually immigrated to the United States. Her entire family, including her father, a United States citizen, followed soon thereafter and settled in New York. Weingarten and his wife divorced three years later. Despite allegations from his wife in post-divorce custody proceedings that he sexually abused Doe, Weingarten was awarded sole custody of his minor children in 2004.

B.

Weingarten’s 1997 abuse of Doe eventually came to the attention of federal authorities. On August 18, 2008, a federal grand jury in the Eastern District of

App. 5

New York indicted Weingarten for his 1997 trips with Doe on two counts of transporting a minor in foreign commerce for the purpose of engaging in criminal sexual activity in violation of 18 U.S.C. § 2423(a) and three counts of traveling in foreign commerce for the purpose of engaging in sexual conduct with a minor in violation of 18 U.S.C. § 2423(b).

On November 26, 2008, Weingarten moved to dismiss the indictment on two grounds relevant to this appeal. First, Weingarten argued that Count Three of the indictment, which involved Weingarten’s April 1997 trip from Belgium to Israel, should be dismissed because it lacked a territorial nexus with the United States. Second, Weingarten argued the entire indictment should be dismissed because the eleven-year delay between his offense conduct and the indictment violated the Due Process Clause of the Fifth Amendment to the United States Constitution. In arguing pre-indictment delay, Weingarten explicitly conceded that his indictment was timely because it was subject to the 2003 version of 18 U.S.C. § 3283, which permitted the prosecution of “offense[s] involving the sexual . . . abuse . . . of a child under the age of 18 years . . . during the life of the child.” PROTECT Act, Pub. L. No. 108-21, § 202, 117 Stat. 650, 660 (2003).² He insisted

² Although Weingarten stated in his motion to dismiss that he believed the 2003 version of § 3283 applied to his case, he quoted language from the 2006 version of § 3283, which provides a limitations period in child sexual abuse cases that runs for the life of the child “or . . . ten years after the offense, whichever is longer.” Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1182(c), 119

App. 6

nevertheless that the indictment was unconstitutional because he was “substantially prejudiced” by the delay. J.A. 763.

The District Court denied Weingarten’s motion in early 2009. Weingarten was tried before a jury and convicted on all five counts.

Weingarten appealed his convictions to this Court. *Weingarten I*, 632 F.3d 60. He argued, *inter alia*, that the District Court erred in denying his motion to dismiss Count Three for want of a territorial nexus with the United States. *See id.* at 63. He did not raise a statute of limitations argument. We agreed that § 2423(b) requires a territorial nexus with the United States and that Weingarten’s Antwerp-to-Israel trip did not satisfy that requirement. As a result, we vacated Weingarten’s conviction on Count Three, affirmed Weingarten’s remaining counts of conviction, and remanded for resentencing. *See id.* at 64-71; *United States v. Weingarten*, 409 Fed.Appx. 433 (2d Cir. 2011).

On remand, the District Court sentenced Weingarten to thirty years’ imprisonment, which we affirmed and which he is currently serving. *Weingarten II*, 713 F.3d at 708-16.

Stat. 2960, 3127. Throughout the present § 2255 litigation, the parties have treated Weingarten’s motion as conceding that the 2003 version applied notwithstanding the 2006 quotation. We adopt the same interpretation.

App. 7

C.

Weingarten timely petitioned the District Court for relief under 28 U.S.C. § 2255, represented for the first time by present counsel. Weingarten argued, *inter alia*, that he was denied effective assistance of counsel because trial counsel conceded the indictment was timely under 18 U.S.C. § 3283 (2003). The District Court denied Weingarten's petition, stating:

I think the [G]overnment is correct that the proper statute of limitations was [§] 3283. I agree that transporting a minor with the intent to engage in criminal sexual activity involved sexual abuse of a minor. I also agree that the post-2003 version of the statute applies to this case.

Special App. 29. We issued Weingarten a certificate of appealability to contest that decision.

II.

As noted, Weingarten argues he was denied his Sixth Amendment right to counsel because his trial counsel conceded the indictment was timely. He offers two arguments that he believes counsel should have made instead of conceding timeliness. First, Weingarten asserts counsel should have argued the shorter limitations period in the 1994 version of § 3283 applied to his 1997 offense conduct because Congress did not intend the longer period in the 2003 version of § 3283 to apply retroactively. Second, Weingarten asserts counsel should have argued the standard

App. 8

five-year limitations period for federal crimes provided in 18 U.S.C. § 3282 applied to his conduct because, under the categorical approach, § 3283 does not apply to 18 U.S.C. § 2423 offenses. Neither argument warrants relief under § 2255.³

A.

There is “a strong presumption that counsel’s conduct fell within the wide range of professional assistance.” *Lynch v. Dolce*, 789 F.3d 303, 311 (2d Cir. 2015) (brackets omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To overcome that presumption, a petitioner must establish two elements. First, the petitioner must show that counsel’s performance was deficient by demonstrating that the representation “fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Second, the petitioner must show that counsel’s deficient representation was prejudicial to the defense by establishing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694, 104 S.Ct. 2052.

B.

Weingarten’s trial counsel submitted a sworn affidavit in the § 2255 proceeding in which they justified

³ Our review is *de novo*. *Puglisi v. United States*, 586 F.3d 209, 215 (2d Cir. 2009).

the decision to forgo a statute of limitations defense as “a technique of writing and of . . . strategy.” App. 447. Weingarten’s counsel considered the statute of limitations defense “tenuous” and believed it would “clutter” the motion to dismiss and distract from the motion’s other “strong point[s].” App. 448. That decision was reasonable under the circumstances of this case.

The Supreme Court long ago made clear that the Sixth Amendment does not require counsel to raise every non-frivolous argument a client requests. See *Jones v. Barnes*, 463 U.S. 745, 753-54, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).⁴ It is the very function of an effective legal counselor to select among the available arguments and raise only “the most promising issues for review.” *Jones*, 463 U.S. at 752, 103 S.Ct. 3308. Such a tactic avoids cluttering the court with unnecessary arguments that would “dilute the force of the stronger ones.” *Id.* Courts on collateral review may not “second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client.” *Id.* at 754, 103 S.Ct. 3308.

⁴ Although *Jones* addressed whether appellate counsel’s decision to forgo arguments constituted ineffective assistance, it informs our analysis of trial counsel’s conduct in this case. See *Thomas v. United States*, 737 F.3d 1202, 1208-09 (8th Cir. 2013) (applying *Jones* in a § 2255 challenge to “trial counsel’s decision not to move to dismiss the indictment”); cf. *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) (“Although the *Strickland* test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel.”).

Nevertheless, failure to raise an argument may, in some instances, constitute deficient performance. *E.g.*, *Lynch*, 789 F.3d at 312-16; *Mayo*, 13 F.3d at 534-36. “[A] petitioner may establish constitutionally inadequate performance if he shows that counsel omitted *significant and obvious* issues while pursuing issues that were clearly and significantly weaker.” *Mayo*, 13 F.3d at 533 (emphasis added). “[R]elief may be warranted when a decision by counsel [to forgo an argument] cannot be justified as a result of some kind of plausible [litigation] strategy.” *Jackson v. Leonardo*, 162 F.3d 81, 85 (2d Cir. 1998).

