

15-1944-pr  
Pierotti v. Walsh

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 \_\_\_\_\_  
4  
5 August Term, 2015

6  
7 (Argued: April 7, 2016

Decided: August 24, 2016)

8  
9 Docket No. 15-1944-pr  
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12  
13 JOHN PIEROTTI,

14  
15 *Petitioner-Appellant,*

16  
17 v.

18  
19 JAMES WALSH, Superintendent at  
20 Sullivan Correctional Facility,

21  
22 *Respondent-Appellee.*  
23

24 \_\_\_\_\_  
25  
26 Before: POOLER, LIVINGSTON, and LOHIER, *Circuit Judges.*

27  
28 Appeal from a May 18, 2015 judgment of the United States District Court  
29 for the Eastern District of New York (Hurley, J.) adopting the report and  
30 recommendation of a magistrate judge (Brown, J.) denying John Pierotti's

1 petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court held  
2 that it was precluded from reviewing the merits of Pierotti’s ineffective  
3 assistance of counsel claim because the state court had rejected that claim on a  
4 procedural ground that was “independent” of federal law and “adequate” to  
5 preclude federal habeas review. We hold that this case falls within the limited  
6 category of exceptional cases where the “exorbitant application of a generally  
7 sound rule renders the state ground inadequate to stop consideration of a federal  
8 question.” *Lee v. Kemna*, 534 U.S. 362, 376 (2002). Accordingly, the district court  
9 was not precluded from reviewing the merits of Pierotti’s ineffective assistance  
10 of counsel claim. We VACATE the judgment of the district court and REMAND  
11 for further proceedings.

12 Vacated and remanded.

13 \_\_\_\_\_  
14 DANIEL D. ADAMS, Latham & Watkins LLP, New  
15 York, NY, *for Petitioner-Appellant*.

16  
17 SARAH S. RABINOWITZ (Tammy J. Smiley, Judith R.  
18 Sternberg, *on the brief*), *for Madeline Singas*, District  
19 Attorney for Nassau County, Mineola, NY.  
20

1 POOLER, *Circuit Judge*:

2           John Pierotti claims that he was sentenced to life in prison after a trial that  
3 he could not hear. Pierotti suffers from a hearing impairment that requires him to  
4 use hearing aids, but those aids were broken during Pierotti’s trial for murder.  
5 He says that although he told his trial counsel that he could not hear during his  
6 trial, counsel never requested an accommodation for Pierotti’s disability.

7           Pierotti now contends that he received ineffective assistance of counsel. He  
8 presented this argument to a state court on collateral review, but the court  
9 declined to address its merits, concluding that the claim was procedurally barred  
10 because Pierotti could have brought it on direct appeal. The district court held  
11 that this decision rested on a state procedural ground that was “independent” of  
12 federal law and “adequate” to preclude federal habeas review.

13           We disagree. We hold that this case falls within the limited category of  
14 exceptional cases where the “exorbitant application of a generally sound rule  
15 renders the state ground inadequate to stop consideration of a federal question.”  
16 *Lee v. Kemna*, 534 U.S. 362, 376 (2002). Accordingly, the district court was not  
17 precluded from reviewing the merits of Pierotti’s ineffective assistance of counsel

1 claim. We vacate the judgment of the district court and remand for the court to  
2 consider the merits of Pierotti's claim.

### 3 **BACKGROUND**

4 In 1998, John Pierotti shot and killed two men outside of a bar. He was  
5 arrested and charged principally with two counts of first-degree murder. Pierotti  
6 admitted to shooting the men, but, at trial, argued that he acted in self-defense.  
7 The jury disagreed and convicted Pierotti of murder. The judge sentenced him to  
8 life imprisonment without the possibility of parole.

9 Pierotti has had a hearing impairment since he was a child. An audiologist  
10 has determined that Pierotti has a "bilateral sensorineural hearing loss," which is  
11 a "hearing impairment due to an abnormality of the functioning of the auditory  
12 nerve located in the inner ear." App'x at 1147. Pierotti accordingly wears  
13 hearing aids in both of his ears.

