

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

August Term, 2008

(Argued: April 20, 2009)

Decided: November 10, 2009)

Docket No. 07-2299-pr

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ABEL ORTIZ,

*Petitioner-Appellant,*

-v.-

N.Y.S. PAROLE IN BRONX, N.Y.,

*Respondent-Appellee.*

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Before: KEARSE, SACK, and LIVINGSTON, *Circuit Judges.*

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Petitioner-Appellant seeks federal habeas review of his convictions for first degree riot and second degree assault under New York law, which were upheld on direct appeal. *See People v. Ortiz*, 777 N.Y.S.2d 640, 640 (N.Y. App. Div. 1st Dep't 2004). The United States District Court for the Southern District of New York (Preska, J.) denied his request for a writ of habeas corpus. On appeal, Petitioner-Appellant claims that the New York courts' interpretation of the riot statute, N.Y.

1 Penal Law § 240.06, deprived him of the right to fair notice under the Due Process Clause of the  
2 Fourteenth Amendment. We find that the New York courts’ rejection of Petitioner-Appellant’s due  
3 process claim and, specifically, his contention that the law did not “ma[ke] it reasonably clear at the  
4 relevant time that [his] conduct was criminal,” *Ponnapula v. Spitzer*, 297 F.3d 172, 183 (2d Cir.  
5 2002) (quoting *United States v. Lanier*, 520 U.S. 259, 267 (1997)) (internal quotation marks  
6 omitted), was not “an unreasonable application of . . . clearly established Federal law.” 28 U.S.C.  
7 § 2254(d)(1). Accordingly, the district court appropriately denied Petitioner-Appellant’s request for  
8 the writ.

9 Affirmed.

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19 General of the State of New York, N.Y., *for Respondent-*  
20 *Appellee*.

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24 DEBRA ANN LIVINGSTON, *Circuit Judge*:

25 Petitioner Abel Ortiz (“Ortiz”) appeals from the decision of the United States District Court  
26 for the Southern District of New York (Preska, J.), denying his application for a writ of habeas  
27 corpus pursuant to 28 U.S.C. § 2254. After a jury trial in New York State Supreme Court, New York  
28 County (Fried, J.), Ortiz was convicted of seven counts of riot in the first degree, in violation of N.Y.

1 Penal Law § 240.06, and seven counts of assault in the second degree, in violation of N.Y. Penal  
2 Law § 120.05(6). On appeal to this Court, Ortiz claims that the district court erred in denying his  
3 petition because the New York courts’ interpretation of the New York riot statute, N.Y. Penal Law  
4 § 240.06, deprived him of the right to fair notice under the Due Process Clause of the Fourteenth  
5 Amendment. *See Rubin v. Garvin*, 544 F.3d 461, 467 (2d Cir. 2008) (“[A] conviction is invalid  
6 under the Due Process Clause if the statute under which it is obtained fails to provide a person of  
7 ordinary intelligence fair notice of what is prohibited . . . .” (quoting *United States v. Williams*, 128  
8 S. Ct. 1830, 1845 (2008)) (internal quotation marks omitted)). We affirm the judgment of the district  
9 court.

## 10 BACKGROUND

11 On June 11, 2000, following the Puerto Rican Day Parade, a large crowd of young men  
12 gathered near an entrance to Central Park at Central Park South and Sixth Avenue. While entering  
13 and exiting the park at that location, women were surrounded by groups of men, who sprayed them  
14 with water and groped them, both over and under their clothes. *See Pet’r’s App. Div. Br. 3*. In some  
15 instances, the victims had their clothes torn off, exposing their breasts and vaginas. In some cases,  
16 the assailants used their fingers to penetrate the women’s vaginas and anuses. Some victims were  
17 punched, kicked, and dragged along the ground. Others had their property stolen. *See App. 12*. The  
18 following is a recitation of the facts surrounding this riot shown at Ortiz’s trial and set forth in the  
19 light most favorable to the prosecution. *See Ponnappula v. Spitzer*, 297 F.3d 172, 176 (2d Cir. 2002).

### 20 I. Ortiz’s Involvement in the Riot

21 Several videotapes depicting scenes from the riot placed Ortiz amidst the crowd between 5:19  
22 p.m and 5:47 p.m. At various times, Ortiz was clapping, smiling and pumping his arm. One video

1 recording captured him waving his arm at 5:40 p.m. and pointing down a road. Ortiz can be heard  
2 to tell the crowd, “Hey everybody be quiet, the bitch is over there down the road by the pole.” Tr.  
3 1217-18. As a result, other individuals pointed and “headed in that direction.” Tr. 1219. Ortiz was  
4 also placed at the scene when a “whole bunch of people [were] rushing towards . . . a certain point.”  
5 Tr. 1221. He is captured in a different video recording “reach[ing] back and grab[bing]” an  
6 unidentified woman from behind. Tr. 1227. Ortiz is shown “facing forward and reaching back and  
7 smiling and grabbing her breast.” *Id.*