“In assessing [an] attorney’s performance, a reviewing court must judge his conduct on the basis of the facts of the particular case . . . and may not use hindsight to second-guess his strategy choices.” *Mayo*, 13 F.3d at 533 (citation omitted). A reviewing court must therefore evaluate an attorney’s performance in light of the state of the law at the time of the attorney’s conduct. *See Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. “Counsel is not required to forecast changes in the governing law.” *Mayo*, 13 F.3d at 533.

Our analysis begins and ends with whether the statute of limitations arguments Weingarten, with the benefit of hindsight, now asserts that his counsel should have raised were “significant and obvious.” *See Mayo*, 13 F.3d at 533. Both arguments were clearly significant; either would have furnished Weingarten a complete defense to the entire indictment. However, neither argument was so obvious that it was unreasonable for Weingarten’s counsel to forgo it. We therefore

App. 11

conclude trial counsel did not provide objectively unreasonable representation without relying on whether trial counsel's Due Process Clause and extraterritoriality arguments were "clearly and significantly weaker." *See id.*⁵

1.

Weingarten contends that the 1994 version of § 3283, rather than the 2003 version, clearly applied to his 1997 offense conduct.

In 1994, when Doe was thirteen years old, Congress amended § 3283 to provide: "No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution *before the child reaches the age of 25 years.*" Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 330018(a), 108 Stat. 1796, 2148 (emphasis added). This extended the federal criminal limitations period for child sex abuse offenses, making it easier to prosecute offenders who commit sex crimes that may be difficult to detect quickly. *See, e.g.,* David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions*, 77 J. CRIM. L & CRIMINOLOGY 1, 60-61 (1986)

⁵ The extraterritoriality argument, which proved meritorious on Weingarten's first appeal, was not weak. *See Weingarten I*, 632 F.3d at 64-71. But it produced a weaker result (dismissal of a single count of the indictment) than a successful statute of limitations defense would have (dismissal of the entire indictment).

App. 12

("[I]t is not unusual for children to delay in reporting sexual abuse. . . ."); Basyle J. Tchividjian, *Predators and Propensity*, 39 AM. J. CRIM. L. 327, 370 (2012) ("[C]hildren often delay or even fail to report sexual abuse. . . .").

After nearly a decade, Congress began to view even the extended limitations period in the 1994 version of § 3283 as "inadequate in many cases" because it released from criminal liability sex abusers whose crimes were not brought to the attention of federal authorities until after their victims turned twenty-five. H.R. Conf. Rep. No. 108-66, at 54 (2003). Thus, in 2003, when Doe was twenty-two years old, Congress amended § 3283 to provide: "No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnapping, of a child under the age of 18 years shall preclude such prosecution *during the life of the child*." PROTECT Act, § 202, 117 Stat. at 660 (emphasis added).

Weingarten clearly fell within the class of perpetrators that were of great concern to Congress in 2003. Weingarten sexually abused Doe in 1997, when she was sixteen. Although Doe reported the abuse to her mother in September 1997 and her mother in turn made similar accusations in post-divorce custody proceedings in 2003, federal prosecutors did not indict Weingarten until 2008, when Doe was twenty-seven.

That presented a statute of limitations issue. Weingarten's prosecution would be time-barred under

the 1994 version of § 3283, which was in effect at the time of Doe’s abuse, but timely under the 2003 version of § 3283, if it applied retroactively to Weingarten’s conduct in 1997. The relevant questions on this § 2255 appeal thus become: Did the 2003 version of § 3283 apply retroactively to Weingarten’s conduct? And if it did not, should that have been “obvious” to Weingarten’s trial counsel at the time of the motion to dismiss? *See Mayo*, 13 F.3d at 533. The first question is difficult; its complexity forecasts the answer to the second.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), the Supreme Court established a two-part test to determine whether a statute applies retroactively. First, if Congress “expressly prescribed” that a statute applies retroactively to antecedent conduct, “the inquiry ends[] and the court enforces the statute as it is written,” save for constitutional concerns. *In re Enter. Mortg. Acceptance Co. Sec. Litig. (“Enterprise”)*, 391 F.3d 401, 405-06 (2d Cir. 2004) (quoting *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483); *see also Stogner v. California*, 539 U.S. 607, 610, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003) (“The Constitution’s two *Ex Post Facto* Clauses prohibit the Federal Government and the States from enacting laws with certain retroactive effects.”). Second, when a statute “is ambiguous or contains no express command” regarding retroactivity, a reviewing court must determine whether applying the statute to antecedent conduct would create presumptively impermissible retroactive effects. *Enterprise*, 391 F.3d at 406; *see Landgraf*, 511 U.S. at 263-79, 114 S.Ct. 1483. If it

would, then the court shall not apply the statute retroactively “‘absent clear congressional intent’ to the contrary.” *Enterprise*, 391 F.3d at 406 (quoting *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483). If it would not, then the court shall apply the statute to antecedent conduct. *See Landgraf*, 511 U.S. at 273, 114 S.Ct. 1483 (“Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations.”).⁶

At the time of his motion to dismiss the indictment, Weingarten may have been able to make a colorable argument at the first step of the *Landgraf* analysis. He could have advanced the arguments he makes here to try to persuade the District Court that the 2003 version of § 3283 does not contain an unambiguous statement from Congress that the provision

⁶ *Landgraf* analysis applies to both civil and criminal statutes. *See Johnson v. United States*, 529 U.S. 694, 701, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000) (citing *Landgraf*, 511 U.S. at 265, 114 S.Ct. 1483); *Al Bahlul v. United States*, 767 F.3d 1, 12 (D.C. Cir. 2014) (en banc) (applying *Landgraf* to statute governing jurisdiction to adjudicate criminal offenses); *United States v. Holcomb*, 657 F.3d 445, 446 (7th Cir. 2011) (Easterbrook, J., concurring in denial of rehearing en banc) (stating that *Landgraf* controls when deciding whether a criminal penalty applies retroactively); *United States v. Jackson*, 480 F.3d 1014, 1018 (9th Cir. 2007) (“Although *Landgraf* . . . involved the possible retrospective application of [a] civil statute[], the same approach to statutory interpretation applies initially to determining the temporal reach of a criminal statute.”); *United States v. Martin*, 363 F.3d 25, 46 (1st Cir. 2004) (applying *Landgraf* to decide whether a criminal sentencing statute applies retroactively); *United States v. Luna-Reynoso*, 258 F.3d 111, 115-16 (2d Cir. 2001) (applying *Landgraf* to decide whether a statute criminalizes antecedent conduct).

applies retroactively. Pursuing these arguments would have involved responding to the Government’s argument that the language at the beginning of the 2003 version § 3283 (“No statute of limitations that would otherwise preclude prosecution. . . .”) is a clear statement as to the statute’s retroactive effect.

