No. 26-______

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY MCCORD,

Petitioner,

v.

BENNIE THORPE, ET AL.

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court of appeals, in evaluating a motion for a certificate of appealability under 28 U.S.C. § 2253(c)(2), may treat a habeas petitioner's constitutional claim as not debatable on the ground that it is in tension with that particular circuit's precedent, when the petitioner's claim finds direct support in decisions of other federal courts of appeals —notwithstanding this Court's holdings in *McKnight v. General Motors Corp.*, 511 U.S. 659 (1994), *Lozada v. Deeds*, 498 U.S. 430 (1991), and *Barefoot v. Estelle*, 463 U.S. 880 (1983), that a claim supported by contrary authority from other courts is, by definition, "debatable among jurists of reason"?

PARTIES TO THE PROCEEDING

The name of the Petitioner is:

Anthony McCord

The names of the Respondents are:

Bennie Thorpe, Superintendent,
Marcy Correctional Facility

Letitia James, Attorney General of the
State of New York

Patrick Reardon, former Superintendent,
Marcy Correctional Facility was the Respondent
in the Eastern District of New York and the
Second Circuit Court of Appeals

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to the case in this Court within the meaning of Rule 14.1(b)(iii):

- *People v. McCord*, Indictment No. 2787-2010, Supreme Court of the State of New York, County of Kings. Judgment entered December 2, 2012.

- *People v. McCord*, Docket No. 2012-05739, New York Appellate Division, Second Department. Judgment entered November 12, 2015.

- *People v. McCord*, Indictment No. 2787/10, State of New York, Court of Appeals. Order denying reconsideration of denial of motion for leave to appeal entered June 14, 2016.

- *People v. McCord*, Indictment No. 2787-10, Supreme Court of the State of New York, County of Kings. Judgment entered August 23, 2019.

- *People v. McCord*, Indictment No. 2787/10, New York Appellate Division, Second Department. Denial of motion for leave to appeal entered December 11, 2019.

- *McCord v. Reardon, et al.*, 20-cv-2005, U.S. District Court, Eastern District of New York. Judgment entered July 29, 2025.

- *McCord v. Reardon, et al.*, 25-2071, U.S. Court of Appeals for the Second Circuit. Judgment entered February 6, 2026.

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PETITION FOR A WRIT OF CERTIORARI

Anthony McCord respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The February 6, 2026 order of the Court of Appeals denying Mr. McCord's motion for reconsideration is unreported and attached as Appendix C, 41a. The January 7, 2026 order of the Court of Appeals denying Mr. McCord's motion for a certificate of appealability is unreported and attached as Appendix A, 1a. The July 29, 2025 Memorandum and Order of the United States District Court for the Eastern District of New York denying Mr. McCord's petition pursuant to 28 U.S.C. § 2254 is unreported and attached as Appendix B, 3a.

JURISDICTION

The Court of Appeals entered its judgment on February 6, 2026. On April 28, 2026, the Honorable Sonia Sotomayor extended Mr. McCord's time to file a petition for a writ of certiorari to and including July 6, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth Amendment. The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to … have the assistance of counsel for his defense.

This case also involves the application of 28 U.S.C. § 2253(c), which states, in relevant part:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

   (A) The final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

   ….

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

INTRODUCTION

After rejecting a five-year plea offer, Anthony McCord proceeded to trial pro se. At no point did the trial court, which deemed Mr. McCord's request to waive trial counsel to be knowing and voluntary, discern that McCord, as a self-represented defendant, understood the length of imprisonment (up to life) he faced if he were to be convicted after trial. After representing himself at trial, Mr. McCord was acquitted of the most serious charge and convicted of only five of the twenty counts which were submitted to the jury. Yet, Mr. McCord was sentenced to 21-years to life imprisonment.

On appeal and in his subsequent petition for a writ of habeas corpus, Mr. McCord challenged the state court's ruling that he had knowingly and intelligently waived his Sixth Amendment right to counsel, based on the fact that state court never discerned that Mr. McCord was aware of the length of imprisonment (which was up to life) he faced if convicted after trial. *See Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) ("Waiver [of the right to counsel] must be made with an apprehension of … the range of allowable punishments."); *Iowa v. Tovar*, 541 U.S. 77, 81 (2004) ("The constitutional requirement is satisfied when the trial court informs the accused … of the range of allowable punishments….").

