

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY McCORD,

Petitioner-Appellant,

- against -

SUPERINTENDENT PATRICK REARDON,
MARCY CORRECTIONAL FACILITY, LETITIA JAMES,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents-Appellees.

**On Application for Extension of Time to
File a Petition for Writ of Certiorari**

**APPLICATION TO EXTEND TIME TO FILE A
PETITION FOR WRIT OF CERTIORARI**

ALAN S. LEWIS

Counsel of Record

CARTER LEDYARD & MILBURN LLP

28 Liberty Street, 41st Floor

New York, NY 10005

(917) 533-2524

lewis@clm.com

Counsel for Petitioner-Appellant

To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit:

Petitioner-Appellant Anthony McCord prays for a 60-day extension of time to file his petition for a writ of certiorari in this Court to and including July 6, 2026. The final judgment of the United States Court of Appeals for the Second Circuit—an order denying Appellant’s motion for rehearing of that court’s previous order denying a certificate of appealability, was entered on February 6, 2026. Consequently, Appellant’s time to petition for certiorari in this Court expires 90 days after February 6, 2026, on May 7, 2026. This application is being filed more than 10 days before that date.

Attached are copies of: (1) the January 7, 2026 Order of the United States Court of Appeals for the Second Circuit denying Appellant’s motion for a certificate of appealability (Appendix 1a); (2) the February 6, 2026 Order of the Second Circuit denying rehearing of that order (Appendix 2a); and (3) the July 29, 2025 Memorandum and Order of the Eastern District of New York denying Appellant’s petition for a writ of habeas corpus (Appendix 3a–42a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Appellant represented himself at his criminal trial, after the trial court ruled that Appellant’s waiver of his right to counsel was knowing and intelligent. But in

connection with that ruling, the trial court never discerned what, if anything, Appellant understood about the kind of sentence he risked, if convicted. Here, unbeknownst to Appellant, he faced the possibility of life imprisonment. After Appellant was convicted, he appealed his conviction, relying on *Iowa v. Tovar*, 541 U.S. 77 (2004) and *Von Moltke v. Gillies*, 332 U.S. 708 (1948) for his argument that his decision to waive his right to trial counsel was not knowing and intelligent, given that he made his waiver decision without being told about the risk of a sentence of life imprisonment.

After the state appellate courts rejected Appellant's appeal, he filed a petition for a writ of habeas corpus in the Eastern District of New York, in which, again relying on *Tovar* and *Von Moltke*, he argued that his waiver of counsel was not knowing and intelligent. In particular, he argued that for a waiver of counsel to be valid, a defendant must be informed "of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments." *Tovar*, 541 U.S. at 81. In denying Appellant's habeas petition, the District Court held that *Tovar* and *Von Moltke* "do not ... clearly establish ... that a trial court must discern whether the defendant understood his sentencing exposure after trial before accepting a waiver."

Appellant filed a motion for a certificate of appealability (“COA”) with the Second Circuit. Under this Court’s precedent, a COA must issue when “jurists of reason could disagree with the district court’s resolution of [the] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A claim is “legally frivolous”—and thus does not warrant a COA—only if it “is squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case.” *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983).

In arguing that he had satisfied the standard for the issuance of a COA, Appellant relied in part on decisions from the Third, Eighth, and Ninth Circuits holding that *Iowa v. Tovar*, 541 U.S. 77 (2004) and/or *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948), require that a defendant be informed of his sentencing exposure for a waiver of counsel to be constitutionally valid. *See Henderson v. Frank*, 155 F.3d 159, 166-67 (3d Cir. 1998) (holding waiver invalid where “neither the waiver of counsel form nor the petition to proceed *pro se* explained, for example, what sentences or fines Henderson could face if convicted”); *Shafer v. Bowersox*, 329 F.3d 637, 647 (8th Cir. 2003) (“In *Von Moltke* the Supreme Court instructed that the presiding judge must ensure that a defendant’s waiver of counsel is ‘intelligent and competent’ before he may proceed to plead guilty. A conclusory statement by the defendant that he is

aware of his rights is not sufficient assurance, for a valid waiver requires ‘an apprehension of ... the range of allowable punishments’); *Arrendondo v. Neven*, 763 F.3d 1122, 1131 n.2 (9th Cir. 2014) (“*Tovar* clearly establishes that a defendant waiving counsel must understand ‘the range of allowable punishments attendant upon the entry of a guilty plea.’”). Accordingly, Appellant argued that the standard for a certificate of appealability was met as reasonable jurists could *and have* disagreed with the conclusion reached by the District Court that he need not be informed of the maximum punishment he faced for his waiver of counsel to be valid.

In denying Appellant’s motion for a COA, the Second Circuit appears to have resolved the legal questions at the heart of his appeal, and not merely asked whether the questions raised by Appellant’s petition are at least “debatable among jurists of reason” as required by *Miller-El*. Accordingly, Appellant intends to ask this Court for certiorari so that it can review the standard for the issuance of a COA being employed by the Second Circuit to ensure that it is not more difficult to meet than the standard applied by other circuits and that it is not inconsistent with this Court’s own precedents.

Appellant requests this extension because his incarceration and conditions of confinement have made it difficult to confer with counsel regarding the denial of his

motion for a certificate of appealability. Accordingly, Appellant respectfully requests a 60-day extension of time.

Counsel for the Respondents, the Office of the Kings County District Attorney, has conveyed that Respondents consent to this application for an extension of time.

Accordingly, the undersigned counsel respectfully requests an extension of time to July 6, 2026 to file a petition for a writ of certiorari.

Dated: New York, New York
April 23, 2026

CARTER LEDYARD & MILBURN LLP

By: Alan Lewis
Alan S. Lewis
28 Liberty Street, 41st Floor
New York, NY 10005
(917) 533-2524
lewis@clm.com

Counsel for Petitioner-Appellant

TO: Solomon Neubort, Esq.
Assistant District Attorney
Office of the Kings County District Attorney
350 Jay Street
Brooklyn, NY 11201
(718) 250-2514
neuborts@brooklynda.org

Counsel for Respondents-Appellees

APPENDIX

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APPENDIX A

E.D.N.Y. – Bklyn
20-cv-2005
Komitee, 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 7th day of January, two thousand twenty-six.

Present:

Amalya L. Kearse,
John M. Walker, Jr.,
Joseph F. Bianco,
Circuit Judges.

Anthony McCord,

Petitioner-Appellant,

v.



25-2071

Superintendent Patrick Reardon, Marcy Correctional
Facility, et al.,

Respondents-Appellees.

Appellant moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not “made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

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

APPENDIX B

**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 6th day of February, two thousand twenty-six,

Present: Amalya L. Kearse,
John M. Walker, Jr.,
Joseph F. Bianco,

Circuit Judges,

Anthony McCord,

Petitioner - Appellant,

v.

Superintendent Patrick Reardon, Marcy Correctional Facility, Letitia James, Attorney General of the State of New York,

Respondents - Appellees.

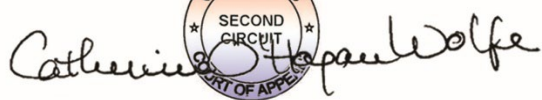

ORDER

Docket No. 25-2071

Appellant Anthony McCord filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX C

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ANTHONY MCCORD,

Petitioner,

MEMORANDUM & ORDER
20-CV-2005 (EK)

-against-

PATRICK REARDON,

Respondent.