Weingarten contends that there is a more natural interpretation of that phrase that does not address retroactivity – that Congress intended the language in the 2003 version of § 3283 to clarify that the statute prescribes a statute of limitations for applicable offenses that is different from the default five-year limitations period under federal law. *See* 18 U.S.C. § 3282. He also argues that, when Congress has in the past intended a criminal statute of limitations to apply retroactively, it has made that intent much clearer than the language on which the Government relies here. In support of this argument, Weingarten cites the 2001 amendment to 18 U.S.C. § 3286(b) extending the statute of limitations for certain terrorism offenses, USA PATRIOT ACT of 2001, Pub. L. No. 107-56, § 809(b), 115 Stat. 272, 381, which included the following application note: “The amendments made by this section shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this section.” *Id.*; *see also* Crime Control Act of 1990, 101 Pub L. No. 647, § 2505(b), 104 Stat. 4789, 4861 (“The amendments . . . shall apply to any offense committed before the date of the enactment of this section, if the statute of limitations applicable to that offense had not run as of such date.” (amending 18 U.S.C. § 3293)). By

comparison, Weingarten argues, the 2003 amendment to § 3283 does not contain any clear statement as to retroactivity. *See* PROTECT Act, § 202, 117 Stat. at 660.

As reflected by this summary, Weingarten's trial counsel could have raised non-frivolous arguments at the first step of the *Landgraf* analysis. *But see United States v. Jeffries*, 405 F.3d 682, 684-85 (8th Cir. 2005). Had Weingarten prevailed in those arguments, the District Court may have found it necessary to proceed to the second step of *Landgraf* – deciding whether applying the 2003 version of § 3283 to Weingarten's 1997 conduct would create presumptively impermissible retroactive effects. That would not have been an easy task.

The law on how to determine if a retroactive statutory effect is presumptively impermissible is murky. Courts generally disfavor statutory effects that “impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.” *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483. The Supreme Court has also stated that a statute has presumptively impermissible retroactive effects when it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.” *Id.* at 290, 114 S.Ct. 1483 (quoting *Soc'y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814) (No. 13,156) (Story, J.)). *But see Hughes Aircraft*

Co. v. United States ex rel. Schumer, 520 U.S. 939, 947, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (observing Justice Story’s definition “constitute[s] a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity”). But in the end, the Supreme Court has acknowledged that “deciding when a statute operates ‘retroactively’ is not always a simple or mechanical task,” *Landgraf*, 511 U.S. at 268, 114 S.Ct. 1483, and courts must rely on judges’ “sound . . . instincts,” as well as the principles of affording parties fair notice, protecting reasonable reliance, and guarding settled expectations, to guide their analyses, *id.* at 270, 114 S.Ct. 1483 (brackets omitted) (quoting *Danforth v. Groton Water Co.*, 178 Mass. 472, 476, 59 N.E. 1033 (1901) (Holmes, J.)).

It has proved particularly difficult to categorize the presumptively impermissible effects of retroactively applying a statute of limitations. In *Vernon v. Cassadaga Valley Cent. School Dist.*, 49 F.3d 886 (2d Cir. 1995), we retroactively applied an amendment to a statute of limitations that shortened a filing period even absent clear congressional intent. We reasoned that a statute of limitations “generally” does not create presumptively impermissible retroactive effects because it regulates “not the primary conduct of . . . defendants . . . but . . . the secondary conduct of . . . plaintiffs” and therefore “increase[s] neither party’s liability, nor impose[s] any new duties with respect to past transactions.” *Id.* at 890.

In re Enterprise Mortgage Acceptance Co., a 2004 decision, retreated from that broad statement

regarding the retroactive effects of a statute of limitations in a slightly different context. 391 F.3d at 406-10. The issue in *Enterprise* was whether an amendment to a statute of limitations that extended a filing period applies retroactively to revive civil claims that expired under the old limitations statute. *Id.* at 406. We held that it did not absent clear congressional intent. *Id.* at 410. We reasoned that “[e]xtending the statute of limitations” for antecedent conduct would upset settled expectations and fail to protect reasonable reliance interests because it would “‘increase[] a defendant’s liability for past conduct’ by increasing the period of time during which a defendant can be sued.” *Id.* (brackets and citation omitted) (quoting *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483). We found that observation to be “particularly prevalent” where the extended statute of limitations revived claims that were fully extinguished under the prior statute. *Id.*; see also *Stogner*, 539 U.S. at 618, 123 S.Ct. 2446 (noting the “general rule” that “where a complete defense has arisen under a statute of limitations, it cannot be taken away by a subsequent repeal thereof” (brackets omitted)).

This case differs from both *Vernon* and *Enterprise*. Unlike *Vernon*, in which the new statute shortened the old filing period, the 2003 amendment to § 3283 extended the filing period for applicable sex abuse charges. And unlike *Enterprise*, in which applying the new statute retroactively would have revived an expired claim, the 2003 amendment to § 3283 extended the filing period for charges against Weingarten that had not yet expired when the amendment was passed,

since Doe turned twenty-two in 2003. Had Weingarten raised this retroactivity argument in his motion to dismiss, the District Court may have needed to determine, without any controlling Circuit or Supreme Court precedent, whether the logic of *Enterprise* extends to criminal cases where the defendant's statute of limitations defense had not vested when the limitations period was extended.

As at the first step of *Landgraf*, Weingarten may have been able to make colorable arguments that *Enterprise* does extend that far. He could have argued that a statute that retroactively extends the limitations period for viable claims also "increas[es] the period of time during which a defendant can be sued," thereby "increas[ing] a defendant's liability for past conduct." See *Enterprise*, 391 F.3d at 410 (brackets omitted) (quoting *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483). Perhaps counsel could have convinced the District Court that increasing a statute of limitations expands the time when criminal charges may be filed regardless of the viability of the claim at the time the statute of limitations is amended.⁷

On the other hand, retroactively revoking a vested statute of limitations defense is different from retroactively extending the filing period for a still-viable claim. The vast weight of retroactivity decisions at the time of the motion to dismiss in this case support that

⁷ At least one court, in a decision that post-dates the motion to dismiss at issue on this appeal, has reached this conclusion. *Abarca v. Little*, 54 F.Supp.3d 1064, 1069 (D. Minn. 2014).

view. Courts have routinely recognized a difference between revoking a vested statute of limitations defense and extending a filing period for live claims. *See, e.g., Hughes Aircraft*, 520 U.S. at 950, 117 S.Ct. 1871 (“[E]xtending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action. . . .”); *Margolies v. Deason*, 464 F.3d 547, 553 (5th Cir. 2006) (limiting holding to expired claims without directly addressing viable claims); *In re ADC Telecomms., Inc. Sec. Litig.*, 409 F.3d 974, 977 & n.2 (8th Cir. 2005) (“[A] retroactive extension of a statute of limitations and revival of stale claims through retroactive application of a statute of limitations are different.”); *Chenault v. U.S. Postal Serv.*, 37 F.3d 535, 538 (9th Cir. 1994) (“[W]e have recognized that a statute of limitations may not be applied retroactively to revive a claim that would otherwise be stale under the old scheme. . . .”); *cf. Stogner*, 539 U.S. at 618, 123 S.Ct. 2446 (“Even where courts have upheld extensions of *unexpired* statutes of limitations . . . , they have consistently distinguished situations where limitations periods have *expired*.”). Had Weingarten prevailed on this retroactivity theory, the District Court would have been the first court to hold that retroactively extending a filing period for live charges is a presumptively impermissible retroactive effect under *Landgraf*. That novel holding would have been in direct conflict with a 2006 decision of the Ninth Circuit that held the same 2003 amendment to § 3283 applied retroactively to extend a filing period for charges that were still viable at the time of the

amendment. *See United States v. Leo Sure Chief*, 438 F.3d 920, 924 (9th Cir. 2006).⁸

The state of authority on this issue shows that it was not clear at the time of Weingarten’s motion to dismiss whether the 2003 version of § 3283 applied retroactively to extend a filing period for live charges. But because Weingarten failed to raise this complex issue in the first instance, it is not our place on this appeal to resolve it definitively. Rather, we hold that Weingarten is not entitled to § 2255 relief on this theory because, given the lack of controlling authority on this difficult issue, Weingarten’s retroactivity argument was not so obvious that it was objectively unreasonable for his trial counsel to forgo it in favor of others. The underlying merits question remains for another day, another case.