Multiple Circuit Courts of Appeal have looked to *Von Moltke* and *Tovar* to hold that a defendant must be apprised of the range of allowable punishment he faces for a waiver of counsel to be valid. *See Henderson v. Frank*, 155 F.3d 159, 166-67 (3d Cir. 1998) (for waiver of counsel to be valid, at a minimum "waiver must be made with an apprehension of the … range of allowable punishments thereunder" (quoting *United States v. Welty*, 674 F.2d 185, 188-89 (3d Cir. 1982)); *Shafer v. Bowersox*, 329 F.3d 637, 649 (8th Cir. 2003) (colloquy inadequate where defendant not informed of possibility of receiving sentence other than life in prison or death penalty as "[c]learly established federal law … required the court to discuss precisely these things. The Supreme Court specified in *Von Moltke* that a defendant must be made aware of the 'range of allowable punishments….'"); *Arrendondo v.*

Neven, 763 F.3d 1122, 1130 (9th Cir. 2014) ("The Supreme Court *has* clearly established that a defendant must have a general understanding of the potential penalties of conviction before waiving counsel to render that waiver valid." (emphasis in original)).

Yet, not only did the District Court deny Mr. McCord's petition for a writ of habeas corpus, both the District Court and the Circuit Court of Appeals denied Mr. McCord's motion for a certificate of appealability, even though such a certificate should issue so long as Mr. McCord can show "that jurists of reason could disagree with the district court's resolution of his 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).

STATEMENT OF THE CASE

A. Introduction

On April 29, 2010, Mr. McCord was charged in a 42-count indictment with various offenses stemming from a single incident at a hotel in Brooklyn, New York. The indictment alleged that, after Mr. McCord was let in to a hotel room, he punched an occupant, causing relatively minor injuries, and took two laptops, three cellphones, clothing, and about $260 in cash.

Initially, Mr. McCord indicated a willingness to plead guilty to some of the charges. As part of those plea proceedings, Mr. McCord was adjudicated under

New York law as a "predicate" or "second felony" offender based on a 2004 attempted assault conviction. A003-005.[1] The next day, after being adjudicated a "predicate" or "second felony" offender, Mr. McCord moved to withdraw his guilty plea. A007.

B. State Court Waiver of Counsel

A few weeks after being adjudicated a "predicate" or "second felony" offender, Mr. McCord informed the trial court that he wished to proceed *pro se*. The court conducted waiver of counsel inquiries on three dates: August 4, August 9, and November 10, 2011. The court focused on Mr. McCord's understanding of the tactical advantages of legal representation at trial. Not once during the inquiries did the court mention McCord's exposure to a life sentence, should he be convicted, much less discern he understood that risk, or even provide him with specifics regarding the range of allowable punishments he faced.

During the first waiver colloquy on August 4, 2011, the court obtained general background information from Mr. McCord and informed him that if he represented himself, he would be "treated" as if he were a lawyer. A009-13. The court did not inform Mr. McCord of the length of the sentence he was facing, instead, the court noted only that a "possible

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[1] Citations preceded by "A" are to the Appendix to Mr. McCord's Memorandum of Law in Support of Petition for Writ of Habeas Corpus. *See McCord v. Reardon*, 20-cv-2005 (E.D.N.Y.) ECF #1–2.

conviction" carried an unspecified "prison sentence." A014.

On August 9, 2011, the prosecution informed Mr. McCord that the five-year plea offer was "still open." A020. After Mr. McCord indicated that he wished to plead innocent and proceed *pro se*, the court simply confirmed that Mr. McCord understood that a conviction after trial carried "significantly more jail time" than the five-year plea offer which he was then being offered. A020-21.