-----x

ERIC KOMITEE, United States District Judge:

Anthony McCord was a pimp – by his telling, an “initiated member” of a “quiet society of pimps.” In 2010, after two women spurned his offer of employment, he allegedly robbed and beat them, then kidnapped and raped one of them. State officials arrested McCord the next day and charged him with offenses including rape, sexual abuse, burglary, robbery, and assault. McCord proceeded to trial *pro se*. Although he was acquitted of the sexual offenses, the jury convicted him of burglary, robbery, assault, and possession of stolen property. The sentencing judge found McCord to be a “persistent felony offender” under New York sentencing law and imposed an indeterminate sentence of twenty-one years to life.

Through retained counsel, McCord now petitions for habeas relief under 28 U.S.C. § 2254. He claims the writ should issue because the New York State Supreme Court violated his

Sixth Amendment rights by failing to advise him of the penalties he faced before permitting him to represent himself at trial. He also asserts that his sentence was the product of judicial "vindictiveness" in retaliation for his decision to exercise his trial rights, and illegal for other reasons.

All of McCord's claims are either procedurally barred, meritless, or both. Accordingly, the petition is denied.

I. Background

A. The Events of March 28 and 29, 2010

The evidence at trial established the following. On the evening of March 28, 2010, two women, L.M. and N.A.,¹ were working as prostitutes in Room 209 at the Imperial Hotel in Brooklyn. R. vol. 2, at 92:14-99:9, 345:16-20, ECF No. 12-2.² At some point, a client arrived. The man "stood around for a few minutes" and smoked a cigarette. *Id.* at 99:10-100:17. Soon, a second man – McCord – knocked on the door, which the first man opened. *Id.* at 100:18-101:5. McCord entered and began "punching [L.M.] in the face" multiple times, "dragging her" across the room, and "pulling on her hair." *Id.* at 101:6-102:2. N.A. attempted to intervene, but the first man stopped

¹ On November 30, 2020, I granted respondent's motion to redact documents containing the victims' names, and instead refer to them by their initials. See Mem. & Order, ECF No. 18.

² Page numbers in record citations other than briefs refer to ECF pagination.

her by revealing a gun in his waistband. *Id.* at 102:3-15.

McCord then took \$60 from N.A.'s wallet, as well as both women's laptop computers, clothes, and phones. *Id.* at 103:16-104:14.

He also hit N.A. in the face. *Id.* at 105:15-20.

McCord eventually ordered L.M. to get dressed, and she left with both men. *Id.* at 106:3-9. N.A., who was left in the room alone, eventually went to her boyfriend's house and called the police. *Id.* at 106:10-109:6.

Meanwhile, the first man dropped off McCord and L.M. at McCord's apartment. *Id.* at 243:21-244:15. L.M. said she wanted to leave, but McCord told him, "B****, you're not going anywhere. You're going to stay here and make me some money." *Id.* at 244:16-245:4. McCord then made L.M. undress and get into his bed, where – according to L.M.'s trial testimony – he forced her to engage in several sexual acts. *Id.* at 245:9-248:9. Both then fell asleep sometime after sunrise. *Id.* at 248:10-15.

Eventually, police arrived at McCord's apartment; L.M., still undressed, heard them knocking and opened the door, screaming that she was being kept "against [her] will." *Id.* at 248:10-249:19, 349:21-350:8. McCord, also undressed, tried to escape through a window but was arrested. *Id.* at 350:9-351:4. Police recovered two laptops, multiple cell phones, and clothes that had been taken from the women. *Id.* at 351:22-352:4. A

rape kit collected from L.M. tested positive for McCord's DNA. *Id.* at 341:21-342:23.

B. Pretrial Proceedings and Trial

McCord was charged in the Supreme Court, Kings County, with rape in the first degree, criminal sexual act in the first degree, sexual abuse, burglary, robbery, and assault in the second degree, and a number of lesser offenses. R. vol. 1, at 177:22-178:3, ECF No. 12-1; R. vol. 2, at 562:3-590:25. On May 4, 2011, McCord pleaded guilty to sexual abuse in the first degree in exchange for a sentence of five years in prison and fifteen years of post-release supervision, to cover all counts in the indictment. R. vol. 1, at 24:7-28:3. The following day, however, he filed a *pro se* motion seeking to withdraw his plea on the basis that it had been coerced; the court granted the motion. *Id.* at 34:10-35:9, 37:18-19. And because McCord had accused his defense attorney of being drunk during the plea proceeding, the Honorable Michael Gary also relieved McCord's counsel. *Id.* at 37:19, 65:9-17.³

Judges discussed McCord's *pro se* status at three subsequent court appearances. The first was a scheduling conference on August 4, 2011. There, the Honorable Elizabeth Foley conducted a colloquy with McCord (accompanied by standby

³ At some point, the court appointed a standby counsel, David Walensky, for McCord, although the record does not reveal precisely when this occurred.

counsel David Walensky) on his request to proceed *pro se*. *Id.* at 42:2-51:3. Justice Foley warned McCord of “the dangers of self-representation,” including that “the average person . . . has limited knowledge or experience in the law,” and the risk of being “too emotionally connected” to the case. *Id.* McCord said he understood those risks but nevertheless wished to waive his right to counsel. *Id.* at 50:18-21.

Five days later, on August 9, 2011, the Honorable Deborah Dowling conducted a *Huntley* hearing.⁴ *Id.* at 64:1-124:14. At the hearing, during which McCord (accompanied by Walensky) again expressed his wish to proceed *pro se*, Justice Dowling conducted a colloquy for the purpose of “inquir[ing] of [McCord] that he knows, exactly, what it is he is doing.” See *id.* at 67:19-21; see also *id.* at 68:5-73:22. She also informed McCord that if he continued to reject the prosecution’s five-year plea offer (which remained open at that point) and was “convicted of the top count,” McCord “certainly, would face significantly more jail time” than what was on offer. *Id.* at 65:23-66:25. McCord expressed that he understood this. *Id.* at 67:1-2.

⁴ “A *Huntley* hearing is held pursuant to *People v. Huntley*, 204 N.E.2d 179, 183 (N.Y. 1965), to determine the admissibility of statements made by a criminal defendant.” *Tineo-Santos v. Piccolo*, No. 19-CV-5038, 2022 WL 4238420, at *1 n.1 (S.D.N.Y. Sept. 14, 2022), appeal dismissed, No. 22-2736, 2023 WL 7284607 (2d Cir. June 29, 2023). Unless otherwise noted, when quoting judicial decisions, this order accepts all alterations and omits all citations, footnotes, and internal quotation marks.

On November 10, 2011, two weeks before trial, the Honorable Wayne Ozzi – before whom the case would be tried – conducted a *Sandoval* hearing.⁵ McCord once more indicated that he wished to proceed *pro se*. *Id.* at 130:1-6. In response, Justice Ozzi warned McCord once again that he would be at “a serious disadvantage” without a trained lawyer, as lawyers are “the experts in conducting trials.” *Id.* at 132:8-23. He discussed other risks, too, such as the risk of being “too emotionally involved.” *Id.* at 135:12-22. Justice Ozzi also explained Walensky’s role as McCord’s advisor and explained that while McCord would be allowed to consult Walensky during trial, McCord would bear “the ultimate responsibility for conducting the trial.” *Id.* at 137:22-147:2. As part of that discussion, and as outlined more fully below, the parties discussed McCord’s sentencing exposure, if he were to be convicted at trial. *Id.* at 145:14-146:9. The prosecutor stated that McCord faced up to fifty years in prison, or, if he was adjudicated a “discretionary persistent” offender, he could receive a life sentence for any felony conviction. *Id.*

McCord took an active role in the remaining pretrial proceedings. He questioned jurors during *voir dire*; raised

⁵ “A *Sandoval* hearing is held, upon a defendant’s request, to determine the extent to which he will be subject to impeachment by cross-examination about prior bad acts if he testifies” *Jones v. Artuz*, 96 F. App’x 742, 743 n.1 (2d Cir. 2004).