2.

Weingarten contends in the alternative that trial counsel clearly should have argued that the default five-year § 3282 limitations period, rather than the extended § 3283 limitations period, applies to prosecutions for § 2423 offenses. Section 3283 applies to any “offense involving the sexual . . . abuse . . . of a child.” Weingarten argues Congress’s use of the words “offense involving” compels courts to apply the categorical approach to determine whether § 3283 applies to a

⁸ After Weingarten’s motion to dismiss, the Fourth Circuit reached a similar conclusion as the Ninth Circuit. *Cruz v. Maypa*, 773 F.3d 138, 145 (4th Cir. 2014).

particular federal offense. *See Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276, 2281, 186 L.Ed.2d 438 (2013) (“[T]he ‘categorical approach’ . . . compare[s] the elements of the statute forming the basis of the defendant’s conviction with the elements of the ‘generic’ crime. . . .”). He asserts that § 2423 offenses do not qualify categorically as “offense[s] involving the sexual . . . abuse . . . of a child” because they are crimes of intent, which do not require proof of actual sexual abuse to sustain a conviction. *See United States v. Broxmeyer*, 616 F.3d 120, 130 n.8 (2d Cir. 2010); *United States v. Han*, 230 F.3d 560, 563 (2d Cir. 2000). Therefore, Weingarten concludes, even though his offense conduct in fact involved sexual abuse of a child, the charges against him were not subject to the extended § 3283 limitations period.

It was not obvious at the time of Weingarten’s motion to dismiss, nor is it today,⁹ that a court must apply the categorical approach, rather than a fact-specific analysis, to determine whether an offense is subject to § 3282 or § 3283. As an initial matter, it is far from clear the categorical approach applies in the context of criminal statutes of limitations for child sex abuse cases. The Supreme Court’s modern categorical approach jurisprudence is confined to the post-conviction contexts of criminal sentencing and immigration deportation cases. *See Descamps*, 133 S.Ct. at 2288 (explaining that the categorical approach avoids “serious

⁹ *See United States v. Schneider*, 801 F.3d 186, 195-97 (3d Cir. 2015) (declining to apply the categorical approach to decide whether a § 2423(b) offense falls under § 3283).

Sixth Amendment concerns” under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that arise when a judge would make a post-conviction finding regarding underlying factual predicate). Weingarten cites no recent case law for the proposition that the categorical approach applies outside the post-conviction context.¹⁰

Even if the categorical approach does apply outside of the sentencing and immigration contexts, it was and is not clear that § 3283 calls for it. *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), established the modern doctrine for when to apply the categorical approach. *Taylor* held that 18 U.S.C. § 924(e) – a provision of the Armed Career Criminal Act that enhanced sentences for felons in possession of firearms in violation of 18 U.S.C. § 922(g) who were previously convicted of certain predicate offenses –

¹⁰ Weingarten’s sole support outside the sentencing and immigration contexts is *Bridges v. United States*, 346 U.S. 209, 73 S.Ct. 1055, 97 L.Ed. 1557 (1953), in which the Supreme Court applied an “essential ingredient” test to determine whether an offense qualified for a provision in the Wartime Suspension of Limitations Act (the “WSLA”) that extended the criminal limitations period for certain fraud offenses. *Id.* at 222, 73 S.Ct. 1055. Weingarten provides no support for his contention that the “essential ingredient” test and the categorical approach are the same. In any event, *Bridges* is distinguishable. The Court there believed applying the restrictive “essential ingredient” test to determine if an offense “involv[ed] the defrauding of the United States” effectuated Congress’s specific intent to limit the WSLA’s extended limitations period to only a few offenses. *Id.* at 215-16, 73 S.Ct. 1055 (“The legislative history of [the WSLA] emphasizes the propriety of its conservative interpretation.”). As explained below, Congress had the opposite intention for § 3283.

required courts to apply the categorical approach for three reasons: (1) the language of § 924(e) referred to previous “convictions” rather than previous offenses a person “has committed,” which indicated that Congress was focused on the legal charges rather than the underlying conduct; (2) the legislative history of the provision revealed Congress favored a categorical approach for defining § 924(e) predicate offenses; and (3) applying a fact-based approach to § 924(e) posed “daunting” “practical difficulties and potential unfairness.” 495 U.S. at 600-02, 110 S.Ct. 2143; *see also Descamps*, 133 S.Ct. at 2287-89 (describing “three grounds for establishing [an] elements-centric, ‘formal categorical approach’”).

None of these conditions is met here. First, unlike § 924(e), § 3283 refers to offenses that “involv[e]” certain abusive conduct, rather than certain convictions. *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), stands as another counterexample. The *Leocal* Court applied the categorical approach to a statute that defined whether a prior conviction qualified as a “crime of violence” by referring to the prior “offense,” the “element[s]” of that offense, and the “nature” of that offense. *Id.* at 7, 125 S.Ct. 377 (quoting 18 U.S.C. § 16) (emphasis omitted). The language of § 3283, by contrast, reaches beyond the offense and its legal elements to the conduct “involv[ed]” in the offense. That linguistic expansion indicates

Congress intended courts to look beyond the bare legal charges in deciding whether § 3283 applied.¹¹

Second, Weingarten points to nothing in the legislative history of § 3283 that indicates Congress favored the categorical approach. To the contrary, in passing recent statutes related to child sex abuse, including extensions of the § 3283 limitations period, Congress “evinced a general intention to ‘cast a wide net to ensnare as many offenses against children as possible.’” *Schneider*, 801 F.3d at 196 (quoting *United States v. Dodge*, 597 F.3d 1347, 1355 (11th Cir. 2010) (en banc)). It would undermine that intention to apply the narrow categorical approach.

Third, it would present no practical difficulty or unfairness to apply a fact-based approach to § 3283. The *Taylor* Court was concerned that looking into the factual predicate of prior convictions, which could have been procured by guilty plea or by general jury verdict on multiple alternative theories of criminal liability, would pose too great an obstacle for a court sentencing a defendant for a later § 922(g) conviction. 495 U.S. at 601-02, 110 S.Ct. 2143. A district court or jury

¹¹ That Congress used the word “involving” in § 3283 does not necessarily mean it intended to trigger the categorical approach. “Involving” may be “entirely consistent” with applying the categorical approach, *Olivas-Motta v. Holder*, 746 F.3d 907, 915 (9th Cir. 2013), but it is equally consistent with applying a fact-based approach, see *Nijhawan v. Holder*, 557 U.S. 29, 38, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009) (holding a statute that includes as an “aggravated felony” certain “offense[s] that . . . involve[] fraud or deceit” mandates “a circumstance-specific approach” (quoting 8 U.S.C. § 1101(a)(43)(M)(i))).

reviewing a § 3283 statute of limitations defense would have no such difficulty. All they would be required to do is decide whether the indictment alleged or the Government proved at trial that the defendant engaged in applicable abusive conduct. That would not implicate the problematic retrospective factual findings that concerned the *Taylor* Court.