8 Video evidence also depicted Ortiz smiling and clapping at the scene of the riot when  
9 victims who testified at trial were also present. E.R. testified that she was surrounded by a large  
10 group of men, that several of them pulled down her top, exposing her breasts, and that they touched  
11 her breasts and buttock and penetrated her vagina until she was able to break free from the crowd.  
12 M.R. testified that a group of approximately twenty men surrounded her, doused her with water, and  
13 ripped her tank top. She alleged that Ortiz himself grabbed her breasts and then restrained her while  
14 others groped her body and penetrated her vagina and rectum with their fingers.<sup>1</sup> Video evidence  
15 placed Ortiz at the scene with both women.

16 Testifying on his own behalf, Ortiz acknowledged that men in the crowd were attacking  
17 women, including both E.R. and M.R. He further admitted that he was present in the crowd during  
18 these attacks. He testified, however, that he was trying to assist E.R. and M.R. and that he did not  
19 participate in any of the attacks. Ortiz acknowledged pointing out women to the men in the crowd  
20 and saying, “[S]hush, be qu[iet], look at them . . . bitch, she is over there by the pole.” Tr. 2316. He

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<sup>1</sup> The jury voted to acquit or failed to reach a verdict with regard to four counts charging Ortiz with the sexual abuse of M.R. in violation of N.Y. Penal Law § 130.65(1).

1 testified, however, that he made the comment not to encourage further incidents but to divert rioters  
2 from a woman under threat of attack. Finally, Ortiz testified that at 5:47 p.m. he “noticed [the  
3 situation was] getting out of control,” and he left the park. Tr. 2225.

4 Twenty other women testified that they were molested by crowds of men in ways similar to  
5 the attacks on E.R. and M.R. Some of these victims were attacked before Ortiz allegedly left the  
6 scene. For example, Ortiz conceded in his brief to the Appellate Division that video evidence placed  
7 him at the scene when K.H. and R.A.L. were attacked. *See* Pet’r’s App. Div. Br. 12-13. K.H.  
8 testified that, as she was exiting the park at around 5:30 or 5:45 p.m., a group of approximately  
9 twenty to thirty men surrounded her and her companions, dousing them with water. Approximately  
10 five men grabbed K.H.’s breasts, clothing, and buttocks, and she fell to the ground, whereupon more  
11 men grabbed her exposed breasts. As K.H. escaped from the crowd, yet additional men grabbed her  
12 breasts and buttocks. R.A.L., a friend of K.H. and a companion of hers that day, testified that she  
13 was separated from K.H. and her other friends by the same large group of men. The crowd  
14 attempted to remove R.A.L.’s clothing, and at one point her shirt was pulled down and her breasts  
15 exposed. R.A.L.’s breasts and buttocks were groped multiple times over her clothing.

16 The first degree riot counts lodged against Ortiz required the State to establish, among other  
17 things, that “a person other than one of the [riot] participants suffer[ed] physical injury.” N.Y. Penal  
18 Law § 240.06 (McKinney 2000). Of the seven victims named in the counts charging Ortiz with first  
19 degree riot, five testified that they were attacked subsequent to Ortiz’s claimed time of departure.  
20 For example, Y.T. and S.T., newlyweds honeymooning in the United States, exited Central Park  
21 around 6:00 p.m. Y.T. testified that twenty to forty men surrounded them and sprayed them with  
22 water. A group of men threw him to the ground and kept him there, while others surrounded S.T.

1 S.T. testified that she was surrounded by men, pushed to the ground, and that she had her skirt and  
2 underwear removed. They touched her breasts and vagina. She suffered injuries, including scratches  
3 above her chest and a laceration near her vagina. J.D., also named in a riot count, was attacked  
4 sometime after 6:00 p.m. Her assailants ripped off her shirt and took a necklace she was wearing.  
5 During the fracas, J.D., then fifteen years old, sprained her knee and suffered bruises and scratches.  
6 Similarly, H.I., a college student visiting from England, was attacked twice between 6:05 p.m. and  
7 6:30 p.m. She was punched in the face as assailants removed her shirt, touched her exposed breast,  
8 and reached inside her shorts to penetrate her anus and vagina. H.I. lost about \$200 in cash and a  
9 bank card when assailants left with her handbag.