14 Shortly before a pretrial hearing, the only hearing aid that Pierotti had  
15 with him in jail broke. At the beginning of the hearing, the clerk asked Pierotti if  
16 he was ready to proceed. Pierotti responded, "No." App'x at 141. Pierotti's  
17 lawyer at the hearing told the court that Pierotti's hearing aid had been broken in

1 jail and that Pierotti was having “extreme difficulty hearing,” so that, if the court  
2 was going to proceed, it would have to “make some accommodations for his  
3 hearing loss.” App’x at 141. Counsel requested a continuance, but the court  
4 denied the request. The following colloquy then ensued:

5 THE COURT: For the record, this is a very small courtroom here in  
6 the west wing. It was originally designed for misdemeanor trials. . . .  
7 [P]lease keep your voice up.

8 Mr. Pierotti, if you have any problem hearing anything, you let me  
9 know. . . .

10 THE CLERK: Mr. Pierotti, I would just like to remind you, you are  
11 still under oath. You are still under oath.

12 THE WITNESS: Are you talking to me?

13 THE CLERK: Yes.

14 THE COURT: You are still under oath, Mr. Pierotti.

15 THE DEFENDANT: Yes.

16 [DEFENSE COUNSEL]: May I ask you to give one more warning to  
17 Mr. Pierotti that if he doesn’t completely hear the question, don’t  
18 assume what it is but ask to have it read back to him so--

19 THE DEFENDANT: I can’t hear you from here.

20 THE COURT: All right, we are going to -- Mr. Walsh come up.

21 I am going to tell you, Mr. Pierotti, you heard me very clearly when  
22 I started as to whether -- you heard the clerk from a lot further away  
23 as to whether or not the defendant was ready to proceed. You could  
24 hear that, and you answered that question.

25 Please, don’t play any games with me. I am a finder of fact here. I  
26 am telling you what I observed up to this point. Now let’s stop.

1 App'x at 147-48. Pierotti then testified and responded to questions. At times he  
2 asked the prosecutor to repeat certain questions.

3 Pierotti was represented by new counsel at trial. The trial record does not  
4 indicate whether counsel was aware that Pierotti had a hearing impairment.

5 According to Pierotti, his hearing aid was still broken during his trial. The trial  
6 was conducted in a different, larger courtroom than the pretrial hearing. Pierotti  
7 claims that he "was only able to understand limited parts of [his] trial," that it  
8 was "most difficult for [him] to understand when more than one person was  
9 speaking at a time or when the person speaking was at a distance or facing away  
10 from [him]," and that he had a "very difficult time understanding witnesses who  
11 were testifying from the witness stand." App'x at 1119. He says that he told his  
12 trial counsel many times that he was unable to hear what witnesses were saying  
13 and that counsel often responded by telling Pierotti to be quiet. He says that trial  
14 counsel refused to explain to him what witnesses were saying during the trial,  
15 that counsel would sometimes explain the proceedings outside of court but told  
16 him that he "did not need to hear all of the proceedings," and that counsel "did

1 not once ask the judge to make any accommodations for [his] hearing  
2 impairment.” App’x at 1120.

3           Following his conviction, Pierotti filed a notice of appeal. He was again  
4 represented by new counsel on appeal. Pierotti’s appellate counsel raised a  
5 number of issues, but he did not argue that Pierotti’s trial counsel was ineffective  
6 in failing to secure an accommodation for Pierotti’s hearing impairment. The  
7 Appellate Division affirmed the conviction on direct appeal, and a judge of the  
8 New York Court of Appeals denied leave to appeal.

9           Pierotti then filed a timely petition for a writ of habeas corpus in federal  
10 court pursuant to 28 U.S.C. § 2254. In his federal habeas suit, Pierotti asserted  
11 that he was denied his constitutional right to effective assistance of counsel  
12 because of his trial counsel’s failure to secure accommodations for his hearing  
13 impairment. He requested that the district court stay his federal habeas  
14 proceedings so that he could exhaust this claim in state-court collateral  
15 proceedings. The court granted the request.

1           Pierotti then filed a motion to vacate his conviction in state court pursuant  
2 to N.Y. Criminal Procedure Law § 440.10.<sup>1</sup> He argued principally that his trial  
3 counsel was ineffective in failing to secure an accommodation for his hearing  
4 impairment. In support of his petition, Pierotti submitted twelve exhibits that  
5 were not part of the trial record. Included in these exhibits was an affidavit from  
6 trial counsel in which counsel acknowledged—for the first time on the record—  
7 that Pierotti told him that he normally wore hearing aids to help with his hearing  
8 ability, but that he did not have any working aids during the trial. Counsel  
9 further acknowledged the following:

10           During the trial, Mr. Pierotti indicated to me on various occasions  
11 that he could not hear what was happening. When this happened, I  
12 either whispered to him, wrote him notes to explain what was  
13 happening, or indicated to him to be quiet so that I could listen to  
14 what was happening in court.