Batson challenges (of which the court sustained one); and sought expert-witness status "on the subject of pimping" (which the court denied). *See, e.g., id.* at 231:16-233:3, 384:3-408:19, 432:14-435:24.

Trial commenced on November 22, 2011 and lasted eight days. L.M., N.A., and McCord all took the stand, along with other witnesses. McCord testified that L.M. was one of the women that he pimped and that she had stolen money from him, as well as a client's phone – the first man to have arrived at Room 209 the evening of March 28. *R. vol. 2* at 436:22-438:23. McCord's defense was that the client, not he, had physically assaulted L.M. *Id.* at 439:14-24. In his telling, L.M. then agreed to "come back home" with McCord before engaging in consensual sex with him. *Id.* at 441:6-445:4.

After just over a day of deliberations, the jury convicted McCord of burglary in the first degree, two counts of robbery in the second degree, criminal possession of stolen property in the fifth degree, and assault in the second degree. *Id.* at 841:7-847:4. The jury acquitted McCord of all other counts, including the seven sex offenses. *See id.*

C. Sentencing

At sentencing, Justice Ozzi considered whether McCord should be adjudicated a persistent felony offender under New York Penal Law 70.10. *R. vol. 3*, at 3:1-55:20, ECF No. 12-3.

"A persistent felony offender is a defendant who stands convicted of a felony and has previously been convicted of two or more felonies." Richard de Simone, *New York Practice Series – New York Criminal Law* § 3:6 (Martin Marcus ed., 4th ed.), Westlaw (Oct. 2022 Update).

The state asked that McCord be sentenced as a persistent felony offender on the basis of two predicate convictions: first, in 1998, he was convicted of sexual abuse in the first degree and was originally sentenced to probation, but after violating that probation, was sentenced to 1.5-to-4 years in prison. R. vol. 3, at 5:17-21.⁶ Second, in 2004, he was convicted of attempted assault in the second degree and attempted criminal possession of a controlled substance in the fifth degree and was sentenced to concurrent terms of 1.5-to-3 years in prison. *Id.* at 5:22-6:6.⁷ The prosecutor advocated for an aggregate sentence of at least forty years to life if the court adjudicated McCord as a persistent felony offender. *Id.* at 15:1-20.

In response, Walensky (who at this point had stepped in to address the court directly) highlighted that the

⁶ On post-conviction review, the Supreme Court described this sentence differently, as 1.5-to-3 years in prison. See R. vol. 3, at 445. But this disharmony is immaterial because, as discussed below, the persistent felony offender statute only requires that the sentence imposed be greater than one year.

⁷ Criminal possession of a controlled substance in the fifth degree is a Class D felony. N.Y. Penal Law § 220.06. Attempt to commit a Class D felony is a Class E felony. N.Y. Penal Law § 110.05.

prosecution had originally offered a plea deal of five years and that it would be "somewhat wrong to punish a person for putting the People to their proof." *Id.* at 16:21-17:22. He also disputed the prosecution's contention that McCord met the requirements to be adjudicated a persistent felony offender. *Id.* at 29:5-8. Walensky requested the minimum sentence of ten years. *Id.* at 40:20-22, 50:22-25.

Justice Ozzi adjudged McCord as a persistent felony offender. *Id.* at 49:11-17. He imposed sentences of twenty-one years to life on the burglary and robbery convictions, fifteen years to life on the assault conviction, and one year on the conviction for criminal possession of stolen property. *Id.* at 53:3-23. All sentences ran concurrently. *Id.* at 53:23.

D. The Appeal and Petition for Post-Conviction Relief

McCord was represented on direct appeal. *Id.* at 57. He argued (among other things) that his waiver of counsel was not knowing and intelligent, that Justice Ozzi imposed his sentence in retaliation for his decision to go to trial, and that the persistent felony offender statute violates the Sixth Amendment. *Id.* at 95-113, 132-56.

The Second Department of the Appellate Division affirmed the Supreme Court's judgment. *People v. McCord*, 20 N.Y.S.3d 98 (App. Div. 2d Dep't 2015). It reasoned that "[t]he record, as a whole, demonstrates that [McCord] made a knowing,

voluntary, and intelligent decision to waive his right to counsel and to proceed [*pro se*]." *Id.* at 99. It also held that McCord's sentence was "not excessive" and denied his "remaining contentions" as "unpreserved for appellate review and, in any event, without merit." *Id.* at 100. The New York Court of Appeals denied McCord's request for leave to appeal on May 4, 2016. *People v. McCord*, 60 N.E.3d 1208, 1208 (N.Y. 2016). Justice Ginsburg granted McCord an extension to file a petition for certiorari on or before November 21, 2016. Harris Ltr., ECF No. 1-2, at 366. He did not so file, rendering the conviction final on that date.

McCord then sought collateral review in the state, moving to vacate his conviction and to set aside his sentence under Sections 440.10 and 440.20, respectively, of the New York Criminal Procedure Law. As relevant here, he argued that the trial court had illegally adjudicated him as a persistent felony offender. The state Supreme Court denied the motions, R. vol. 3, at 441-46, and the Appellate Division denied him leave to appeal, *id.* at 482.

On May 1, 2020, McCord filed the instant petition. Pet., ECF No. 1.⁸ His petition is timely, notwithstanding the

⁸ McCord brought this suit against the superintendent of the correctional facility in which he is confined, as well as New York Attorney General Letitia James. Ms. James is not a proper respondent. See 28 U.S.C. § 2243 ("The writ, or order to show cause shall be directed to the person

one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), because the statute was tolled during the period when his properly filed petition for collateral review was pending. See 28 U.S.C. §§ 2244(d)(1)-(2).⁹ McCord brings four claims. First, he argues that his waiver of counsel was constitutionally defective. Second, he argues that his sentence was the result of judicial vindictiveness, in violation of his due process rights. Third, he argues that New York's persistent felony offender statute violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the Sixth Amendment. Finally, he argues that Justice Ozzi incorrectly adjudicated him a persistent felony offender.

II. Legal Standards

A. Deference Under AEDPA

28 U.S.C. § 2254, as amended by AEDPA, governs an application for a writ of habeas corpus for a person in custody

having custody of the person detained.”). However, the state never moved to dismiss her from this case. As noted below, the case against her will now be dismissed as well.