During another pre-trial hearing on November 10, 2011, the court again questioned Mr. McCord about his desire to waive his right to counsel and represent himself, focusing on Mr. McCord's background and the necessary legal skills. A029-36. Only after it had this colloquy with Mr. McCord, did the trial court have a *separate* discussion with Mr. McCord's "legal advisor" (who was not his lawyer) and the prosecutor. Mr. McCord did not participate in this separate discussion. During this discussion, Mr. McCord's "legal advisor" stated that Mr. McCord was a "predicate" offender who faced a potential "25 years consecutive" sentence. A039-40. The prosecution responded that Mr. McCord was "actually a discretionary persistent" who could get a "life sentence" after trial. A040. At no point did the court confirm that Mr. McCord had even heard, let alone understood, the prosecution's statement. Similarly, the court did not confirm that McCord could be sentenced as a discretionary persistent subject to life (he had previously been adjudicated a predicate, a category under which he was not subject to life).

During the November 10, 2011 pretrial conference, while Mr. McCord was proceeding *pro se*, the prosecution disclosed that it possessed recordings by the New York City Department of Corrections ("Corrections") of calls Mr. McCord made while he was incarcerated. While the prosecution initially said that it would only offer those recordings on rebuttal, *see* A042-43, a week later the prosecution notified Mr. McCord that it intended to introduce the recordings during its case-in-chief.

Both the court and the prosecution appeared to recognize that the recordings were subject to challenge on state law grounds, but both insisted that if Mr. McCord did not waive his right to challenge their admissibility, a Corrections employee would be allowed to testify and reveal Mr. McCord's pre-trial incarceration. *See* A058-59. The court did not permit Mr. McCord to obviate this prejudice while preserving his objection by stipulating to the recordings' *authenticity* while challenging their *admissibility* on other state law grounds. *See* A054; A058-59; A078.

C. Trial and Sentencing

Having waived his constitutional right to counsel, Mr. McCord proceeded to trial *pro se*. During *voir dire*, he made a *Batson* challenge and the court made a *prima facie* finding of discrimination. A067-69. The prosecutor gave purportedly race-neutral reasons for the first three challenges. However, the court found the reasons pretextual as to one juror and re-seated him. A070-73. Despite this successful *Batson* challenge, Mr. McCord inexplicably waived his challenge as to four other jurors, and the court did not require the prosecution to state its reasons for those preemptory challenges. A074-75.

At the conclusion of the trial, 20 counts were submitted to the jury. The jury convicted Mr. McCord of only five: one count of burglary in the first degree, two counts of robbery in the second degree, one count of assault in the second degree, and one count of criminal possession of stolen property. Mr. McCord was acquitted of the most serious charge (first degree rape) as well as an additional count of first-degree burglary. A113-15.

At the conclusion of the evidentiary portion of the trial, the court held a charge conference where Mr. McCord's "legal advisor" expressed confusion and a misunderstanding regarding Mr. McCord's potential sentencing exposure, specifically describing Mr. McCord's sentencing exposure as "a minimum of ten years and a maximum of 25 years." A111. Similarly, after Mr. McCord was convicted the court stated that it "was not aware that [Mr. McCord] … can be sentenced as a persistent." A116. Thus, even after trial, both the attorney who was appointed to "advise" Mr. McCord and the trial court were unaware that Mr. McCord had faced a life sentence.

Ultimately, the court sentenced Mr. McCord as a persistent felony offender and imposed a sentence of 21 years to life. A150.

D. State Appellate Proceedings

Mr. McCord appealed to the New York Appellate Division, arguing, among other things, that his Sixth

Amendment right to counsel was infringed because his waiver of his right to counsel was not knowing and intelligent. In particular, Mr. McCord argued the trial court erred by accepting his waiver of counsel without ascertaining that he understood the range of possible punishments he faced if convicted. *See* A154; A163-68.