10 Based on the time estimates they provided, two of the victims named in the first degree riot  
11 counts may have been attacked either before or after 5:47 p.m., when Ortiz claims to have left the  
12 park. M.T. stated that more than forty men surrounded her, and that many touched her breasts,  
13 buttocks, and vaginal area, both over and under her clothing, sometime between 5:30 p.m. and 6:00  
14 p.m. She suffered a cut to her back and received bruises on her arms and legs and scratches on her  
15 chest, neck, and buttocks as a result of the assault. S.W., a young mother from New Jersey, was  
16 attacked sometime between 5:00 p.m. and 6:15 p.m. She was kicked in the shin when, surrounded  
17 by a crowd of men who were touching her breasts and buttocks, she tried to push away one who was  
18 attempting to put his hand inside her pants. S.W. suffered a bruised and swollen leg.

## 19 **II. State Court Proceedings**

20 Ortiz was indicted for seven counts of riot in the first degree, in violation of N.Y. Penal Law  
21 § 240.06. He was also charged with seven counts of assault in the second degree, in violation of  
22 N.Y. Penal Law § 120.05(6), for causing injury in furtherance of the commission of a felony, to wit,

1 riot in the first degree. Finally, Ortiz was indicted for four counts of sexual abuse in the first degree,  
2 in violation of N.Y. Penal Law § 130.65(1), for sexual contact with M.R.

3 The scope of Ortiz’s criminal liability for actions taken by rioters *after* his alleged departure  
4 was an issue during his trial. In particular, the defense argued at the charge conference that “in this  
5 particular situation, I think what we have to say, is when somebody is no longer there they are not  
6 responsible . . . .” Tr. 2757. The court disagreed, stating that “[w]hat I think I will say is . . . once one  
7 joins a riot, that person remains criminally liable for the conduct set in motion until he withdraws  
8 . . . .” Tr. 2764.<sup>2</sup> When instructing the jury on this issue, the court first read the text of the riot  
9 statute, which, at the time of Ortiz’s conduct, stated as follows:

10 A person is guilty of riot in the first degree when (a) simultaneously with ten or more  
11 other persons he engages in tumultuous [sic] and violent conduct and thereby  
12 intentionally or recklessly causes or creates a grave risk of causing public alarm, and  
13 (b) in the course of and as a result of such conduct, a person other than one of the  
14 participants suffers physical injury or substantial property damage occurs.

15  
16 N.Y. Penal Law § 240.06 (McKinney 2000); *see also* Tr. 3117-18.<sup>3</sup>

17  
18 The court then continued:

19  
20 Furthermore, one who participates in a riot is responsible for the violence of  
21 any committed during the entire riot. This is because the law punishes joint behavior.  
22 And one who joins a riot takes it as one finds it. . . . [M]erely leaving the riot scene  
23 would not end one[’]s criminal responsibility for someone’s actions. That’s because  
24 the law punishes a joint action and a participant is responsible for the consequences  
25 of the group[’]s joint action or the conduct set in motion by the riot regardless of  
26 whether that person was actually there or present at the precise moment of the

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<sup>2</sup> The court instructed that simply leaving the riot is insufficient to withdraw. *See* Tr. 3120 (instructing that “once one joins a riot, [a] person remains criminally liable for the conduct set in motion until he makes substantial effort to end the conduct”).

<sup>3</sup> The riot statute was amended in 2005 in ways not pertinent to the present appeal. *See* 2005 N.Y. Laws c. 294. All references to the statute here are to the version as it existed at the time of Ortiz’s conduct.

1           conduct. Moreover, once one joins a riot, that person remains criminally liable for the  
2           conduct set in motion until he makes substantial effort to end the conduct.

3  
4           Tr. 3119-3120. In short, the court’s instructions made clear that, absent substantial efforts to end the  
5           riot, Ortiz was criminally liable for injuries inflicted by the continuing riot subsequent to the time  
6           that he testified he had departed from the scene.

7           After deliberating, on April 2, 2001, the jury convicted Ortiz of all seven counts of riot in the  
8           first degree and assault in the second degree. Ortiz was acquitted of three counts of sexual abuse of  
9           M.R., regarding contact with her buttocks, vagina and anus, and the jury was unable to reach a  
10          verdict on the fourth, regarding her breasts. He received concurrent sentences of five years on the  
11          assault convictions and one and one third to four years for the riot convictions.

12          Ortiz appealed his convictions to the Appellate Division’s First Department, making two  
13          arguments that are relevant here. First, Ortiz argued that his convictions were supported by  
14          insufficient evidence because there was not enough proof to show that he was taking part in the riot  
15          at the time when any of the women named in the riot counts received injury. Second, Ortiz argued  
16          that, because the jury instructions imposed liability for actions taken by members of the continuing  
17          riot after he left the scene, the instructions were so fundamentally flawed as to deny him a fair trial  
18          under the Fourteenth Amendment. In particular, Ortiz argued that the scope of criminal liability  
19          articulated in the jury instructions was “completely in derogation of the plain terms of the statute,  
20          the legislative intent and the law’s purposes.” Pet’r’s App. Div. Br. 46-47.