⁹ McCord received an extension of time to petition for certiorari, though he did not ultimately seek that writ. The one-year statute of limitations began to run when this extension ended. See Brian R. Means, Federal Habeas Manual §9A.16, at 982 (2025) (“[I]f the extension is granted, the date of finality is extended, even if the petitioner never files the petition for writ of certiorari.”); *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012). McCord's time to petition for certiorari expired on November 21, 2016. Harris Ltr., ECF No. 1-2, at 366. He then filed his Section 440.10 petition on May 1, 2017, and it remained pending – and the statute of limitations remained tolled – until December 11, 2019, when the Appellate Division denied leave to appeal the Supreme Court's Section 440.10 decision. See App. Div. Decision & Order on Application, ECF No. 1-2, at 364.

pursuant to the judgment of a state court. Where the state court adjudicated a claim that the petitioner raises in his petition "on the merits," AEDPA requires meaningful deference to that determination. 28 U.S.C. § 2254(d); see *Dolphy v. Mantello*, 552 F.3d 236, 238 (2d Cir. 2009).

Thus, a petitioner challenging a decision made on the merits in state court must demonstrate that the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2).

A legal conclusion is "contrary to" clearly established federal law if it "contradicts the governing law set forth in" the Supreme Court's cases or "confronts a set of facts that are materially indistinguishable from a decision" of the Supreme Court, yet "arrives at a result different from [that] precedent." *Price v. Vincent*, 538 U.S. 634, 640 (2003). And a decision involves an "unreasonable application" of federal law "if the state court identifies the correct governing legal principle" in the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). It is the petitioner's burden to show that the state court applied the

governing principle in an objectively unreasonable manner.
Price, 538 U.S. at 641.

It is not enough that the federal court conclude, in its independent judgment, that the state court's decision was incorrect or erroneous: "[A] petitioner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Carmichael v. Chappius*, 848 F.3d 536, 544 (2d Cir. 2017) (citing *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

To ascertain whether the state court adjudicated the claim on the merits, "[t]he habeas court looks to the last state court decision rendering a judgment on the petitioner's federal claim. Unless this last decision clearly relies on a state procedural ground, the claim was decided on the merits and AEDPA deference applies." *Clark v. Perez*, 510 F.3d 382, 394 (2d Cir. 2008).

B. Exhaustion

A habeas petitioner must exhaust his available remedies in state court before presenting the claim to a federal district court. 28 U.S.C. § 2254(b)(1). To exhaust a federal claim, a petitioner must have "fairly present[ed] his claim in each appropriate state court (including a state supreme court

with powers of discretionary review), thereby alerting that court to the federal nature of the claim," and thus "giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). In New York, this means the petitioner must have raised the issues in question on direct appeal to the Appellate Division of the Supreme Court and again in seeking leave to appeal from the New York Court of Appeals. *Galdamez v. Keane*, 394 F.3d 68, 74 (2d Cir. 2005). Each claim must be exhausted. See *Jordan v. Lefevre*, 206 F.3d 196, 198-99 (2d Cir. 2000).

Alternatively, a petitioner may exhaust a claim by raising it in a motion to set aside the conviction under Section 440.10 of the New York Criminal Procedure Law and appealing the denial to the Appellate Division. See *Coke v. Superintendent, Green Haven Corr. Facility*, No. 06-CV-811, 2009 WL 3162486, at *1 (W.D.N.Y. Sept. 29, 2009). A petitioner who has litigated a claim on direct appeal, however, need not pursue it further on collateral review. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999).

Here, each claim is exhausted. McCord exhausted his claims regarding the waiver of his right to counsel, judicial vindictiveness, and unconstitutionality of the persistent felony offender statute by raising them on direct appeal. R. vol. 3,

at 95-113, 132-56 (Appellate Division brief); *McCord*, 60 N.E.3d at 1208 (denying leave to appeal). McCord exhausted his incorrect adjudication claim by raising it in his Section 440.10 motion, and then appealing that denial to the Appellate Division. R. vol. 3, at 357-64 (Supreme Court brief); *id.* at 459-65 (Appellate Division brief).

III. Discussion

A. Ground One: Defective Waiver of Right to Counsel

McCord first argues that the state court failed to comply with two Sixth Amendment requirements outlined in *Iowa v. Tovar*, 541 U.S. 77 (2004), before allowing him to waive his right to counsel and represent himself. Pet. Mem. 26-54, ECF No. 1-1. First, he argues that the court failed to inform him of the maximum punishment – up to life in prison – that he could face. Second, he argues that the court failed to ensure that he understood that he had the right to assistance of counsel during the plea-bargaining process.

1. The Supreme Court Has Not Clearly Established a Rule that a Defendant Must Be Warned of the Maximum Possible Punishment

At the outset, we note that the factual premise of this claim is shaky at best: McCord did receive clear and grave warnings about his sentencing exposure. At the *Huntley* hearing, Justice Dowling warned him that he could face “significantly [] more jail time” than the five years offered by the prosecution

if he went to trial and were convicted. R. vol. 1, at 66:20-25. Even more, at the *Sandoval* hearing before Justice Ozzi, the prosecutor stated that McCord could face a “life sentence for any felony conviction.” *Id.* at 145:18-25. At that same hearing, Walensky reserved the right to concede some charges in favor of a lower sentence if he took over as trial counsel. *Id.* at 144:7-146:12. McCord argues that none of these warnings were sufficient to apprise him of the “range of allowable punishments,” which he argues was required by Supreme Court law. But the New York courts did not err when they rejected this argument.

a. The Appellate Division Rejected This Argument on the Merits

In his reply brief, McCord argues that the Appellate Division failed to reach the merits of this claim, and therefore that AEDPA deference should not obtain. Reply Br. 2-5, ECF No. 17. He is mistaken.

AEDPA deference applies when a state court has “adjudicated [the claim] on the merits.” 28 U.S.C. § 2254(d); see *Johnson v. Williams*, 568 U.S. 289, 302 (2013). This bar is relatively low. “To qualify as an adjudication ‘on the merits,’ a state court decision need not mention a particular argument or explain the reasons for rejecting it.” *Bierenbaum v. Graham*, 607 F.3d 36, 48 (2d Cir. 2010). Even when a state court states

simply that a “defendant’s remaining contentions are without merit,” that suffices (absent some affirmative basis to believe the “claim was denied on procedural or any other nonsubstantive grounds”). *Brown v. Artuz*, 283 F.3d 492, 498 (2d Cir. 2002).

The Appellate Division went substantially further than what is required in rejecting this claim on the merits:

The Supreme Court did not err in allowing the defendant to represent himself at trial. The record, as a whole, demonstrates that the defendant made a knowing, voluntary, and intelligent decision to waive his right to counsel and to proceed pro se. Contrary to the defendant’s assertion, neither the United States Supreme Court nor the New York Court of Appeals has prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The trial court adequately warned the defendant of the risk inherent in proceeding pro se, and apprised him of the singular importance of the lawyer in the adversarial system of adjudication.

McCord, 20 N.Y.S.3d at 99. The court cited – among other cases, *Tovar* – the principal case that *McCord* relies on here. AEDPA deference clearly applies. See *Johnson*, 568 U.S. at 302.

In his effort to avoid this outcome, *McCord* endeavors to articulate a dichotomy between what he calls the “Tactical Risk Claim” and the “Magnitude Risk Claim.” Reply Br. 3. The former, he avers, “focuses on the risks that exist *within* the adjudicative process and . . . the skill gap between lawyers and *pro se* defendants.” *Id.* The latter “focuses instead on the defendant’s awareness (or lack of awareness) of *the magnitude of the consequences* he is risking if his gambit to be his own

lawyer fails – e.g., the amount of time in prison he risks.”