The state Appellate Division rejected Mr. McCord's challenge to his waiver of counsel. Although Mr. McCord pointed to the Sixth Amendment and relevant federal court decisions, the Appellate Division held only that "[t]he 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." *People v. McCord*, 133 A.D.3d 689, 690 (2d Dep't 2015). The Appellate Division did not find that Mr. McCord had been informed of his sentencing exposure prior to waiving his right to counsel. Instead, it simply found that Mr. McCord was warned of the (unspecified) risks of proceeding *pro se* and informed of the role a lawyer plays in the adversarial system. *Id.*

E. Mr. McCord's Federal Habeas Petition

On May 1, 2020, Mr. McCord filed a petition in the United States District Court for the Eastern District of New York seeking a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, setting aside his unconstitutional conviction and sentence.

In his petition, Mr. McCord renewed his argument that his waiver of counsel was invalid because he had not been apprised of the sentencing risk he faced after trial. He argued that the state court had failed to adjudicate Mr. McCord's Sixth Amendment claim on the merits, because it treated his claim as a standard *Faretta* claim and not the claim it was—a challenge to his waiver based on the trial court's specific failure to ascertain his understanding of his sentencing risk. In the alternative, he argued that even if the state court decision is treated as an adjudication on the merits subject to Section 2254, its denial of his claim was contrary to or an unreasonable application of clearly established law governing what a defendant must understand to knowingly and intelligently waive his constitutional right to representation.

The District Court held oral argument on Mr. McCord's petition on November 10, 2022. During the oral argument, the District Court was critical of the colloquies the state court had engaged in prior to allowing Mr. McCord to waive his right to counsel, stating that "at the risk potentially of understatement," the state court "could have done better" and that the warnings Mr. McCord received were "suboptimal." 11/10/22 Tr. 6:11-13; 20:8.[2] The District Court also stated that it was spending longer on Mr. McCord's petition than usual and that "you can see that obviously there's something here." 11/10/22 Tr. 64:24-65:2.

Two and a half years later, on July 29, 2025, the District Court issued a Memorandum and Order denying the petition and declining to issue a certificate of appealability. The District Court

[2] A copy of the transcript is available from the District Court docket. *See McCord v. Reardon*, 20-cv-2005 (EDNY) ECF #28.

concluded that Supreme Court precedent did not clearly establish that a defendant must be warned of the maximum possible punishment prior to waiving his constitutional right to counsel.

In rejecting Mr. McCord's petition, the District Court interpreted *Iowa v. Tovar*, 541 U.S. 77 (2004) and *Von Moltke v. Gillies*, 332 U.S. 708 (1948) as *not* holding that knowledge of sentencing risk is part of a constitutionally valid waiver but, in so doing, ignored that several other courts, including United States Circuit Courts of Appeals, have held that a defendant must be informed of his sentencing risk in order for a waiver of counsel to be valid. The District Court's alternative holding, in which it characterized the state court record as purportedly supporting the notion that Mr. McCord knew his sentencing risk, violated this Court's *repeated* holding to "indulge in every reasonable presumption against waiver." *Brewer v. Williams*, 430 U.S. 387, 404 (1977); *see also Michigan v. Jackson*, 475 U.S. 625, 633 (1986), *overruled on other grounds by Montejo v. Louisiana*, 556 U.S. 778 (2009); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *overruled in part on other grounds by Edwards v. Arizona*, 451 U.S. 477 (1981).

Mr. McCord filed a motion in the Second Circuit seeking a certificate of appealability as to his Sixth Amendment claim. On January 6, 2026, the Second Circuit heard oral argument on the motion. The next day, on January 7, 2026 the Second Circuit issued a summary order denying the motion, without providing a reasoned explanation. On January 21, 2026, Mr. McCord moved for reconsideration which motion was denied by the Second Circuit on February

6, 2026, again via summary order without a reasoned explanation.

REASONS FOR GRANTING THE WRIT

The Second Circuit contravened this Court's precedent as to when a certificate of appealability should issue and deepened a circuit split raising an issue of national significance: whether a waiver of the Sixth Amendment right to trial counsel is valid when the court accepting such a waiver fails to discern that the defendant understands the sentencing risk he faces if convicted after trial.