Accordingly, it was not obvious that the categorical approach applied to § 3283.

CONCLUSION

The District Court's order of March 8, 2016 denying Weingarten's § 2255 petition insofar as it pertains to the statute of limitations defense is **AFFIRMED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
ISRAEL WEINGARTEN,
 Petitioner,
v. United States Courthouse
 Brooklyn, New York
UNITED STATES
OF AMERICA,
 Respondent.
-----X

March 8, 2016
9:00 a.m.

TRANSCRIPT OF CIVIL CAUSE
FOR STATUS CONFERENCE
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE

APPEARANCES:
For the Petitioner:

BURNS & COHAN
1350 Columbia Street
San Diego, California 92101
BY: TODD W. BURNS, ESQ.
(via telephone)

LAW OFFICES OF JODI THORP
1010 Second Avenue
San Diego, California, 92101
BY: **JODI THORP, ESQ.**
(via telephone)

For the Government:

ROBERT L. CAPERS, ESQ.
United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
BY: JENNIFER S. CARAPIET
Assistant United
States Attorney

Court Reporter: Georgette K. Betts, CSR, RPR
225 Cadman Plaza East
Brooklyn, New York
Phone: (718)804-2777

Proceedings recorded by mechanical stenography,
transcript produced by computer-aided transcription.

[2] COURTROOM DEPUTY: Weingarten
versus the United States of America.

THE COURT: State your appearances please,
counsel.

MS. CARAPIET: Good morning, Your Honor,
Jennifer Carapiet –

MR. BURNS: This is Todd Burns and Jodi
Thorp on behalf of Mr. Weingarten. We're having a lit-
tle difficulty hearing.

THE COURT: I'll try to speak slowly and
clearly. Good morning to you both.

MR. BURNS: Good morning.

MS. THORP: Good morning.

THE COURT: Are you in California?

MR. BURNS: Yes.

THE COURT: I should have thought of that when I set this at 9:00 o'clock, I'm sorry. Please forgive me for having you up.

MR. BURNS: That's all right with me, I'm an early riser. I'm not sure about Ms. Thorp.

MS. THORP: It's good for me too.

THE COURT: Okay.

MS. CARAPIET: Good morning, Your Honor, Jennifer Carapiet for the United States.

THE COURT: Good morning. The case here is on a remand from the Court of Appeals in this challenge to the [3] conviction and sentence under 28 U.S.C. 2255 and the Court of Appeals order dated June 17th of last year remands the case for the limited purpose of permitting me, the district court, to provide an explanation for the denial of the accounts 2255 claims. The oral decision from last January the Court of Appeals held is without more insufficient to permit appellate review because the court provided no explanation for the denial of appellant's ineffective assistance of counsel claims, did not mention his government misconduct claims, or his claim that his waiver of his right to counsel was invalid and failed to specify which aspects of the government's arguments regarding the statute of limitations claim were adopted.

I think the government is correct that the proper statute of limitations was Section 3283. I agree that transporting a minor with the intent to engage in criminal sexual activity involved sexual abuse of a minor. I also agree that the post-2003 version of the statute applies to this case.

There was and is no reason to believe – this is with respect to the misconduct claims – that anyone other than the defendant wrote the so-called repentance letter and in my view there is no good reason to conclude that the government withheld anything in that regard. I’m not persuaded even in the slightest that there was misconduct with [4] regard to Weiss and Stauber, witnesses whom the government sought to depose under Rule 15, and I conclude the government disclosed all that it anticipated Weiss and Stauber could and would testify to in connection with the Rule 15 proceedings.

With regard to the ineffective assistance of counsel claims, this issue has arisen obviously in connection with the 2255 but it is not the first time it’s arisen and I – the briefing here is excellent, but I find it adds nothing to the issue as I addressed it as it was when I addressed it in a 34-page written decision on May 8th of 2009.

Israel Weingarten got exactly the kind of representation he chose to have for himself. He frustrated his own lawyer’s efforts by confounding his defense at trial with others in his community participating in/getting in the way of his defense. I painstakingly addressed the core of these arguments in a written decision and I

incorporate that by reference in response to the circuit's remand order.

The 192 pages of briefing in connection with this current application to my mind presents nothing of value that's new. Some of it is beyond the pale in my view. Just one or two examples in criticism of the testimony of the older brother of the victim the petitioner's brief says, "In an answer that appears to have been prepared." And all I could think of when I read that was the scripted testimony of the sisters at trial which was plainly perjurious, plainly absurd, [5] and plainly prepared.

To my mind nothing could be more inappropriate in this case than to order, as I'm requested to do so in connection with this petition, that the tools of civil discovery be made available to Israel Weingarten. This case was exhaustively tried, I was at great pains to save the defendant from the pitfalls of self representation. The details of that are set forth in the opinion I've incorporated here by reference and assume familiarity with. There is nothing about the problems he exhibited in connection with his effort to represent himself that was unusual. I've had multiple other pro se criminal defendant trials, they all suffer from the same types of problems, not understanding how to pose a question, not understanding how to stay on the issue before the court, before the witness at the time. I did everything I could to save Israel Weingarten from the adverse consequences of his own decision after failing to talk him out of that decision. All of my admonitions were outside

the presence of the jury. It was one of the most difficult trial experiences I ever had.

The last thing that occurred to me at the time, and I'm not persuaded even in the slightest at this point in time having once again reviewed these voluminous submissions, is that his conduct evidenced cognitive deficits or any of the other characteristics the defendant's counsel now attribute to [6] and the defendant himself through them attributes to it.

As I say, Israel Weingarten got the defense he chose. I am not persuaded that having made that decision that he is now entitled to any of the relief he seeks. I've reviewed all the other claims, I find them once again to be entirely without merit, so for those reasons once again I'm denying the petition.

Thank you. Have a good day.

MR. BURNS: Your Honor, may I have a couple of things?

THE COURT: Yes.

MR. BURNS: First of all, I noted the record it looks like the record that was transmitted to the Court of Appeals just included the record from the civil case. That the parties of course you know – the motion was originally filed in the criminal case and a number of things have been referred to that were the record in the criminal case. I wonder if the court would in some manner or other effectively order the two records merged so that all of what's in play here is forwarded to the Court of Appeals.

THE COURT: Sure. Just put it in a one-line letter and I'll grant that so that there is a documentary vehicle for the appeals people in the clerk's office to act upon to send everything up there, but that sounds right to me.

MR. BURNS: And that's all I have, Your Honor.

[7] THE COURT: Thank you. Have a good day.

MS. CARAPIET: Thank you, Your Honor.

MR. BURNS: Goodbye.

(Matter concluded.)

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

<u>/s/ Georgette K. Betts</u>	<u>March 10, 2016</u>
GEORGETTE K. BETTS	DATE

App. 34

E.D.N.Y. – Bklyn
14-cv-5738
Gleeson, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of June, two thousand fifteen.

Present:

Guido Calabresi,
Chester J. Straub,
Debra Ann Livingston,
Circuit Judges.

Israel Weingarten,
Petitioner-Appellant,

v.

15-923

United States of America,
Respondent-Appellee.