15           During breaks, I was able to discuss specific witness testimony with  
16 Mr. Pierotti, and he seemed aware of the gist of the testimony and  
17 the proceedings. However, I never directly asked Mr. Pierotti during  
18 these breaks how well he was able to follow the proceedings.

19 App'x at 1141. None of this information was part of the trial record.

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<sup>1</sup> Section 440.10(1)(h) provides, “At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . . [t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.”



1           Pierotti’s exhibits also included four hearing tests performed by the  
2 department of corrections documenting the severity of his hearing disability, an  
3 affidavit from Pierotti attesting to his inability to hear witnesses and counsel at  
4 trial and that he advised trial counsel of that fact, affidavits from four family  
5 members, three of whom witnessed Pierotti visibly struggling to hear during  
6 trial and who told trial counsel that Pierotti could not hear the proceedings, and  
7 an affidavit from an expert audiologist who analyzed the courtroom in which  
8 Pierotti was tried and concluded that Pierotti’s disability would have made it  
9 difficult for him to understand his trial proceedings without accommodations.  
10 Again, none of this information was part of the trial record.

11           The state court denied Pierotti’s Section 440.10 motion on procedural  
12 grounds without a hearing. The court held that because “the issue of the  
13 defendant’s hearing impairment was available pre appeal, the issue could have  
14 been raised upon appeal and [Pierotti’s] failure to do so preclude[s]

1 consideration of his claim now” pursuant to Section 440.10(2)(c). App’x at 1238.<sup>2</sup>

2 A justice of the Appellate Division denied leave to appeal.

3 With his state remedies exhausted, Pierotti returned to federal court to  
4 assert his ineffective assistance of trial counsel claim. A magistrate judge  
5 reviewed the record that had been before the state court, including the twelve  
6 exhibits Pierotti submitted, and recommended denying Pierotti’s petition. Over  
7 Pierotti’s objection, the district court adopted the magistrate judge’s  
8 recommendation, holding that it could not review the merits of Pierotti’s claim  
9 because the state court had rejected the claim on state procedural grounds, which  
10 were, in the district court’s view, “adequate” to preclude federal habeas review.  
11 The court granted a certificate of appealability on the issue, however. The court  
12 also stated that, were it to address Pierotti’s claim on the merits, Pierotti “would,

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<sup>2</sup> Section 440.10(2)(c) provides,

[T]he court must deny a motion to vacate a judgment when . . .  
[a]lthough sufficient facts appear on the record of the proceedings  
underlying the judgment to have permitted, upon appeal from such  
judgment, adequate review of the ground or issue raised upon the  
motion, no such appellate review or determination occurred owing  
to the defendant’s unjustifiable failure to . . . raise such ground or  
issue upon an appeal actually perfected by him . . . .

1 at the very least, be entitled to a hearing on his ineffective assistance of trial  
2 counsel claims.” *Pierotti v. Walsh*, No. 03-3958 (DRH), 2015 WL 2337316, at \*15  
3 (E.D.N.Y. May 13, 2015). The court was “particularly disturbed by trial counsel’s  
4 apparent failure to request any accommodation for [Pierotti] despite his  
5 admission that during the trial, Mr. Pierotti indicated to him on various  
6 occasions that he could not hear what was happening and that he never directly  
7 asked Pierotti how well he was able to follow proceedings.” *Id.* (alterations and  
8 internal quotation marks omitted). The court stated that, in its view, “[t]o the  
9 extent trial counsel was aware of Pierotti’s hearing impairment and failed to  
10 request any accommodation, counsel failed to assure Pierotti received his  
11 constitutional rights.” *Id.*

12 Pierotti now appeals, arguing that his failure to raise his ineffective  
13 assistance of trial counsel claim on direct appeal was not an “adequate” ground  
14 to bar federal habeas review.

## 15 DISCUSSION

16 We review the denial of a petition for habeas corpus de novo. *Clark v.*  
17 *Perez*, 510 F.3d 382, 389 (2d Cir. 2008).