I. The Second Circuit's Denial of a Certificate of Appealability Creates a Split Among the Circuits About the Standard for Granting a Certificate of Appealability

This Court has held that when assessing whether to grant a certificate of appealability, the court should engage in only a threshold analysis and should defer full merits review to after there has been full appellate briefing. "[A] prisoner seeking a COA need only demonstrate a 'substantial showing'" that the district court erred in denying relief. *Miller-El*, 537 U.S. at 327 (quoting 28 U.S.C. § 2253(c)(2)). To meet this standard, a petitioner need not show that he will prevail, or even that some jurists would agree with him. Instead, the threshold inquiry is satisfied where the petitioner shows "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537

U.S. at 327. The key is "the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.* at 342. This Court has held that the standard is met when other courts have resolved the issue "in a different manner" than the court whose decision is being challenged. *See Lozada*, 498 U.S. 430, 432 (1991) (reversing denial of certificate of appealability where petition was denied based on lack of prejudice under *Strickland* but "at least two Courts of Appeals have presumed prejudice in this situation").

Mr. McCord's motion for a certificate of appealability certainly appears to meet this standard and he was denied a certificate of appealability only because of the Second's Circuit's unauthorized enhancement of the standard under which it requires a petitioner to also show he could overcome circuit precedent on his underlying claim. That Mr. McCord's Sixth Amendment claim is capable of being resolved differently by other jurists of reason is readily apparent: The United States Courts of Appeals for the Third, Eighth, and Ninth Circuits have all held that a defendant cannot knowingly and intelligently waive his right to counsel unless he has been informed of the range of possible sentences he faces if convicted. *See infra* at 16-17. The question presented by Mr. McCord's request for a certificate of appealability has thus not merely divided jurists of reason in theory; reasonable jurists have actually confronted the question and resolved it in his favor. Under this Court's precedent, a claim that some courts have decided in the petitioner's favor is, by definition, "debatable among jurists of reason," because those decisions demonstrate "that a court could resolve the issues in a different manner." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) ; *see also Miller-El*, 537 U.S. at 327; *McKnight*, 511 U.S. 659, 660 (1994); *Lozada*, 498 U.S. at 432. Thus, a certificate of appealability should have issued.

But as discussed below, the Second Circuit appears to have engaged in an impermissible review of the merits and denied relief based on its perception that Mr. McCord could not succeed on his Sixth Amendment claim—only because of Second Circuit precent—rather than simply resolving the threshold question of whether Mr. McCord's petition raised a debatable constitutional claim. Notably, the Second Circuit's failure to follow this Court's clear holdings as to the correct standard to apply on a motion for a certificate of appealability does not appear to be limited to the instant case. *See infra* at 22-23. Accordingly, the Court should grant Mr. McCord's petition for a writ of certiorari to reaffirm that a certificate of appealability should issue whenever a habeas petitioner has shown that the issues are "debatable among jurists of reason," which necessarily includes the situation when different Circuit Courts of Appeal have answered the question differently.

A. The Panel Appears to Have Denied Relief Based on Its View of the Merits

So long as reasonable jurists could have disagreed as to whether Mr. McCord's waiver of counsel was valid, he was entitled to a certificate of appealability. *See Miller-El*, 537 U.S. at 327. In other words, so long as some reasonable jurists could disagree as to whether (1) Mr. McCord needed to be informed of his sentencing exposure in order for his waiver of counsel to be valid, and (2) Mr. McCord was not informed of his sentencing exposure, then a certificate of appealability should have issued.

As set forth below, the Second Circuit appears to have denied Mr. McCord's motion for a certificate of appealability based on its view of the merits on one or both of these questions, and thus failed to apply the correct standard.

i. The Second Circuit Must Have Adjudicated the First Question on the Merits Because Reasonable Jurists Have Disagreed on the Question of Whether a Defendant Must be Informed of His Sentencing Risk Prior to Waiving Counsel