Appellant moves for a certificate of appealability (“COA”) to appeal the denial of his 28 U.S.C. § 2255 motion. Upon due consideration, it is hereby ORDERED that the appeal is HELD IN ABEYANCE and the case is REMANDED for the limited purpose of permitting

the district court to provide an explanation for the denial of Appellant's § 2255 claims. *See Miranda v. Bennett*, 322 F.3d 171, 175-77 (2d Cir. 2003). The district court's January 30, 2015 oral decision is, without more, insufficient to permit appellate review because the court provided no explanation for the denial of Appellant's ineffective assistance of counsel claims, did not mention his Government misconduct claims or his claim that his waiver of his right to counsel was invalid, and failed to specify which aspects of the Government's arguments regarding the statute of limitations claim were adopted.

In accordance with *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), the mandate shall issue forthwith. Jurisdiction over the appeal will be automatically restored to this Court, without the need for a new notice of appeal, if the Appellant, within thirty (30) days of a new decision by the district court notifies this Court of the new decision. Once this Court is notified of the district court's decision, this appeal will be reactivated pursuant to *Jacobson*, and the COA motion will be addressed by a new panel in the ordinary course.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
ISRAEL WEINGARTEN, : 14-CV-5738 (JG)
 Petitioner, : U.S. Courthouse
 : Brooklyn, New York
 -against- :
UNITED STATES : TRANSCRIPT OF
OF AMERICA, : ORAL ARGUMENT
 Respondent. : January 30, 2015
 : 12:00 p.m.
----- X

BEFORE:
 HONORABLE JOHN GLEESON, U.S.D.J.

APPEARANCES:

For the Petitioner: TODD W. BURNS, ESQ.
 RICHARD M. LIPSMAN, ESQ.
 JODI D. THORP, ESQ.

For the Respondent: LORETTA E. LYNCH, ESQ.
 United States Attorney
 271 Cadman Plaza East
 Brooklyn, New York 11201
 BY: JENNIFER S. CARAPIET, ESQ.
 SHREVE ARIAIL, ESQ.
 Assistant U.S. Attorneys

Court Reporter: Holly Driscoll, CSR
 Official Court Reporter
 225 Cadman Plaza East
 Brooklyn, New York 11201
 (718) 613-2274

Proceedings recorded by mechanical stenography,
transcript produced by Computer-Assisted Transcript.

* * *

[20] You look at what the statute requires, not what's charged. They specifically say that, you don't look at what's charged in the indictment, that's a categorical approach, that's just what it is. And as we all know, the categorical approach is, you know, writ large in the federal criminal justice system, it comes up in every context probably in, you know, 50 percent of the cases at least, in immigration, in criminal, all over the place, you know, in deciding whether or not the crime is a crime of violence in the Bail Reform Act or whether or not it's appropriate to charge someone in the Juvenile Delinquency Act, it's everywhere in all types of offenses.

And the key language in this statute of limitations are "offense" and "involving." Leocal makes clear "offense" denotes a categorical approach. James and Nijhawan make clear "involving" denotes a categorical approach. Once that issue is decided that it's a categorical approach, the government doesn't even make an argument that these two offenses qualify if you conduct a categorical approach.

So, it seems to me that both the statute of limitations issues are very, very strong and i don't have anything further, Your Honor.

THE COURT: Thank you. Thank you both for your advocacy.

The petition is denied. There's a lot that's been said in this petition. There's some granular detail that's [21] the product of a fine tooth comb examination of the record but really in its essence there's not a whole lot that is said that hasn't been said before and there really isn't a whole lot for me to say in response to it that I didn't say in my May 8th, 2009 memorandum and order.

It is a very unusual case in a lot of respects. Chief among them generally is the decision to go pro se but chief among them for purposes of many of the arguments that have been advanced here is a phenomenon that's even more unusual than the defendant's decision to represent himself at trial and I referenced it briefly on page 12 of that memorandum and order I just referenced and that is what I refer to as this off stage force that the defendant described as his people, and I won't repeat what's there, you've read it, you've obviously carefully gone over the record, but I had no doubt at the time and I have no doubt now that that made the representation, that the influence of these unseen folks that Mr. Weingarten referred to as his people made the representation of Mr. Weingarten especially difficult, uniquely difficult and there's a recitation of some of the examples of that in the memorandum and order.

I don't think an evidentiary hearing is warranted at all. I don't think there was ineffective assistance. I think the government has it right on the statute of limitations arguments on the merits. And I also think it's true that [22] there's some deference to be accorded to

the decisions made by trial counsel who were placed in the crucible by the way their client himself chose to arrange his defense with all these unseen folks and I remember to this day them having to walk outside because there's supposed to be defense witnesses that Mr. Weingarten's people were going to provide but they weren't in the hall. This case was a nightmare for defense counsel.

Only someone who sat in this courtroom during this trial could fully appreciate what I have to say briefly on the actual innocence assertion here. I don't think anybody in the well of this courtroom except me sat through this trial. It's not always the case that trial judges and the people who are present when testimony is given have a real peculiar advantage over those who read the cold record, sometimes they don't, sometimes they do, and anybody who sat through that trial has an advantage that in my 30 years in the criminal justice system is unmatched in any other case.

It is a very difficult standard, this actual innocence standard, new reliable evidence that wasn't presented that shows more likely than not that no reasonable juror would find the defendant guilty beyond a reasonable doubt. You could cut the tension in this courtroom with a knife. I'll go to my grave remembering the victim witness' reaction the first time her father uttered on cross-examination the name Frieme Leaieh and [23] you're just going to have to find some other judge than me to ascribe any weight whatsoever to your actual innocence claim.

I have no doubt that the defendant and his people and his new lawyers can find people in Belgium who will provide information that might suggest exculpatory evidence. I'm not buying it. I sat through the testimony, heard the government's evidence. I'm not buying it. I think in every dimension these motions, including the motion to strike the challenged attorneys' declarations have no merit whatsoever; so, I'm denying the motion to strike, I'm denying the petition under Rule 2255 there being no substantial showing of a deprivation of a federally protected right. No certificate of appealability shall issue.

Have a good day.

MR. BURNS: Your Honor, may I just address one other thing?

THE COURT: Yes, you can quickly.

MR. BURNS: I referenced in my argument that Frieme Leaieh's deposition mentioned two witnesses. I don't believe that that's been lodged with the Court. Is it acceptable if we lodge that with the Court in the next couple of days?

THE COURT: You can file an application to supplement the record and I'll hear from the government.

[24] MR. BURNS: It basically –

THE COURT: It sounds fine to me but I have to give the government the process it is due.

App. 41

MR. BURNS: Okay. And there's not going to be a written order that will issue, am I correct about that?

THE COURT: No, I just denied your applications.

MR. BURNS: Thank you, Your Honor.

THE COURT: Thank you.

MS. CARAPIET: Thank you, Your Honor.

(Time noted: 12:25 p.m.)

(End of proceedings.)

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of October, two thousand seventeen.

Israel Weingarten,
Petitioner-Appellant,
v.
United States of America,
Respondent-Appellee.