Id. He argues that the Appellate Division only considered the former. *Id.* But the Appellate Division’s conclusion that the trial judge “adequately warned the defendant of the risk inherent in proceeding [*pro se*], and apprised him of the singular importance of the lawyer in the adversarial system of adjudication” (emphasis added) easily subsumes both, even absent the specific phrasing McCord alludes to. Indeed, “the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances – even though the defendant may not know the *specific detailed* consequences of invoking it.” *Tovar*, 541 U.S. at 92.

Finally, the Appellate Division buttressed its merits ruling by declaring all of McCord’s “remaining contentions” “unpreserved for appellate review and, in any event without merit.” As discussed, even this cursory catchall suffices to merit AEDPA deference. *See Brown*, 283 F.3d at 498; accord Brian R. Means, *Federal Habeas Manual* § 3.7, at 310 (2025).

b. The Appellate Division’s Rejection of This Argument Was Not an Unreasonable Application of Supreme Court Precedent

McCord sees the clearly established Supreme Court precedent applicable here in two cases: *Iowa v. Tovar*, 541 U.S.

77 (2004), and *Von Moltke v. Gillies*, 332 U.S. 708 (1948) (plurality opinion). These cases do not, however, clearly establish the “rule” that McCord invokes: that a trial court must “discern[] whether [the defendant] understood his sentencing exposure after trial” before accepting a waiver. Pet. Mem. 2.

McCord relies on a passage in *Tovar* in which the Court said that knowing and intelligent waiver of the right to counsel “is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.” *Tovar*, 541 U.S. at 81 (emphasis added).

The first problem with McCord’s reliance on this language is that (as noted above) he was, indeed, informed of his potential sentencing exposure prior to trial. Assistant District Attorney Kevin O’Donnell informed McCord of the range of penalties before he proceeded to represent himself at trial. The following colloquy took place:

Mr. Walensky: His potential here is 25 years consecutive. There are two -- well, yeah, 25 years consecutive I believe on one of them with the rape and the robbery, right?

[ADA] O’Donnell: Judge, he is actually a discretionary persistent. So, if the Court deems it appropriate, *the Court could give him a life sentence for any felony conviction.*

Mr. Walensky: And that would be subject to review.

The Court: You view him as a discretionary persistent?

[ADA] O'Donnell: He has two prior felony convictions. Two prior felony convictions which would make him eligible for that sentence, but that is completely discretionary with the Court. *Absent that, he is facing up to 50 years.*

The Court: On the two consecutive as Mr. Walensky has described.

Mr. Walensky: There is certainly a lot of time.

R. vol. 1, at 145:14-146:9 (emphases added). This colloquy placed McCord on notice of the magnitude of the sentence he was facing.

Following this colloquy, McCord was not asked again if he wanted to represent himself, though Justice Ozzi noted that he was "convinced" McCord waived his right to counsel "knowingly, intelligently and voluntarily." *Id.* at 146:18-147:2. And McCord had been asked three prior times to confirm that he desired to proceed *pro se*. This repetition, together with the fact that Walensky stayed on as standby counsel, made it obvious that McCord's waiver was not set in stone.

The second problem with McCord's reliance on *Tovar* is that the passage in question is dicta. *Tovar* argued that he had never been "made aware by the court of the dangers and

disadvantages of self-representation.” *Tovar*, 541 U.S. at 85.

Specifically, he argued that the court must:

- (1) advise the defendant that waiving the assistance of counsel in deciding whether to plead guilty entails the risk that a viable defense will be overlooked; and
- (2) admonish the defendant that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty[.]

Id. at 81. The Iowa Supreme Court agreed. *Id.* at 86. The Supreme Court reversed, however, holding that “neither warning is mandated by the Sixth Amendment. *Id.* at 81. This was *Tovar*’s holding. See *id.* at 91–92 (“[T]he sole question before us is whether the Sixth Amendment compels the two admonitions here in controversy.”); *id.* at 94 (“We hold only that the two admonitions the Iowa Supreme Court ordered are not required by the Federal Constitution.”).¹⁰ And because “clearly established” law involves only “the holdings, as opposed to the dicta, of [the Supreme Court’s] decisions,” *Williams v. Taylor*, 529 U.S. 362, 412 (2000), that passage cannot provide relief.

¹⁰ In March 2025, McCord filed a letter of supplemental authority. ECF No. 34 (“Suppl. Ltr.”). McCord attached the Supreme Court’s recent decision in *Andrew v. White*, 145 S. Ct. 75 (2025), to support that this passage in *Tovar* was not dicta. Suppl. Ltr. 1. *Andrew* is inapposite. There, the Supreme Court applied its longstanding rule that “[w]hen this Court relies on a legal rule or principle to decide a case, that principle is a ‘holding’ of the Court for purposes of AEDPA.” *Andrew*, 145 S. Ct. at 81. The Court explained that *Payne v. Tennessee*, 501 U.S. 808 (1991), “removed one protection for capital defendants (the *per se* bar on victim impact statements) in part because another protection (the Due Process Clause) remained available against evidence that is so unduly prejudicial that it renders the trial fundamentally unfair.” *Andrew*, 145 S. Ct. at 81. Accordingly, the latter principle was “indispensable to the decision in *Payne*” and a holding for purposes of AEDPA. *Id.* Here, though, the passage McCord invokes was not “indispensable” to the Court’s sole holding.

McCord also seeks to harness Justice Black's plurality opinion in *Von Moltke*, which spoke of a "strong presumption against waiver of the constitutional right to counsel." 332 U.S. at 723. That opinion went on:

To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, *the range of allowable punishments thereunder*, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

Id. at 724 (emphasis added).

But as the Eighth Circuit has observed, the Supreme Court has not "adopted the *Von Moltke* plurality opinion in all of its particulars." *United States v. Kiderlen*, 569 F.3d 358, 367 (8th Cir. 2009). This makes sense; it would not be possible to require comprehensive compliance with these particulars. For example, defenses may only appear upon investigation later in the case. Additionally, a judge is generally not in a position to identify "circumstances in mitigation" before a trial or without the benefit of sentencing submissions and a pre-sentence report, which are provided post-trial. "The Supreme Court has not defined the phrase 'range of allowable punishments,'" *Akins v. Easterling*, 648 F.3d 380, 399 (6th Cir. 2011), let alone clearly established that a trial judge must provide a defendant

with the exact sentencing range that might apply in his case. Federal courts themselves are not required to give the detailed warnings about proceeding *pro se* that McCord believes *Von Moltke* requires. The court “must establish that a defendant knew what he was doing and his choice was made with eyes open,” but the Second Circuit has not mandated any “talismanic procedures to this end.” *United States v. Hurtado*, 47 F.3d 577, 583 (2d Cir. 1995). While such warnings “normally include[] a discussion of . . . the range of allowable punishments . . . an explicit accounting of the potential punishment” is not required. *United States v. Fore*, 169 F.3d 104, 108 (2d Cir. 1999).

In the end, *Von Moltke* is not clearly established. When the Supreme Court issues no majority opinion, the only law “clearly established” is the narrowest holding of the Justices concurring in the judgment. *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007). Justice Frankfurter’s concurring opinion is thus *Von Moltke*’s holding. His narrowest holding was that the record was insufficiently developed to decide the case, and thus remand was required. *Von Moltke*, 332 U.S. at 729-31 (Frankfurter, J., concurring).¹¹

¹¹ *But see Shafer v. Bowersox*, 329 F.3d 637, 651 (8th Cir. 2003) (treating the plurality opinion as “clearly established”).