The Second Circuit denied Mr. McCord's motion for a certificate of appealability, and his motion for reconsideration, via standard form orders which give no explanation as to why his motion was denied. *See* App. A & App. C. However, based on statements made by members of the panel at oral argument of McCord's motion for a certificate of appealability, it is evident that the Second Circuit denied Mr. McCord's motion based on its resolution of the merits of Mr. McCord's underlying petition, specifically based on its belief that under Second Circuit precedent, Mr. McCord did not need to be informed of his sentencing exposure in order for his waiver of counsel to be intelligent and, thus, constitutionally valid. Indeed, one member of the panel, Judge Bianco, posed a rhetorical question during oral argument based on the premise that the Second Circuit had already determined that a defendant waiving counsel does not need to meaningfully understand his sentencing risk after trial. Even if the Second Circuit had so held, that should not have disqualified McCord from obtaining a COA if, as is the case, other courts have disagreed with the Second Circuit. *See Henderson*, 155 F.3d at 166-67 (for waiver of counsel to be valid, at a minimum "waiver must be made with an apprehension of the … range of allowable punishments thereunder" (quotation omitted)); *Shafer*, 329 F.3d at 649 ("[c]learly established federal law … required the court to discuss [possibility of receiving sentence other than life or death penalty]. The Supreme Court specified in *Von Moltke* that a defendant must be made aware of the 'range of allowable punishments….'"); *Arrendondo*, 763 F.3d at 1130 ("[t]he Supreme Court *has* clearly established that a defendant must have a general understanding of the potential penalties before waiving counsel to render that waiver valid." (emphasis in original)).

But in any event, Judge Bianco's characterization of the Second Circuit decision he referenced, *Dallio v. Spitzer*, 343 F.3d 553 (2d Cir. 2003), was inaccurate. *Dallio* cannot preclude McCord's *Tovar* based-claim even under circuit precedent because *Dallio* predates *Tovar*, which was rendered the following year in 2004, and thus *Dallio* could not have decided whether, as Mr. McCord argues, *Tovar* is clearly established law making knowledge of sentencing risk a necessary part of a knowing and intelligent decision to waive counsel.

Another question posed during Mr. McCord's Second Circuit argument suggested that the panel believed to the extent *Tover* mandates knowledge of sentencing risk as part of an intelligent waiver of counsel, the requirement is limited to waivers executed before guilty pleas. But that view of *Tovar* has been rejected by other courts, including some circuit courts of appeals. Specifically, in *Arrendondo*, the Ninth Circuit held that the requirement that a defendant before informed of the range of possible punishment he faced applied to trial waivers as "there is no difference at all in the two circumstances [plea stage vs. trial] with regard to … knowledge of the magnitude of the risk face." 763 F.3d at 1132. Additionally, the Ninth Circuit reasoned that given this "Court's express declaration that the requirements for a guilty plea waiver of counsel are *less* rigorous than those applicable to a trial waiver, excising any of Tovar's requirements in the trial context would be an unreasonable interpretation of clearly established Supreme Court law." *Id.* (emphasis in original). Similarly, in *Henderson*, the Third Circuit found invalid the waiver of counsel at a suppression hearing for a defendant who later went to trial where the generic waiver of counsel form did not explain, *inter alia* "what sentences or fines Henderson could face if convicted" as a defendant must always be informed of his sentencing exposure for a waiver of counsel to be constitutionally valid. *See* 155 F.3d at 166–67.[3] These decisions establish that Mr. McCord's

[3] District courts, including those within the Second Circuit, have also held that a defendant must be informed of his sentencing exposure for a waiver of counsel to be valid in the context of defendants who proceeded to trial. *See Rodriguez v.*

Sixth Amendment claim is *at least* debatable among jurists of reason. Indeed, reasonable jurists *have* debated these precise questions, and multiple courts have resolved in Mr. McCord's favor.

Accordingly, the Second Circuit could not have rejected Mr. McCord's motion on this basis according to the standard set forth by this Court in *Miller-El*. That is, if all the Second Circuit had done was assess whether reasonable jurists could disagree with the conclusion reached below, that Mr. McCord did not need to be informed of his sentencing exposure, then Mr. McCord would have been entitled to a certificate of appealability since reasonable jurists *have disagreed* with the conclusion reached below. *See Barefoot*, 463 U.S. at 893 n.4 (to meet requirement to make substantial showing of the denial of constitutional right petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues in a different manner" (emphasis in original, internal punctuation omitted)); *see also Lozada*, 498 U.S. at 431-32 (same). Here, it is obvious that a court *could* resolve Mr. McCord's Sixth Amendment claim differently since other courts *have* resolved such claims differently. Thus, the Second Circuit went further, by rejecting a certificate of appealability based on circuit precedent,