1 Under the independent and adequate state ground doctrine, federal courts  
2 “will not review a question of federal law decided by a state court if the decision  
3 of that court rests on a state law ground that is independent of the federal  
4 question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S.  
5 722, 729 (1991). The doctrine first arose in the context of direct appeals to the  
6 Supreme Court. *See Garcia v. Lewis*, 188 F.3d 71, 76 (2d Cir. 1999); *see also, e.g., Fox*  
7 *Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032,  
8 1038-42 (1983). In that context, the doctrine is jurisdictional: “Because [the  
9 Supreme] Court has no power to review a state law determination that is  
10 sufficient to support [a state court] judgment, resolution of any independent  
11 federal ground for [such a] decision could not affect the judgment and would  
12 therefore be advisory.” *Coleman*, 501 U.S. at 729; *see also Garcia*, 188 F.3d at 76.

13 The independent and adequate state ground doctrine also applies to  
14 federal habeas review, albeit for different reasons. *Coleman*, 501 U.S. at 729-30. In  
15 the habeas context, the existence of an independent and adequate state ground of  
16 decision is not a jurisdictional bar, as the federal court is not technically  
17 “reviewing” a state-court judgment, so there is no concern about the court

1 rendering an advisory opinion. Rather, the federal court is answering a different  
2 question: whether a person is in custody “in violation of the Constitution or laws  
3 or treaties of the United States.” 28 U.S.C. § 2254(a); *see Garcia*, 188 F.3d at 76.  
4 Still, the Supreme Court has held that, under principles of comity and federalism,  
5 a federal habeas court faced with an independent and adequate state ground of  
6 decision must defer in the same manner as the Supreme Court would in a case  
7 on direct review. *Coleman*, 501 U.S. at 730-31; *Garcia*, 188 F.3d at 76.

8 In this case, the district court held that it could not reach the merits of  
9 Pierotti’s ineffective assistance of trial counsel claim because the state court’s  
10 rejection of that claim rested on an independent and adequate state ground,  
11 namely, that the claim was procedurally barred under Section 440.10(2)(c)  
12 because Pierotti could have brought the claim on direct appeal but failed to do  
13 so. On appeal, Pierotti does not dispute that this state procedural bar was  
14 “independent” of federal law. The only question is whether it was “adequate” to  
15 preclude federal habeas review. This is a federal question. *Garcia*, 188 F.3d at 77.

16 A habeas petitioner may bring two kinds of challenges to the adequacy of  
17 a state procedural bar. First, the petitioner may challenge a procedural bar on the

1 ground that it is not “‘firmly established and regularly followed’ by the state in  
2 question.” *Id.* (quoting *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)). Second, even  
3 if a procedural bar is “‘firmly established and regularly followed,’” a petitioner  
4 may still challenge the adequacy of the bar in exceptional cases where the state  
5 court’s application of the rule was “‘exorbitant,” “‘render[ing] the state ground  
6 inadequate to stop consideration of a federal question.” *Lee v. Kemna*, 534 U.S.  
7 362, 376 (2002).

8 Here, there is no dispute that Section 440.10 is “‘firmly established and  
9 regularly followed.” Rather, Pierotti’s challenge concerns the state court’s  
10 application of Section 440.10(2)(c) to the facts of his case. In *Cotto v. Herbert*, 331  
11 F.3d 217 (2d Cir. 2003), we identified three considerations that are relevant to  
12 assessing a state court’s application of a generally sound rule:

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

1 *Cotto*, 331 F.3d at 240 (quoting *Lee*, 534 U.S. at 382). These three considerations are  
2 “guideposts” for courts, not exclusive “factors.” *Whitley v. Ercole*, 642 F.3d 278,  
3 287-88 (2d Cir. 2011).

4 Where, as here, we are “assessing the contours of a state court’s denial of  
5 collateral review because of a petitioner’s failure to raise an issue on direct  
6 appeal,” we “focus on the second of the *Cotto* guideposts.” *Fulton v. Graham*, 802  
7 F.3d 257, 262-63 (2d Cir. 2015). “The second *Cotto* [guidepost] considers whether  
8 state case law indicates that compliance with a procedural rule *was required*  
9 under the specific circumstances of the case.” *Id.* at 262-63 (quoting *Clark*, 510  
10 F.3d at 392).