21          The Appellate Division rejected Ortiz’s arguments and affirmed his convictions:

22          The verdict was based on legally sufficient evidence. Contrary to defendant’s  
23          argument, the People were not required to prove that he was still present at, or  
24          participating in, the riot at the moment of the victims’ injuries. The riot statute  
25          permits a riot participant to be held criminally liable for the acts of other participants,  
26          in the course of the same continuing riot, even after his or her own participation may



1           have terminated. Similarly, the court’s instruction in this regard was correct.  
2  
3     *People v. Ortiz*, 777 N.Y.S.2d 640, 640 (N.Y. App. Div. 1st Dep’t 2004) (citations omitted). The  
4     New York Court of Appeals denied Ortiz leave to appeal. *People v. Ortiz*, 820 N.E.2d 299 (N.Y.  
5     2004).

### 6     **III. Federal Court Proceedings**

7           On January 20, 2006, Ortiz filed a *pro se* petition for a writ of habeas corpus in the Southern  
8     District of New York. In the petition, he reiterated the same arguments he made to the Appellate  
9     Division. On February 5, 2007, Magistrate Judge Ronald L. Ellis issued a report and  
10    recommendation denying Ortiz’s claims. Judge Ellis found, *inter alia*, that the jury instructions did  
11    not deprive Ortiz of the right to a fair trial and that his convictions were supported by sufficient  
12    evidence. Specifically, Judge Ellis found that “the trial court’s instructions on liability for the  
13    actions of other riot participants was [not] a misstatement of state law,” App. at 16, and that the  
14    Appellate Division’s interpretation of the riot statute was not “so egregious as to be fundamentally  
15    unfair and thus violate . . . the fair notice aspect of the Due Process Clause,” *id.* at 17 (quoting  
16    *Ponnapula v. Spitzer*, 297 F.3d 172, 182 n.2 (2d Cir. 2002)) (internal quotation marks omitted). On  
17    February 28, 2007, the district court adopted Judge Ellis’s report and recommendation in full, denied  
18    Ortiz’s petition, and declined to issue a certificate of appealability.

19           Ortiz moved for a certificate of appealability from this Court *pro se*, and on January 23, 2008,  
20    we granted the certificate and appointed counsel. We instructed counsel “to brief the issue of whether  
21    the application of New York Penal Law § 240.06 to Ortiz, who was absent at the time of the assaults  
22    underlying his conviction, violated his due process right to fair notice.” App. at 5. Thus, our review  
23    is limited to Ortiz’s claim that the state courts’ interpretation of the New York riot statute deprived

1 him of the due process right to fair notice. *See Armienti v. United States*, 234 F.3d 820, 824 (2d Cir.  
2 2000) (“We will not address a claim not included in the certificate of appealability.”); 28 U.S.C. §  
3 2253(c)(1) (“Unless a circuit justice or judge issues a certificate of appealability, an appeal may not  
4 be taken to the court of appeals from . . . the final order in a habeas corpus proceeding in which the  
5 detention complained of arises out of process issued by a State court.”).

## 6 DISCUSSION

### 7 I. Standard of Review

8 We review a district court’s denial of a petition for a writ of habeas corpus *de novo*. *See, e.g.,*  
9 *Anderson v. Miller*, 346 F.3d 315, 324 (2d Cir. 2003). The Antiterrorism and Effective Death Penalty  
10 Act (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214 (1996), establishes a “deferential standard of  
11 review” of a state court’s adjudication of the merits of a petitioner’s claim. *Wilson v. Mazzuca*, 570  
12 F.3d 490, 499 (2d Cir. 2009) (quoting *Dolphy v. Mantello*, 552 F.3d 236, 238 (2d Cir. 2009)). Under  
13 AEDPA, we may not issue a writ of habeas corpus “with respect to any claim that was adjudicated  
14 on the merits in State court proceedings unless the adjudication . . . resulted in a decision that was  
15 contrary to, or involved an unreasonable application of, clearly established Federal law, as  
16 determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d). Because the Appellate  
17 Division rejected Ortiz’s due process challenge to the jury instructions construing N.Y. Penal Law  
18 § 240.06, and thereby implicitly rejected Ortiz’s fair notice claim, that claim has been “adjudicated  
19 on the merits.” *Id.*; *see Dallio v. Spitzer*, 343 F.3d 553, 560 (2d Cir. 2003) (“Our precedents instruct  
20 that to qualify as an adjudication ‘on the merits,’ a state court decision need not mention a particular  
21 argument or explain the reasons for rejecting it.”). Thus, as agreed by both parties, the AEDPA  
22 standard of review applies.