ORDER

Docket No: 15-923

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

App. 43

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

DECLARATION OF DAVID V. KIRBY

(Jan. 19, 2015)

1. I am an attorney licensed to practice law in the State of New York and other states, and I have substantial experience with federal criminal law, including practicing in the Eastern District of New York. A copy of my resume is attached.
2. Based on my experience and training, I have a good understanding of the practices and expectations of the legal community, and its professional norms and standards, with respect to defending a federal criminal case. This background informs my understanding of what is reasonably required to provide effective assistance of counsel in a federal criminal proceeding.
3. I have been asked by counsel for Israel Weingarten to give my opinions with respect to the representation provided by attorneys Barry Gene Rhodes and Alan Stutman in *United States v. Weingarten*, E.D.N.Y. Case No. 08cr0571-JG. Specifically, I have been asked to offer my opinions as to whether counsel's performance was unreasonable, and thus amounted to deficient performance under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984).
4. For that purpose, I have reviewed the materials counsel submitted in support of Mr. Weingarten's 28 U.S.C. §2255 motion, filed on September 30, 2014, and the materials the government submitted in response on December 18, 2014. I have also reviewed some of the materials found in the district court record.

5. In offering my opinions, I have tried to avoid venturing into any areas in which key facts are disputed. Thus, I have mostly offered opinions based on what Mr. Rhodes and Mr. Stutman stated in their April 2009 and November 2014 declarations, which were filed with the government's opposition memorandum. When I offer an opinion in an area in which relevant facts seem to be unclear, or disputed, I have tried to mention my understanding of the dispute and the significance of that dispute, if any, to my opinion.
6. I have offered opinions here only on what I consider to be the more substantial deficiencies in the performance of Mr. Rhodes and Mr. Stutman, and I have not discussed what I consider to be lesser deficiencies.
7. It bears noting that I am aware that at the beginning of the first day of trial Mr. Weingarten began to represent himself. The opinions offered below relate to Mr. Rhodes's and Mr. Stutman's performance before that time, and mostly relate to their failure to prepare for trial. Although at times I refer to things that happened during the trial, that is because those things illustrate the attorney's lack of preparation for trial (*e.g.*, Mr. Rhodes's objections at trial with respect to what has been called the "repentance letter," and Mr. Rhodes's statement to the Court during trial that he did not have a copy of Mr. Weingarten's 911 call).
8. For ease of reference, the opinions offered below are organized by headings that relate to key issues raised in Mr. Weingarten's §2255 filings. The first section deals with counsel's failing to raise statute

of limitations issues, and instead conceding that the prosecution was not time-barred. The subsequent headings, except for the last, identify issues related to counsel's trial preparation. The last heading relates to my opinions with respect to Mr. Rhodes's December 7, 2008 letter to the Court.

Pre-Trial Issues – Statute of Limitations

9. I have reviewed the two issues raised by Mr. Weingarten in his §2255 memorandum with respect to the applicable statute of limitations. I have also reviewed the government's response, and the portions of Mr. Rhodes's 2014 declaration that deal with that issue. The government, and Mr. Rhodes, seem to suggest that Mr. Rhodes made a strategic decision not to raise either of those issues.
10. I do not believe it is appropriate for me to comment on whether Mr. Weingarten should prevail on either of those issues, because that is the Court's province. But I do believe it is appropriate, and accurate, to say that both issues are substantial.
11. It was unreasonable for defense counsel to not raise either of those issues. Unlike some issues of deficient performance, this is not an issue that involves multiple potential variables that can make counsel's decision hard to assess in hindsight. Here, the prosecution was either time barred or it was not. Given the substantiality of the two issues, the potential impact for the defense if either issue was successful, and the lack of any real cost for raising the issues, there could have been no sound

strategic reason for defense counsel not to raise either issue.

12. Sometimes on appeal an attorney may choose not to raise an issue because the attorney does not want to distract from more promising issues, or because of word-limits for briefs. It is hard for me to imagine any circumstances in which those types of considerations would justify not raising, in the district court or on appeal, the statute of limitations issues involved here. Again, that is because the issues are substantial, and if successful they completely bar the prosecution.
13. In short, I view the failure to raise the statute of limitations issues, in the district court or during the first appeal, as unreasonable.

Counsel's Trial Preparation – Introduction and Preliminary Remarks

14. There are four areas in which I regard defense counsel's performance with respect to trial preparation as deficient. First, counsel did not prepare for or have any appropriate response ready concerning what has been referred to as the "repentance letter." Second, counsel should have conducted investigations at the scenes of the alleged crimes, and should have

* * *

DAVID V. KIRBY, Esq.

O'Connor & Kirby, P.C.

75 Wall St., #32B

New York, NY 10005

802.233.2766 (mobile)

david@kirbyoconnor.com

EDUCATION:

Northwestern University School of Law (J.D. 1975)

Editor-in-Chief, Northwestern University Law Review; Order of the Coif

Pomona College (B.A. History 1972)

ADMISSIONS:

Illinois, New York and Vermont; United States Court of Appeals – 2d Circuit; United States District Court – Vermont, Eastern and Southern Districts of New York; United States Supreme Court

EMPLOYMENT:

1975-1976	Law Clerk to Judge Robert A. Sprecher, United States Court of Appeals for the Seventh Circuit
1976-1977	Law Clerk to Justice John Paul Stevens, United States Supreme Court
1977-1988	Assistant United States Attorney Eastern District of New York Chief of General Crimes Chief of Appeals

Tried 15 jury trials to verdict. As Appeals Chief, wrote and argued numerous appeals and edited numerous others.

1988-1989

Assistant Attorney General

Office of the Attorney General,
State of Vermont
Montpelier, Vermont

Obtained guilty verdict in 10-year-old rape case. Handled other investigations and appeals to the VT Sup. Ct.

1989-2007

**Assistant United States Attorney,
District of Vermont**

Chief of the Criminal Division
(1989-2001; 2001-2003)

First Assistant United States Attorney
(2003-05; 2006-07)

At all times in the Vermont U.S. Attorney's Office, carried an active caseload and acted, *inter alia*, as Appellate Chief for the Criminal Division, editing all appellate work – literally hundreds of briefs over 18 years. Wrote and argued numerous appeals. As Criminal Chief, supervised approximately 12 attorneys and 10 support staff. As First Assistant, managed the office. Tried about 15 cases and obtained guilty verdicts (including a three month international narcotics conspiracy).

2001;

2005-2006

United States Attorney

District of Vermont

Responsible for office of over 20 attorneys and 30 support staff. Participated

in national conferences and coordinated prosecution efforts with other federal and state prosecutorial offices. Coordinated international investigations and joint ventures relating to border activities with Canadian law enforcement.

2007-present **O'Connor & Kirby, P. C.**

Burlington, Vermont
Founding Partner

Criminal and civil practice, with primary concentration on Federal criminal trials and appeals.

2007-present **Krantz & Berman, LLP**

New York, NY
Of Counsel

Fall 2008- **Williams College,**

Winter 2009; Adjunct Professor teaching Federal Legal

Winter 2010 Practice, including brief preparation and moot court argument. Judges for 2009 moot court: Judge Jeffrey Howard, CA1; Judge William Sessions, DVt; Judge Consuelo Marshall, CDCal.; Judge Victor Marrero, SDNY. Judges for the 2010 moot court: Judge Stephen Reinhardt, CA9; Judge Jeffrey Howard, CA1; Judge Jeffrey Sutton, CA6; Judge Peter Hall, CA2.