Given the foregoing, the Appellate Division did not “unreasonably apply” the lessons of *Von Moltke* (or *Tovar*).¹²

2. The Supreme Court Has Not Clearly Established that a *Pro Se* Defendant Must Be Informed of the Right to Counsel in Plea Bargaining

McCord next argues that the trial court should have explained that by waiving his right to counsel, he waived his right to counsel in the plea-bargaining process. Pet. Mem. 42-44. McCord acknowledges that this omission could be explained by the Supreme Court not extending the Sixth Amendment right to counsel to the plea-bargaining context until *Missouri v. Frye*, 566 U.S. 134 (2012) – after his trial. Pet. Mem. 43 n.17. It would make no difference, however, if *Frye* was decided prior to McCord’s trial (or applied retroactively). Even if McCord had a clearly established right to an attorney in plea bargaining, he cites no Supreme Court authority requiring that he be *advised* of that right before foregoing representation. See *Tovar*, 541 U.S. at 88 (“We have not . . . prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel.”). McCord was advised that he had a right to counsel, full stop – and the Court has not required that that right be

¹² At oral argument, McCord asserted that the penalty information should have come from the court, not the prosecutor or standby defense counsel. Tr. 20:23-24:11, ECF No. 28. This rule does not emerge at all, let alone clearly, from any Supreme Court case. On the contrary, *Patterson v. Illinois* suggests the opposite when it refers to the “State’s showing that the information it” – not the court – “provided to him satisfied the constitutional minimum.” 487 U.S. 285, 294 (1988).

broken down into its component parts (at status conferences, during plea bargaining, in jury selection, at trial, sentencing, and so on).

B. Ground Two: Judicial Vindictiveness

McCord next argues that his sentence was the product of judicial vindictiveness – specifically, retaliation for his having exercised his trial right, in violation of the constitutional due process guarantee. Pet. Mem. 55–71. McCord sees evidence of this vindictiveness primarily in the disparity between the plea he was offered prior to trial and the sentence he received after it. *Id.* at 56, 58. But McCord failed to object to his sentence on this ground when it was imposed, and this renders his argument procedurally defaulted under New York law. That procedural default is, in turn, an independent and adequate state ground that bars habeas relief. In any event, McCord is wrong on the merits: the record does not reflect such vindictiveness.

1. McCord's Failure to Object at Sentencing Is an Independent and Adequate State Ground

On direct appeal, the Appellate Division rejected McCord's argument that his sentence was vindictive as "unpreserved for appellate review and, in any event, without

merit.” *McCord*, 20 N.Y.S.3d at 100.¹³ New York law requires a defendant to object contemporaneously to a sentence he believes to be imposed vindictively. See N.Y. Crim. Proc. Law § 470.05(2) (“For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same.”); *People v. Hurley*, 553 N.E.2d 1017, 1018 (N.Y. 1990) (finding a vindictiveness claim “unpreserved for our review” where defendant “made no protest or objection as the 2-to-4-year predicate felony offender sentence was imposed”). The Second Circuit has held that failing to comply with Section 470.05(2) is an “independent and adequate state ground” that bars federal collateral review. *Richardson v. Greene*, 497 F.3d 212, 218–20 (2d Cir. 2007).

¹³ The Second Department rejected on the merits *McCord*’s argument that his sentence was excessively long, but did not consider it unpreserved, instead simply concluding that “[t]he sentence imposed was not excessive.” See *McCord*, 20 N.Y.S.3d at 100. But that remark did not address the vindictive-sentencing claim, which is distinct from (and is generally treated by the Appellate Division as distinct from) the excessive-sentence claim. See *People v. Murray*, 984 N.Y.S.2d 417, 418–19 (App. Div. 2d Dep’t 2014) (rejecting as unpreserved defendant’s “contention that the Supreme Court, by the sentences it imposed, penalized him for exercising his right to a trial” and finding that claim unsupported by the record in any event, before separately finding that “[t]he sentences imposed were not excessive”).

McCord does not dispute that he failed to object to the sentence as required. Instead, he argues that this claim falls into the category, established by the Supreme Court in *Lee v. Kemna*, of “exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question.” 534 U.S. 362, 376 (2002). Interpreting this exception, the Second Circuit has held that a court should use the three factors relied upon in *Lee* “as guideposts in evaluating the state interest in a procedural rule against the circumstances of a particular case.” *Cotto v. Herbert*, 331 F.3d 217, 240 (2d Cir. 2003). Those factors are:

(1) whether the alleged procedural violation was actually relied on in the trial court, and whether perfect compliance with the state rule would have changed the trial court’s decision; (2) whether state caselaw indicated that compliance with the rule was demanded in the specific circumstances presented; and (3) whether petitioner had “substantially complied” with the rule given “the realities of trial,” and, therefore, whether demanding perfect compliance with the rule would serve a legitimate governmental interest.

Id. “[T]he adequacy of a state procedural bar is determined with reference to the particular application of the rule; it is not enough that the rule generally serves a legitimate state interest.” *Id.* These “factors are not a three-prong test: they are guideposts to aid inquiry” *Clark v. Perez*, 510 F.3d 382, 391 (2d Cir. 2008).

Here, none of the three *Lee / Cotto* factors weigh in favor of McCord. The first factor "is not very relevant" in contemporaneous objection cases, as "the lack of objection by a party would not, almost by definition, be mentioned by the trial court." *Monroe v. Kuhlman*, 433 F.3d 236, 242 (2d Cir. 2006). Regardless, "the lack of objection was 'relied upon' by the trial court in the sense that, had an objection been made, it would have allowed the trial court to review and weigh [McCord's] request." *Antiqua v. Giambruno*, No. 05-CV-2681, 2006 WL 800742, at *7 (S.D.N.Y. Mar. 30, 2006), *report and recommendation adopted*, No. 05-CV-2681 (S.D.N.Y. June 7, 2006), ECF No. 12.

As to the second factor, New York courts regularly hold that the failure to make a contemporaneous objection at sentencing waives appellate review.¹⁴ Thus, "state case law indicates that compliance with [this] procedural rule was required under the specific circumstances of [this] case," *Clark*, 510 F.3d at 392, and this factor weighs against McCord.

¹⁴ See, e.g., *People v. Ruz*, 519 N.E.2d 614, 614 (N.Y. 1988) ("[Defendant] now maintains for the first time that the surcharge was unconstitutional as applied to him, in that it violated the ex post facto prohibition contained in the Federal Constitution. By not bringing this issue to the attention of the court at the time of sentence, defendant failed to preserve it for our review."); *People v. Lemon*, 465 N.E.2d 363, 364 (N.Y. 1984) ("Defendant's contention that his sentence is illegal may not be reviewed on this appeal because the point has not been properly preserved. . . . The defendant . . . did not bring this point to the court's attention at the time of the sentence, or by way of a motion for resentencing, and thus no error of law has been preserved for our review.").

Finally, McCord did not substantially comply with the contemporaneous objection requirement. The sentencing transcript reveals that neither he nor Walensky mentioned anything about vindictiveness, or raised any objection at all, following the court's imposition of sentence. R. vol. 3, at 53-55. McCord notes that Walensky, during argument at sentencing, argued specifically that "it's somewhat wrong to punish a person for putting the People to their proof." R. vol. 3, at 17:17-18; see Pet. Mem. 66. But that statement, and the other remarks he pointed to, was made during argument and not when the sentence was imposed. *Cf. Hurley*, 553 N.E.2d at 1018 (a defendant must object "as the . . . predicate felony offender sentence was imposed" to preserve that objection for appellate review).