1           “Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain  
2 federal habeas relief”: where the relevant state-court decision was either (1) “*contrary to . . . clearly*  
3 *established federal law, as determined by the Supreme Court*” or (2) “*involved an unreasonable*  
4 *application of . . . clearly established Federal law, as determined by the Supreme Court.*” *Williams*  
5 *v. Taylor*, 529 U.S. 362, 404-05 (2000) (quoting 28 U.S.C. § 2254(d)(1)). We have previously stated  
6 that a “state court decision is ‘contrary to’ existing Supreme Court precedent (i) when it applies a  
7 rule of law ‘that contradicts the governing law set forth in’ the Supreme Court’s cases, or (ii) when  
8 it ‘confronts a set of facts that are materially indistinguishable from a decision of [the Supreme]  
9 Court and nevertheless arrives at a result different from [the Supreme Court’s] precedent.’” *Lurie*  
10 *v. Wittner*, 228 F.3d 113, 127 (2d Cir. 2000) (alterations in original) (citations omitted) (quoting  
11 *Williams*, 529 U.S. at 405-06). Ortiz does not – and could not – contend that the New York courts  
12 stated the fair notice standard in a way that contradicts Supreme Court precedent; moreover, he  
13 mentions no case with materially indistinguishable facts. Thus, the “contrary to” clause of Section  
14 2254(d)(1) is not at issue.

15           Instead, Ortiz’s appeal is predicated upon the “unreasonable application” prong of Section  
16 2254(d)(1). It is “well-established in [this] [C]ircuit that the objectively unreasonable standard of §  
17 2254(d)(1) means that [a] petitioner must identify some increment of incorrectness beyond error in  
18 order to obtain habeas relief.” *Lynn v. Bliden*, 443 F.3d 238, 246 (2d Cir. 2006) (alterations in  
19 original) (quoting *Cotto v. Herbert*, 331 F.3d 217, 248 (2d Cir. 2003)) (internal quotation marks  
20 omitted). Thus, we may not issue the writ simply because we conclude in our independent judgment  
21 “that the relevant state-court decision applied clearly established federal law erroneously or  
22 incorrectly. Rather the application must *also* be unreasonable.” *Lurie*, 228 F.3d at 129 (emphasis

1 added) (quoting *Williams*, 529 U.S. at 411) ; *see also Policano v. Herbert*, 507 F.3d 111, 115 (2d  
2 Cir. 2007) (“As we have interpreted [the AEDPA] standard, we decide not whether the state court  
3 *correctly* interpreted the doctrine of federal law on which the claim is predicated, but rather whether  
4 the state court’s interpretation was *unreasonable* in light of the holdings of the United States  
5 Supreme Court at the time.”(emphasis added) (quoting *Brown v. Greiner*, 409 F.3d 523, 533 (2d Cir.  
6 2005)) (internal quotation marks omitted)).

7 The Supreme Court has instructed that the “unreasonable application” standard is sensitive  
8 to the generality of the legal rule at issue:

9 [T]he range of reasonable judgment can depend in part on the nature of the relevant  
10 rule. If a legal rule is specific, the range may be narrow. Applications of the rule may  
11 be plainly correct or incorrect. Other rules are more general, and their meaning must  
12 emerge in application over the course of time. Applying a general standard to a  
13 specific case can demand a substantial element of judgment. As a result, evaluating  
14 whether a rule application was unreasonable requires considering the rule’s  
15 specificity. *The more general the rule, the more leeway courts have in reaching*  
16 *outcomes in case-by-case determinations.*

17  
18 *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) (emphasis added); *see also Knowles v.*  
19 *Mirzayance*, 129 S. Ct. 1411, 1420 (2009) (“[B]ecause the *Strickland* standard is a general standard,  
20 a state court has even more latitude to reasonably determine that a defendant has not satisfied the  
21 standard.”). In *Yarborough*, the Court considered the legal standard for determining whether a  
22 suspect is in “custody” for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), i.e., “given [the  
23 circumstances surrounding an interrogation], would a reasonable person have felt he or she was not  
24 at liberty to terminate the interrogation and leave.” *Yarborough*, 541 U.S. at 663 (quoting *Thompson*  
25 *v. Keohane*, 516 U.S. 99, 112 (1995)). The Court found that because “the custody test is general,”  
26 the state court’s application of federal law need only “fit[] within the matrix of [the Supreme]