Additional Activities:

Guest lecturer at Vermont Law School;
CLE lecturer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

ISRAEL WEINGARTEN,

Petitioner,

-against-

14 CV 5738 (JG)

UNITED STATES
OF AMERICA,

(Filed Dec. 18, 2014)

Respondents.

----- x

State of New York)

) ss.:

County of Nassau)

BARRY GENE RHODES, being duly sworn, deposes and says:

1. I am an attorney at law duly admitted to practice in the courts of New York, to the bar of the United States District Court for the Eastern District of New York, and elsewhere. I supply this affidavit in regard to the above-captioned writ of habeas corpus. The writ calls into question my ethics, honesty, and ability as a lawyer, mainly by again contending that I was not prepared to start trial of the case against the petitioner and lied about it. I address only those aspects of the petitioner's submission which impact directly on the baseless impugning of my integrity and performance and that of my colleague, Alan Stutman,

2. This is the second time I am called upon to defend my conduct before and during a trial where the

defendant elected to represent himself. I provided an affidavit in regard to the petitioner's Rule 33 motion, which motion made similar but less detailed insulting allegations. I have recently reviewed that affidavit. My statements in regard to that affidavit were true when I made them and they remain true

3. Among other things, the writ contends that I failed to understand a statute of limitations argument which should have been made; that both Mr. Stutman and I were unprepared for trial; that there was a breakdown in my relationship with the petitioner; that I had irreconcilable conflicts of interest; that my colleague and I should have observed the petitioner's alleged psychological deficits, had him examined, and proposed to the Court that the petitioner was incapable of representing himself at trial; and that all of these shortcomings cumulated to deprive the defendant of his constitutional rights. I will speak to these issues *seriatim*, tracking the allegations in the petition pretty much in the order used by the petitioner.

STATUTE OF LIMITATIONS

4. Petitioner's first allegation is that the prosecution of the petitioner was time-barred before the indictment was voted. Petitioner contends that a Congressional extension of the statute of limitations did not apply to the petitioner because it did not specifically use the word "retroactive" (although §3283 states that "No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical

abuse . . . of a child under the age of 18 years shall preclude such prosecution during the life of the child. . . .”) According to petitioner, the failure to use the word “retroactive” was fatal, and the crimes against the petitioner’s daughter did not involve sexual or physical abuse. Therefore, argues petitioner, I should not have conceded that § 3283 applied, and the argument I made, that the statute was *ex post facto*, was off-the-mark.

a. What the petitioner contends was an improper “concession,” is better labeled a technique of writing and of appellate strategy. That is how I write legal arguments and that is how I have been writing legal arguments throughout my career, during which I have handled hundreds of appeals and complex memoranda, and during which forty plus years I have been fully specialized in criminal work. I always go for what I believe is the strong point and let the weaker possibilities languish. I would not clutter a legal submission with arguments as seemingly tenuous as those proposed by petitioner’s latest advocates.

b. The petitioner knew what was being argued in his pre-trial motions, what was being omitted, why strategy necessitated these choices, and how they were going to be presented. He claims otherwise, but he was aware of filings in advance and actively participated in what they said. He pored over almost everything I gave him, at least before he obtained permission to represent himself. (He did not, however, preview or discuss the strategies of the reply memorandum in support of the main motions. He declined to read the reply I wrote

before it was filed and when I brought it to him for his opinion.) The petitioner and I spent hours going over other aspects of the pretrial motions. The petitioner took an active role and interest in the motions, substantially more than that of most clients I have defended.

PREPARATION FOR TRIAL

5. Petitioner once again claims that his decision to be his own lawyer was compelled because Alan Stutman and I were (stunningly) unprepared for trial. These contentions have already been raised and rejected, but I will nonetheless address the petitioner's complaints.

a. I have been a criminal attorney for more than four decades. I began reading criminal trial transcripts and ghost-writing briefs while I was still in law school and on law review. From

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

UNITED STATES
OF AMERICA,

NOTICE OF MOTION

-against-

08 CR 571 (JG)

ISRAEL WEINGARTEN,
Defendant.

(Filed Nov. 26 2008)

----- x

SIRS:

PLEASE TAKE NOTICE, that upon the annexed declaration of Barry Gene Rhodes, Esq., dated the 26th day of November, 2008, upon the appended affidavit of the defendant, upon the annexed memorandum of law, and upon all those papers and proceedings heretofore had herein, that the defendant, Israel Weingarten, by the undersigned, will move this court, at the courthouse located at 225 Cadman Plaza East, before Hon. John Gleeson, on the date, time and hour chosen by His Honor, for an order seeking:

1. DISMISSAL OF COUNT THREE OF THE INDICTMENT IN THAT THIS COUNT IS BASED ON A STATUTE WHICH IS UNCONSTITUTIONAL AS IT VIOLATES THE NECESSARY AND PROPER CLAUSE OF THE UNITED STATES CONSTITUTION AND IN OTHER RESPECTS; and
2. DISMISSAL OF ALL FIVE COUNTS OF THE INDICTMENT IN THAT THE PRE-INDICTMENT DELAY VIOLATED THE DUE

PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION; and, in the event the indictment is not dismissed,

3. JUDICIAL INSPECTION OF THE LEGAL INSTRUCTIONS PROVIDED TO THE GRAND JURY TO DETERMINE IF IT WAS PROPERLY ADVISED CONCERNING THE NEED OF SEXUAL MISCONDUCT BEING A DOMINANT INTENT UNDERLYING THE TRAVEL; IF THE INSTRUCTIONS WERE INCORRECT, THE INDICTMENT SHOULD BE DISMISSED; and, in the event the indictment is not dismissed,

* * *

Point Two

THE INDICTMENT VIOLATES DUE PROCESS IN THAT THERE WAS PREJUDICIAL PRE-INDICTMENT DELAY.

Each count of the indictment charges conduct that allegedly occurred more than a decade ago. The statute of limitations in 1997 for the crimes alleged was the 25th birthday of the complainant. 18 U.S.C. § 3283 (1994 Amend.). The limitations period was extended again in 2003 to “the life of the child, or for ten years after the offense, whichever is longer.” It is well-established that Congress has the power to extend a statute of limitations without violating the ex post facto clause of the Constitution if the original period did not expire when it was extended. *United States v. Morgan*, 113 F3d 1230 (2d Cir. 1997); *United States v. Falter*, 23 F.2d 420,

425-426 (2d Cir. 1928). This is a broadly accepted principle. *See, e.g., United States v. Leo Sure Chief*, 438 F.3d 920 (9th Cir. 2006); *United States v. Jeffries*, 405 F.3d 682 (8th Cir. 2005), *cert. denied*, 546 U.S. 1007. In the case at bar, Jane Doe was 22 years of age in 2003, when the statute was extended to the lifetime of a child victim.

Though prosecutions brought within the statute of limitations are presumptively valid and rarely dismissed as untimely, *United States v. Corneille*, 171 F.3d 748, 751 (2d Cir. 1999), this one should be dismissed. Where the defense is substantially prejudiced by delay and where the delay was for a bad purpose, there has been a violation of due process. *Id.* at 752. *See, also, United States v. Lovasco*, 431 U.S. 783, 795 (1997). The burden of establishing these things falls on the defense and is a heavy one. *United States v. Scarpa*, 913 F.2d 993, 1014 (2d Cir. 1990); *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987). The defendant meets this burden in the case at bar.

* * *