Because none of the three *Lee / Cotto* factors weigh in McCord's favor, that exception does not apply, and the claim remains procedurally barred. For such a claim "to escape [dismissal in federal court], the petitioner must show cause for the default and prejudice, or demonstrate that failure to consider the claim will result in a miscarriage of justice (*i.e.*, the petitioner is actually innocent)." *Aparicio v. Artuz*, 269 F.3d 78, 90 (2d Cir. 2001). McCord does not attempt to show either cause and prejudice for the default or actual innocence. Accordingly, this claim is barred from federal habeas review.

2. The Record Does Not Reflect Vindictiveness

The vindictiveness claim is meritless, in addition to being procedurally barred. McCord points to the minimum term of his actual sentence – twenty-one years – compared to the five-year sentence his plea offer contemplated. Pet. Mem. 58. But this disparity, without more, is insufficient. “[A] presumption of vindictiveness applies to a sentence only when there is a realistic motive for the vindictive sentencing. When a presumption of vindictiveness does not apply, the Petitioner has the burden of proving vindictiveness by a preponderance of the evidence.” *Pabon v. Hake*, 763 F. Supp. 1189, 1194 (E.D.N.Y. 1991).

A disparity between the plea offer and the post-trial sentence “does not make out a claim of actual vindictiveness” if “the judge never suggested that the sentence was based on [the defendant’s] refusal of the plea offer.” *Naranjo v. Filion*, No. 02-CV-5449, 2003 WL 1900867, at *10 (S.D.N.Y. Apr. 16, 2003).¹⁵ Indeed, the judge who sentenced McCord – Justice Ozzi – did not preside over McCord’s plea hearing or decide his petition to

¹⁵ *Accord*, e.g., *Brewster v. People of State of N.Y.*, No. 08-CV-4653, 2010 WL 92884, at *11 (E.D.N.Y. Jan. 6, 2010) (rejecting vindictiveness claim where the sentencing judge “never stated or implied that petitioner’s sentence was based on his failure to accept the prosecutor’s plea offer); *Brown v. Donnelly*, 371 F. Supp. 2d 332, 342 (W.D.N.Y. 2005) (“[T]he difference between the offered sentence and the imposed sentence does not make out a claim of actual vindictiveness because the judge never stated or implied that the sentence was based on [the defendant’s] refusal of the plea offer.”).

withdraw the plea. R. vol 1, at 22-38; *cf. United States v. Perez*, 904 F.2d 142, 145 (2d Cir. 1990) (where sentencing judge and resentencing judge are different, “there is no realistic motive for vindictive sentencing”). The mere “imposition of a higher sentence than that recommended in a plea offer does not, in and of itself, establish actual vindictiveness.” *Murray v. People of N.Y.*, No. 15-CV-3555, 2017 WL 3704677, at *15 (E.D.N.Y. Aug. 28, 2017).¹⁶

Courts regularly reject vindictiveness claims in cases involving similar, if not greater, disparities. *See, e.g., Russ v. Greene*, No. 04-CV-6079, 2009 WL 2958007, at *11 (W.D.N.Y. Sept. 11, 2009) (pretrial offer of five years; imposed sentence of twenty-four and a half years); *Murray*, 2017 WL 3704677, at *15 (pretrial offer of three and one-half years; imposed sentence of thirteen years); *Scott v. Graham*, No. 16-CV-2372, 2018 WL 5257613, at *20-21 (S.D.N.Y. Oct. 22, 2018) (pretrial offer of five years; imposed sentence of twenty years).¹⁷ The

¹⁶ *See also Corbitt v. New Jersey*, 439 U.S. 212, 223 (1978) (“We discern no element of retaliation or vindictiveness against [the defendant] for going to trial. There is no suggestion that he was subjected to unwarranted charges. Nor does this record indicate that he was being punished for exercising a constitutional right. . . . There is no doubt that those homicide defendants who are willing to plead *non vult* may be treated more leniently than those who go to trial, but withholding the possibility of leniency from the latter cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed.”).

¹⁷ *See also, e.g., Rosario v. Colvin*, No. 18-CV-0988, 2020 WL 360882, at *1, 6 (N.D.N.Y. Jan. 22, 2020) (pretrial offer of four years; imposed sentence of fifteen years to life), *appeal dismissed*, No. 20-398, 2020 WL 4345732 (2d Cir. May 28, 2020); *Brinson v. Walker*, 407 F. Supp. 2d 456, 469 (W.D.N.Y. 2006) (pretrial offer of seven years; imposed sentence of eighteen

disparity here is well within the range that federal courts have declined to disturb.

McCord also points to Justice Ozzi's statement that McCord was "disingenuous" in presenting mitigating information of his childhood. Pet. Mem. 60; see R. vol. 3, at 48:7. But Justice Ozzi was not disparaging McCord's rough childhood. Rather, he was reacting to McCord's argument that his criminal conduct was attributable to that background "when, in fact, [he] had the opportunity to lead a hard-working and legitimate life," given that McCord undisputedly had, for some time, been "on the right path" working lawful jobs selling mortgages, cell phones, and cars. R. vol. 3, at 48:3-10. That stray remark is insufficient to suggest vindictiveness.

McCord notes that Justice Ozzi "did not even attempt to discuss what, if anything, was particularly egregious" about McCord's crimes. Pet. Mem. 59. But Justice Ozzi explicitly noted the "violent conduct" underpinning McCord's convictions. R. vol. 3, at 46:21-47:5. McCord also argues that Justice Ozzi erroneously referred to "all of the . . . examples of violence" in his criminal history, despite him previously being convicted

years), *aff'd*, 547 F.3d 387 (2d Cir. 2008); *Archie v. Strack*, 378 F. Supp. 2d 195, 200 (W.D.N.Y. 2005) (pretrial offer of four and one-half to nine years; imposed sentence of ten to twenty years); *Thomas v. Kuhlman*, No. 99-CV-3737, 2003 WL 21294065, at *6-7 (E.D.N.Y. Apr. 8, 2003) (pretrial offer of two to four years; pre-persistent felony offender hearing offer of four years; imposed sentence of four to fifteen years); *Naranjo*, 2003 WL 1900867, at *10 (pre-trial offer of five to ten years; imposed sentence of twenty-five to fifty years).

of just one violent felony. Pet. Mem. 59. But Justice Ozzi recognized that “not all of [McCord’s] criminal history involved violence.” R. vol. 3, at at 45:20-45:23.