1 Court’s prior decisions.” *Id.* at 665.

2 The due process right to fair notice is a similarly general rule of law that “demand[s] a  
3 substantial element of judgment,” *id.* at 664, and can hardly “be implemented . . . mechanically,”  
4 *Brisco v. Ercole*, 565 F.3d 80, 89 (2d Cir. 2009). As stated by the Supreme Court, the “touchstone”  
5 of the “fair warning requirement” is “whether the statute, either standing alone or as construed,  
6 made it reasonably clear at the relevant time that the defendant’s conduct was criminal.” *United*  
7 *States v. Lanier*, 520 U.S. 259, 266-67 (1997). Thus, based on the nature of the rule at hand, we owe  
8 the New York courts “more leeway” in “reaching outcomes in case-by-case determinations.”  
9 *Yarborough*, 541 U.S. at 664; *see also Brisco*, 565 F.3d at 89 (“Our determination of whether a court  
10 has unreasonably applied a legal standard depends in large measure on the specificity of the standard  
11 in question.”); *Serrano v. Fischer*, 412 F.3d 292, 297 (2d Cir. 2005) (“[T]he range of judgments that  
12 can be deemed ‘reasonable’ may vary with the nature of the rule in question. Thus, while very  
13 specific rules may not permit much leeway in their interpretation the same is not true of more general  
14 rules . . . .” (citation omitted)); *Locke v. Cattell*, 476 F.3d 46, 51 (1st Cir. 2007) (“[W]here the legal  
15 rule is general and review of the state court decision is under the deferential standard of § 2254(d)(1),  
16 state courts have substantial leeway in reaching a reasonable decision.” (citing *Yarborough*, 541 U.S.  
17 at 665)).

## 18 **II. Merits**

### 19 **A. Fair Notice Principles**

20 At the outset, it is helpful to set aside two issues that are not before the Court. First, it is not  
21 for us to consider whether the New York courts’ construction of N.Y. Penal Law § 240.06 – under  
22 which a rioter is responsible for acts committed by others after he leaves the riot – is correct. “[I]t  
23

1 is not the province of a federal habeas court to reexamine state-court determinations on state-law  
2 questions.” *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *see also Mullaney v. Wilbur*, 421 U.S.  
3 684, 691 (1975) (“This Court . . . repeatedly has held that state courts are the ultimate expositors of  
4 state law.”). Rather, our task is limited to the determination of whether the New York courts’  
5 conclusion that the riot statute as construed did not deprive Ortiz of the right to fair notice under the  
6 Due Process Clause was reasonable.<sup>4</sup>

7         Second, we are not confronted with a situation where, in interpreting § 240.06, the Appellate  
8 Division *expanded* the scope of criminal liability beyond the contours of previous judicial  
9 interpretation. This is not a case like *Bouie v. City of Columbia*, 378 U.S. 347 (1964), in which the  
10 Supreme Court held that petitioners were denied due process when the South Carolina Supreme  
11 Court interpreted a criminal trespass statute to cover “the act of remaining on the premises of another  
12 after receiving notice to leave,” *id.* at 350, and applied that interpretation to the defendants’ conduct  
13 even though South Carolina case law up to that period had “emphasized that proof of notice before  
14 entry was necessary to sustain a conviction,” *id.* at 356. Nor is it a case like *Rogers v. Tennessee*, 532  
15 U.S. 451 (2001), where the Supreme Court considered whether the Tennessee Supreme Court’s  
16 repudiation of the common law year-and-a-day rule – which had required the death of the victim  
17 within a year to sustain a murder conviction – could be retroactively applied to a criminal defendant  
18 who committed his crime before this repudiation of the common law rule took place. *See id.* at 461

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<sup>4</sup> It follows that Ortiz’s invocation of the rule of lenity does not add anything to his fair notice argument. Because “the rule of lenity is a canon of construction rather than a federal law,” and the construction of state law is left to the state courts, we have previously indicated that “federal courts cannot vacate a state conviction on lenity grounds unless a state criminal statute (i) is unconstitutionally vague, or (ii) otherwise fails to give constitutionally required ‘fair notice.’” *Lurie*, 228 F.3d at 126.

1 (holding that the “retroactive application of judicial interpretations of criminal statutes” violates the  
2 due process right to fair notice only when such application is “unexpected and indefensible by  
3 reference to the law which had been expressed prior to the conduct in issue” (quoting *Bowie*, 378  
4 U.S. at 354)).

5 Unlike *Bowie* and *Rogers*, this case does not involve any expansion in the scope of criminal  
6 liability beyond that indicated by previous decisional law. Until Ortiz’s case, the New York courts  
7 had not addressed the issue whether defendants can be responsible under the riot statute for physical  
8 injuries or substantial property damage that may occur after they have left the scene of a riot in which  
9 they have participated. Thus, we need not consider whether the New York courts have worked an  
10 impermissible retroactive *change* in the law, violating due process by adopting a new judicial  
11 interpretation that was “unexpected and indefensible” by reference to what courts had said before.  
12 *See Rogers*, 532 U.S. at 461; *see also id.* at 471 (Scalia, J., dissenting) (noting “the crucial difference  
13 between simply applying a law to a new set of circumstances and changing the law that has  
14 previously been applied to the very circumstances before the court”). Instead, we consider simply  
15 whether it was reasonable for the Appellate Division to find in upholding his conviction that §  
16 240.06 itself provided Ortiz fair notice of the construction the court adopted, or whether this  
17 construction was so unreasonably novel as to deprive Ortiz of fair warning that his conduct was  
18 prohibited.