11 Here, the state court based its decision on the procedural rule articulated  
12 in N.Y. Criminal Procedure Law Section 440.10(2)(c). Recently, in *Fulton*, we  
13 looked to the second *Cotto* guidepost to conclude that the state court’s  
14 application of Section 440.10(2)(c) to bar an ineffective assistance of counsel claim  
15 was so “exorbitant” that it rendered Section 440.10(2)(c) inadequate to preclude  
16 federal habeas review of the claim. *Id.* at 262-64. In *Fulton*, petitioner was offered  
17 a plea that would have made him eligible for a 10-year sentence, but he turned it

1 down and was eventually sentenced to 40 years' imprisonment. *Id.* at 266. On  
2 collateral review in state court, he alleged that his trial lawyer gave him "no  
3 guidance" during plea negotiations and "failed to discuss the pros and cons of  
4 accepting the plea offer." *Id.* The state court denied petitioner's motion to vacate  
5 his conviction under Section 440.10 on the ground that petitioner could have  
6 raised the ineffective assistance argument on direct appeal, citing Section  
7 440.10(2)(c). *Id.* at 261. The district court denied the petition for a writ of habeas  
8 corpus, concluding that the state court had relied on an independent and  
9 adequate state ground in rejecting the ineffective assistance of counsel claim. *Id.*

10 We vacated and remanded, holding that Section 440.10(2)(c), as applied by  
11 the state court to petitioner's case, was inadequate to preclude federal habeas  
12 review. *Id.* at 264. In considering the state court's application of Section  
13 440.10(2)(c), we noted that "the weight of state case law suggest[ed] that New  
14 York Courts do not ordinarily apply [Section] 440.10(2)(c) to bar claims of  
15 ineffective assistance based on out-of-court conversations between a defendant  
16 and his counsel." *Id.* at 263. Rather, our review of state court authority  
17 "suggest[ed] the opposite: state courts ordinarily demand that such ineffective



1 assistance claims be brought in collateral proceedings, rather than on direct  
2 appeal." *Id.* We noted that the trial record "d[id] not clearly reflect the adequacy  
3 of counsel's advice" and concluded that, under the circumstances, "the state  
4 court's reliance on [Section] 440.10(2)(c) to bar Fulton's claim represent[ed] an  
5 'exorbitant application' of the state rule." *Id.* at 264 (quoting *Lee*, 534 U.S. at 376).

6         The same is true here. New York case law indicates that Pierotti did not  
7 have to raise his ineffective assistance of counsel claim on direct appeal. To the  
8 contrary, while 440.10(2)(c) is designed "to prevent Section 440.10 from being  
9 employed as a substitute for direct appeal," *Fulton*, 802 F.3d at 263 (alterations  
10 and internal quotation marks omitted), New York courts uniformly hold that  
11 where, as here, an ineffective assistance of counsel claim turns on facts that are  
12 outside of the trial-court record, the claim *must* be brought in collateral  
13 proceedings, not on direct appeal.

14         The New York Court of Appeals has held,

15         Generally, the ineffectiveness of counsel is not demonstrable on the  
16 main record . . . . Consequently, in the typical case it would be  
17 better, and in some cases essential, that an appellate attack on the  
18 effectiveness of counsel be bottomed on an evidentiary exploration  
19 by collateral or post-conviction proceeding brought under [Section]  
20 440.10.

1 *People v. Brown*, 45 N.Y.2d 852, 853-54 (1978); *see also* *People v. Peque*, 22 N.Y.3d  
2 168, 202 (2013) (“Where a defendant’s complaint about counsel is predicated on  
3 factors such as counsel’s advice or preparation that do not appear on the face of  
4 the record, the defendant must raise his or her claim via a [Section] 440.10  
5 motion.”); *People v. Harris*, 491 N.Y.S.2d 678, 687 (2d Dep’t 1985) (“The Court of  
6 Appeals has time and time again advised that ineffective assistance of counsel is  
7 generally not demonstrable on the main record.”).

8 Further, under New York law, where “some of the defendant’s allegations  
9 of ineffectiveness involve matters appearing on the record, while others involve  
10 matters that are outside the record, the defendant has presented a ‘mixed claim’  
11 of ineffective assistance.” *People v. Maxwell*, 933 N.Y.S.2d 386, 388 (2d Dep’t 2011)  
12 (alteration omitted) (quoting *People v. Evans*, 16 N.Y.3d 571, 575 n.2 (2011)).

13 Where “a defendant presents a mixed claim of ineffective assistance . . . [,] such a  
14 mixed claim, presented in a [Section] 440.10 motion, is not procedurally barred,  
15 and the [Section] 440.10 proceeding is the appropriate forum for reviewing the  
16 claim of ineffectiveness in its entirety.” *Id.*; *see also* *People v. Love*, 57 N.Y.2d 998,  
17 1000 (1982); *People v. Stokes*, 3 N.Y.S.3d 618, 619 (2d Dep’t 2015); *People v. Barbuto*,

1 6 N.Y.S.3d 369, 373 (4th Dep't 2015); *People v. Freeman*, 940 N.Y.S.2d 314, 315 (2d  
2 Dep't 2012).