The only case McCord points to in which habeas relief was granted on the basis of vindictive sentencing is *Garcia v. Herbert*, No. 02-CV-2052, 2018 WL 6272778 (E.D.N.Y. Nov. 30, 2018). Pet. Mem. 61. In that case, Judge Weinstein found that the petitioner’s determinate sentence of 125 years imprisonment was “grossly disproportionate” to the twenty-year prison term he had been offered by the judge if he pleaded guilty prior to trial. *Garcia*, 2018 WL 6272778, at *2. But there, the sentencing judge had communicated an “implied judicial threat” to sentence the petitioner to an “extremely long sentence” if convicted after trial. *Id.* at *37-38 (emphasis omitted). Judge Weinstein also found that “[t]he two sentences differ in kind: a 20 year sentence would likely have allowed [the petitioner] to live a significant portion of his life outside of prison.” *Id.* at *37. He contrasted that sentence with what the defendant received: “A sentence of 125 years is a sentence of life – petitioner stands no chance of leaving prison before he dies unless the serious constitutional injustice done to him is corrected.” *Id.*

Garcia is distinguishable. Among other things, the sentencing judge in *Garcia* had significant involvement in the

plea process, see *id.* at *37-38, whereas Justice Ozzi had no involvement at all in McCord's. In addition, Justice Ozzi imposed an indeterminate sentence, which – unlike the essentially mandatory life sentence in *Garcia* – may still afford McCord “a significant portion of his life outside of prison.” *Id.* at *37.

Thus, even if the claim were not procedurally barred, there is no basis in the record for a finding of vindictiveness.

C. Ground Three: Unconstitutionality of the Persistent Felony Offender Statute

Under New York's persistent felony offender statute, a defendant convicted of a felony may be subject to harsher punishment as a “persistent felony offender” if the trial judge makes two findings: (1) that he had been convicted of two predicate felony offenses; and (2) that his “history and character . . . and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest.” N.Y. Penal Law § 70.10. McCord argues that allowing the trial judge to make the second finding violates *Apprendi*. Pet. Mem. 71-72. He also argues that allowing the judge to make the first finding violates the Sixth Amendment. *Id.* at 72-73. On direct appeal, the Appellate Division found these arguments to be “unpreserved

for appellate review and, in any event, without merit.” *McCord*, 20 N.Y.S.3d at 100.

As with *McCord*’s judicial vindictiveness claim, both arguments are procedurally barred because *McCord* failed to object at sentencing. This state-law default is an independent and adequate state ground barring habeas relief here. And again, these claims are meritless as well.

1. McCord’s Failure to Object at Sentencing Is an Independent and Adequate State Ground

As discussed above, New York courts require that a defendant contemporaneously object to a sentence to preserve any constitutional issues with it for appellate review. *McCord* does not meaningfully dispute the contention that his *Apprendi* and Sixth Amendment arguments are unpreserved. See Pet. Mem. 71–73. Nor does he attempt to argue that the *Lee / Cotto* exception applies, or show either cause and prejudice for the default or actual innocence. And his reply brief declines to discuss the claim at all. Accordingly, the independent and adequate state ground bars federal habeas review.

2. This Claim Is Meritless

Even if this ground for relief were not procedurally barred, it would be foreclosed by the Second Circuit’s *en banc* opinion in *Portalatin v. Graham*, 624 F.3d 69 (2d Cir. 2010). *Portalatin* held that the New York courts did not unreasonably

apply clearly established federal law in holding that the persistent felony offender statute does not violate *Apprendi*. The felony offender statute, according to the Circuit, does not “suffer from a constitutional defect that the state courts were objectively unreasonable to overlook.” *Id.* at 87. That holding forecloses McCord’s first argument.

McCord’s second, and more open-ended, argument is that “the trial judge’s mere finding that Mr. McCord had been convicted of prior felonies itself violated the Sixth Amendment.” Pet. Mem. 72. But *Portalatin* – and Supreme Court precedent – forecloses this claim as well. The Court in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), “affirmed the constitutionality of the use of recidivism as a judicially determined ‘sentencing factor’ authorizing an enhanced sentence.” *Portalatin*, 624 F.3d at 80. McCord takes issue with this case: citing disagreement among the Justices in *Shepard v. United States*, 544 U.S. 13 (2005), he argues that *Almendarez-Torres* “no longer represents the view of the majority of the Supreme Court.” Pet. Mem. 72; see *Shepard*, 544 U.S. at 27-28 (Thomas, J., concurring in part and concurring in the judgment) (“*Almendarez-Torres* . . . has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. The parties do not request it here, but in an

appropriate case, this Court should consider *Almendarez-Torres*' continuing viability.").

But this Court has no authority to abrogate *Almendarez-Torres*; "only the Supreme Court is vested with the prerogative of overruling its own decisions." *Jackson v. Conway*, 763 F.3d 115, 139 n.24 (2d Cir. 2014). Moreover, the Second Circuit continues to consider *Almendarez-Torres* binding. See *Portalatin*, 624 F.3d at 92 n.14 ("[I]n our own review of federal sentences, we have concluded that, despite the reservations expressed in *Shepard*, *Almendarez-Torres* continues to bind this court in its application of *Apprendi*").

Thus, because the Second Circuit has foreclosed both McCord's arguments, relief would be denied even on the merits.

D. Ground Four: Adjudication as a Persistent Felon

Finally, McCord argues that the state court incorrectly adjudicated him a persistent felony offender. McCord argues that he was originally sentenced to probation on his 1998 conviction, and was only imprisoned only after a probation violation. He contends that the operative "sentence" for purposes of the persistent felony offender statute is the probation, not the imprisonment, and therefore the 1998 conviction could not have been a predicate conviction. Pet. Mem. 17 n.8, 75.

This claim presents a pure question of state law and therefore is not cognizable on habeas review. "It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The Second Circuit has applied that principle in this precise context. In *Saracina v. Artus*, a habeas petitioner argued "that the question of whether a petitioner was unlawfully adjudicated a persistent felony offender and improperly subjected to recidivist sentencing under New York State law is cognizable on federal habeas review." 452 F. App'x 44, 46 (2d Cir. 2011). The Second Circuit held that argument to be "without merit," because "[w]hether a New York court erred in applying a New York recidivist sentencing enhancement statute is a question of New York State law, not a question of fact." *Id.* *Saracina* controls here.

Recognizing this, McCord argues that the error was "of constitutional dimension and deprived him of fundamental fairness." Pet. Mem. 76. Federal courts have entertained such contentions in habeas petitions in the context of *evidentiary* rulings by a state trial court. *See, e.g., Wilson v. Van Buren*, No. 07-CV-3567, 2010 WL 3260461, at *9 (S.D.N.Y. July 19, 2010); *see also Rosario v. Kuhlman*, 839 F.2d 918, 924 (2d Cir. 1988) ("The court must determine whether the exclusion [of evidence] was an error of constitutional dimension, and whether that

constitutional error was harmless beyond a reasonable doubt.”). But McCord cites to no case applying this exception in the context of sentencing or a recidivist sentencing scheme. On the contrary, courts have repeatedly held that “[i]f a sentence is within the range prescribed by state law, its length does not present a question of constitutional dimensions.” *Rosa v. Herbert*, 277 F. Supp. 2d 342, 346 (S.D.N.Y. 2003); see also *Ashby v. Senkowski*, 269 F. Supp. 2d 109, 115 (E.D.N.Y. 2003) (“A challenge to the imposition of consecutive sentences fails to present an issue of constitutional dimension if the sentence falls within the range prescribed by state law.”).

IV. Conclusion

For these reasons, McCord’s petition for a writ of habeas corpus is denied and this case is dismissed as to all respondents. No certificate of appealability shall issue because McCord has not made a substantial showing that he was deprived of any constitutional right. See 28 U.S.C.

§ 2253(c)(2). The Clerk of Court is respectfully directed to enter judgment and close this case.

SO ORDERED.

 /s/ Eric Komitee
ERIC KOMITEE
United States District Judge

Dated: July 29, 2025
Brooklyn, New York