19 The “basic and general principle of fair warning” was set forth by the Supreme Court as  
20 follows: “[D]ue process bars courts from applying a novel construction of a criminal statute to  
21 conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its  
22 scope.” *Rogers*, 532 U.S. at 459 (quoting *Lanier*, 520 U.S. at 266) (internal quotation marks

1 omitted). The fair warning principle is violated “[i]f a judicial construction of a criminal statute is  
2 unexpected and indefensible by reference to the law which had been expressed prior to the conduct  
3 in issue.” *Id.* at 457 (quoting *Bouie*, 378 U.S. at 354) (internal quotation marks omitted). Second  
4 Circuit precedent on the meaning of an “unexpected and indefensible” interpretation of state law is  
5 both clear and longstanding: “The Due Process Clause requires only that the law give sufficient  
6 warning that men may conduct themselves so as to avoid that which is forbidden, and thus not lull  
7 the potential defendant into a false sense of security, giving him no reason even to suspect that his  
8 conduct might be within its scope.” *Rubin v. Garvin*, 544 F.3d 461, 469 (2d Cir. 2008) (quoting  
9 *United States v. Herrera*, 584 F.2d 1137, 1149 (2d Cir. 1978)) (internal quotation marks omitted);  
10 *see also United States v. Tannenbaum*, 934 F.2d 8, 11 (2d Cir. 1991) (same). Furthermore, the  
11 unavoidable ambiguities of language do not transform every circumstance in which judicial  
12 construction is necessary into a violation of the fair notice requirement: “The root of the vagueness  
13 doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional  
14 dilemma the practical difficulties in drawing criminal statutes both general enough to take into  
15 account a variety of human conduct and sufficiently specific to provide fair warning that certain  
16 kinds of conduct are prohibited.” *Colten v. Kentucky*, 407 U.S. 104, 110 (1972); *see also Herrera*,  
17 584 F.2d at 1149 (“[The] prohibition against excessive vagueness does not . . . invalidate every  
18 statute which a reviewing court believes could have been drafted with greater precision. Many  
19 statutes will have some inherent vagueness, for in most English words and phrases there lurk  
20 uncertainties.” (quoting *Robinson v. United States*, 324 U.S. 282, 286 (1945)) (internal quotation  
21 marks omitted)).



1 **B. Application**

2 At the time of Ortiz’s conduct, the New York riot statute provided as follows:

3 A person is guilty of riot in the first degree when (a) simultaneously with ten or more  
4 other persons he engages in tumultuous [sic] and violent conduct and thereby  
5 intentionally or recklessly causes or creates a grave risk of causing public alarm, and  
6 (b) in the course of and as a result of such conduct, a person other than one of the  
7 participants suffers physical injury or substantial property damage occurs.

8 N.Y. Penal Law § 240.06 (2000). The Appellate Division held that “[t]he riot statute permits a riot  
9 participant to be held criminally liable for the acts of other participants, in the course of the same  
10 continuing riot, even after his or her own participation may have terminated.” *People v. Ortiz*, 777  
11 N.Y.S.2d 640, 640 (N.Y. App. Div. 1st Dep’t 2004) (citations omitted). Although this was the first  
12 time the New York courts addressed the issue, we have made clear that “[d]ue process is not . . .  
13 violated simply because the issue is a matter of first impression.” *Ponnapula v. Spitzer*, 297 F.3d  
14 172, 183 (2d Cir. 2002); *see also United States v. Kinzler*, 55 F.3d 70, 74 (2d Cir. 1995) (“The  
15 claimed novelty of this prosecution does not help [defendant’s fair notice argument], for it is  
16 immaterial that there is no litigated fact pattern precisely in point.” (quoting *United States v.*  
17 *Ingredient Tech. Corp.*, 698 F.2d 88, 96 (2d Cir. 1983)) (internal quotation marks omitted)).

18 Ortiz argues that the Appellate Division’s interpretation of § 240.06 is at odds with the  
19 statute’s plain meaning. He contends that the “conduct” in clause (b) – conduct that “in the course  
20 of and as a result of . . . a person . . . suffers physical injury” – must be “riotous conduct committed  
21 by 11 people, including the accused.” Appellant’s Br. 17. On this view, the “conduct” in clause (b)  
22 refers to the *entirety* of clause (a) – i.e., “tumultuous and violent conduct” that the defendant  
23 “engages in” “simultaneously with ten or more other persons.” N.Y. Penal Law § 240.06(a). If the  
24 injuries covered by clause (b) are limited to those injuries sustained “in the course and as a result of”

1 conduct that the defendant engages in simultaneously with at least ten individuals, the defendant  
2 must be present when the injuries occur.