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Superintendent of Clinton Corr. Facility, 2021 U.S. Dist. LEXIS 1928, at *13–14 (S.D.N.Y. Jan. 6, 2021) (waiver not knowing and intelligent where defendant was not "inform[ed]… about the extent of potential punishment"); *see also Lagarde v. Cain*, 2010 U.S. Dist. LEXIS 129749, at *22 (E.D. La. Nov. 22, 2010) (waiver of counsel valid where, *inter alia*, "record reflects … that defendant knew he was facing a potential life sentence").

even where reasonable jurists in other circuits have disagreed with the legal reasoning on which McCord's habeas petition had been denied.

ii. The Second Circuit Gave No Indication as to Whether It Believed Mr. McCord Was Actually Informed of His Sentencing Risk, but the Conclusion Is Manifest that He Was Not

As to whether Mr. McCord was actually informed of his sentencing risk, the Second Circuit did not indicate whether it believed he had been so informed and appears to have relied on its understanding that Mr. McCord was not required to be informed of his sentencing exposure to reject his motion for a certificate of appealability. However, a review of the underlying record shows that Mr. McCord easily meets the standard to show that it is at least debatable as to whether he was informed that he faced a life sentence after trial, since there is no evidence showing that he was ever informed of his sentencing exposure, much less that he faced a possible life sentence after trial.

While the state Appellate Division rejected Mr. McCord's Sixth Amendment waiver of counsel claim, it never found that he knew and understood his sentencing exposure to life imprisonment or otherwise. Instead, the Appellate Division held that "[t]he 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*]" while stating that "[t]he 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*, 133 A.D.3d at 690.

The District Court's alternative holding, in which it characterized the state court record as purportedly supporting the notion that Mr. McCord knew his sentencing risk, violated the Supreme Court's repeated directive to "indulge in every reasonable presumption against waiver." *Brewer,* 430 U.S. at 404, *see also Jackson*, 475 U.S. at 633, *overruled on other grounds by Montejo v. Louisiana*, 556 U.S. 778 (2009); *Johnson*, 304 U.S. at 464, *overruled in part on other grounds by Edwards v. Arizona*, 451 U.S. 477 (1981). Instead, the District Court relied on the vague warnings that Mr. McCord was given which contained no indication that Mr. McCord actually heard or even understood those warnings, or that those warnings were specific enough to adequately apprise Mr. McCord of the risks that he faced. Specifically, the District Court cited the portion of the August 9, 2011 colloquy warning Mr. McCord that "he could face 'significantly [] more jail time' than the five years offered by the prosecution if he went to trial and were convicted." App. B at 17a. But this warning is so vague as to be meaningless—a sentence of 10 years would be twice that of 5 years and would surely be considered "significantly more", while a sentence of life (which is what Mr. McCord received), would also be considered "significantly more." A warning that does not allow a defendant to know if he faces 10 years or life, cannot satisfy the requirement that a defendant be meaningfully warned of his sentencing exposure prior to intelligently waiving counsel.

The District Court also relied on the pre-trial comment by the *prosecutor* that Mr. McCord could face a life sentence to find that Mr. McCord had been warned of his sentencing exposure. *See* App. B at 17a. But this comment also cannot satisfy a constitutional requirement Mr. McCord's knowledge of his sentencing exposure be discerned for two reasons. First, there was no indication on the record that Mr. McCord heard or understood this offhand remark by the prosecution. *See* A040-41. Second, there was no indication that the court endorsed or agreed with the prosecution's comment regarding Mr. McCord's potential sentencing exposure. Therefore, even if Mr. McCord had heard the comment (and there is no indication that he did), there was no reason for Mr. McCord to know that it accurately reflected his sentencing exposure.