3 This is not, however, the only reading of the statute that is consistent with its language. The  
4 “conduct” in clause (b) can be read to refer to the “tumultuous and violent conduct” of the same  
5 continuing riot, and not conduct that the defendant engages in “simultaneously with ten or more  
6 other persons.” Indeed, nothing in the language of the statute requires that the “conduct” in clause  
7 (b) incorporate the totality of the language in clause (a). Clause (b) does not state “in the course of  
8 and as a result of *that person’s* conduct,” or “in the course of and as a result of *that simultaneous*  
9 *conduct*,” both of which would necessarily refer to the continuing actions of the defendant. Instead,  
10 § 240.06(b) uses the phrase “in the course of and as a result of *such* conduct” – a phrase that does  
11 not specify the precise conduct in clause (a) to which it refers. *See Webster’s Third New*  
12 *International Dictionary Unabridged* 2283 (2002) (defining “such,” in pertinent part, as “previously  
13 characterized or specified”). Because of the lack of particularization in the phrase “such conduct,”  
14 that phrase can, consistent with the language of § 240.06, include “tumultuous and violent conduct”  
15 that continues after a riot participant has left the scene. This was the Appellate Division’s reading  
16 of the statute. *See Ortiz*, 777 N.Y.S. 2d at 640 (holding a defendant criminally liable for injuries  
17 sustained “in the course of the same continuing riot”). We think this is at the very least a reasonable  
18 construction of the statute’s text. *See Ponnepula*, 297 F.3d at 184.

19 The Appellate Division’s interpretation, moreover, is consistent with the New York courts’  
20 interpretation of other criminal provisions prior to its decision in *Ortiz’s* case. Several New York  
21 statutes expressly punish defendants for injuries that they or their co-participants inflict during their  
22 crime “or in immediate flight therefrom.” *See, e.g., N.Y. Penal Law* § 120.05(6) (“A person is guilty

1 of assault in the second degree when . . . [i]n the course of and in furtherance of the commission or  
2 attempted commission of a felony . . . or of immediate flight therefrom, he, or another participant  
3 if there be any, causes physical injury to a person other than one of the participants.”). These statutes  
4 do not require, however, that injury be inflicted during the *defendant’s* immediate flight. They have  
5 been construed to punish defendants for injuries occurring during their co-participants’ immediate  
6 flight, even if the defendant’s flight has already ended.

7 For example, in *People v. Spivey*, 81 N.Y.2d 356 (1993), the defendant was convicted of  
8 felony assault based on injuries inflicted on an officer by individuals fleeing from the scene of a  
9 robbery they had perpetrated with Spivey. *Id.* at 359. At the time of the injury, Spivey had already  
10 been arrested and was being detained in a different location. *Id.* The Court of Appeals nevertheless  
11 upheld his felony assault conviction, ruling that “the defendant need not be physically present at the  
12 scene of the assault.” *Id.* at 361. Importantly, the Appellate Division’s decision in Ortiz’s case  
13 specifically relies on *Spivey* to justify its similar construction of the riot statute. *See Ortiz*, 777  
14 N.Y.S.2d at 640.

15 We need not consider whether the Appellate Division’s interpretation of § 240.06 is the  
16 correct one, or even whether it was “unexpected and indefensible” in light of the plain language of  
17 the statute. *See Rogers*, 532 U.S. at 457. We need only determine whether the Appellate Division’s  
18 conclusion that its interpretation did not violate due process – that it was *not* so unexpected and  
19 indefensible as to deprive Ortiz of fair notice – was an unreasonable application of due process  
20 principles. 28 U.S.C. § 2254(d)(1). Given the leeway we owe New York courts in applying the fair  
21 notice requirement, a general legal standard, *see Yarborough*, 541 U.S. at 664, and given that the  
22 Appellate Division’s construction of § 240.06 is at the very least consistent with the provision’s

1 language and analogous case law, we find the New York courts' conclusion that § 240.06 provided  
2 "sufficient warning that men [could] conduct themselves so as to avoid that which is forbidden,"  
3 *Rubin*, 544 F.3d at 469, was not an unreasonable one. Under the deferential AEDPA standard of  
4 review, we cannot say that Ortiz was given "no reason even to suspect that his conduct might be  
5 within [the] scope" of § 240.06. *Id.* Accordingly, we conclude that Ortiz's fair notice claim lacks  
6 merit.

### 7 **III. Conclusion**

8 For the foregoing reasons, the judgment of the district court is AFFIRMED.  
9