Indeed, while the District Court rejected Mr. McCord's petition, it acknowledged that the warnings he received were "suboptimal," and that it was an "understatement" to say that the trial court could have done better. 11/10/22 Tr. 6:11-13; 20:8. Accordingly, even if the District Court and Second Circuit could have concluded that Mr. McCord was warned to some degree as to his sentencing exposure after trial (despite the lack of any such specific warnings in the records), it is incomprehensible how the Second Circuit could have concluded that no reasonable jurist could have concluded that Mr. McCord did not receive and understand an adequate warning as to his sentencing exposure given that the

District Court conceded that the warnings he received were "suboptimal" and a court is supposed to engage in every inference *against* waiver. *See Brewer*, 430 U.S. at 404. The conclusion is manifest that if the Second Circuit did in fact rely on the warnings that Mr. McCord received to reject his request for a certificate of appealability, it must have looked beyond whether Mr. McCord's petition raised a substantial question of constitutional law and instead looked at the underlying merits of Mr. McCord's petition.

B. The Second Circuit Appears to be Employing an Overly Restrictive Standard

The Second Circuit Court of Appeals uniformly relies on standard form orders to deny motions for certificates of appealability, as it did in the instant case. These form orders impede effective review because they give no indication of the standard employed by the Second Circuit or the reasons for which the motions are denied. Without information as to the standard applied or the reasons for which a motion for certificate of appealability is denied, it is impossible for this Court to assess whether the Second Circuit is in fact following the standard articulated by this Court in *Miller-El, Barefoot, Lozada,* and *McKnight* when assessing whether a certificate of appealability should issue. However, statistics suggest that the Second Circuit is employing an overly restrictive standard.

A 2012 study found that the Second Circuit was the third least likely Circuit Court of Appeals to grant certificates of appealability, granting them in only 1.8% of requests (or 1 out of 55 cases reviewed by the authors). *See* Nancy J. King, "Non-Capital Habeas Cases after Appellate Review: An Empirical Analysis," *24 Fed. Sent'g Rep.* 308, 310 (2012). Only the First and Fourth Circuits were less likely to grant certificates of appealability, both of which granted certificates of appealability in 0% of the cases reviewed during the study period. *Id.* Notably, the First Circuit Court of Appeals, heard only 6 such cases, compared to the 55 heard in the Second Circuit. *Id.* Meanwhile, the same study found that the Third and Sixth Circuits, both which heard a similar number of cases as the Second Circuit, granted certificates of appealability in 7.7% and 12.7% of the cases reviewed, respectively. *Id.* The low probability of obtaining a certificate of appealability in the Second Circuit relative to other Circuit Courts of Appeals, in combination with the above-described facts, reinforces the conclusion that the Second Circuit is employing its own, unduly restrictive and burdensome standard to resolve motions for a certificate of appealability in a way that is in tension with this Court's precedent.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should issue.

Dated: New York, New York
July 6, 2026

Respectfully submitted,

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APPENDIX

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JANUARY 7, 2026

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

25-2071

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.

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:

/s/

Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED JULY 29, 2025

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANTHONY MCCORD,

Petitioner,

v.

PATRICK REARDON,

Respondent.

20-CV-2005(EK)

MEMORANDUM & ORDER

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

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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.

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 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

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

Elizabeth Foley conducted a colloquy with McCord (accompanied by standby 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.

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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 *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.

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).

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 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.

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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.

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 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

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 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

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 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)

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.

(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.

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

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.

> 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]

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

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

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).

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 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

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").

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).

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.

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).

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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 resentence, and thus no error of law has been preserved for our 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 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,*

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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.").

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.").

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 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

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 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).

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 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

APPENDIX C — DENIAL OF RECONSIDERATION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED FEBRUARY 6, 2026

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 25-2071

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 FACILTY, LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents-Appellees.

Appendix C

ORDER

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

/s/

APPENDIX D — RELEVANT STATUTORY PROVISIONS

U.S.C.A. CONST. AMEND. VI-JURY TRIALS

Amendment VI. Jury trials for crimes, and procedural rights [Text & Notes of Decisions subdivisions I to XXII]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix D

28 U.S.C.A. § 2253

§ 2253. Appeal

Effective: April 24, 1996

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).