3 Pierotti presented such a "mixed claim" of ineffective assistance in his  
4 Section 440.10 motion. His claim depended on some facts appearing on the trial  
5 record, such as his trial counsel's failure to secure an accommodation for  
6 Pierotti's hearing impairment, but his claim ultimately turns on facts appearing  
7 outside the record, such as his trial counsel's alleged awareness of Pierotti's  
8 hearing impairment. Although it is apparent from the transcript of the pretrial  
9 hearing that Pierotti's counsel at that hearing was aware of Pierotti's hearing  
10 impairment, nothing in the trial record indicates that Pierotti's new counsel at  
11 trial was aware of this fact. Nor does the trial record indicate that Pierotti was  
12 unable to hear critical portions of his trial, as he now claims. Without this  
13 information, the Appellate Division could not have adjudicated Pierotti's  
14 ineffective assistance of counsel claim on direct appeal.

15 Indeed, the district court agreed with this analysis. It concluded that

16 Pierotti

17 presented a mixed ineffective assistance claim in his [Section] 440.10  
18 motion because his claim rested partly on his trial counsel's failure

1 to object to the lack of accommodation at trial for his hearing  
2 impairment which does appear on the record—and partly on the  
3 affidavits attesting to petitioner’s inability to hear during the trial  
4 and his trial counsel’s knowledge of that fact, and the affidavit of the  
5 expert explaining the nature of [Pierotti’s] hearing impairment and  
6 why [Pierotti] was able to hear adequately during, for example, his  
7 direct examination at the pre-trial hearing and during the charge  
8 conference but not during the testimony of witnesses.

9 *Pierotti*, 2015 WL 2337316, at \*13. Thus, the court concluded that “compliance  
10 with . . . [Section] 440.10(2)(c) was not demanded in the specific circumstances  
11 presented because sufficient facts did not appear on the record to permit  
12 adequate review upon direct appeal.” *Id.* (citations, alteration, and internal  
13 quotation marks omitted).

14 The district court also, however, analyzed the first and third *Cotto*  
15 guideposts, found that they favored the state, and then concluded that, based on  
16 its consideration of all three guideposts, the state court’s application of Section  
17 440.10(2)(c) was adequate to bar federal habeas review. *Pierotti*, 2015 WL 2337316,  
18 at \*12-14. This was error. The *Cotto* guideposts are not all applicable in every case  
19 because we derived them from a fact-specific analysis in *Lee*. See *Cotto*, 331 F.3d at  
20 240. Here, as was the case in *Fulton* and *Clark*, only the second *Cotto* guidepost is  
21 instructive because the first and third pertain specifically to procedural violations

1 that occurred before a trial court. The district court thus improperly “force[d]  
2 square pegs into round holes” in considering those guideposts. *Clark*, 510 F.3d at  
3 391.

4 Under *Cotto*’s second guidepost, the state’s contention that Pierotti’s  
5 ineffective assistance of counsel claim was “sufficiently reviewable from the  
6 record,” Appellee’s Br. at 35, and that Section 440.10(2)(c)’s procedural bar was  
7 properly applied, is mistaken. We can find no case law that supports the state’s  
8 position, particularly given the essential facts of Pierotti’s claim (namely,  
9 Pierotti’s alleged hearing difficulties at trial, the extent of those difficulties, and  
10 trial counsel’s awareness of them) are dependent on evidence outside the trial  
11 record. The cases cited by the state instead support only the unremarkable  
12 proposition that where there are record facts that dispose of an ineffective  
13 assistance of counsel claim, the state appellate court will address that claim on  
14 direct review. For example, in *People v. Koons*, 623 N.Y.S.2d 398 (3d Dep’t 1995),  
15 the Appellate Division was able to reject defendant’s claim “that his counsel  
16 acted ineffectively when he failed to raise the issue of defendant’s [hearing]  
17 impairment prior to the hearing” because the record indicated that defendant

1 had “admitted that he was able to hear all of the testimony of the prosecution  
2 witnesses.” *Id.* at 399; *see also, e.g., People v. Feliz*, 858 N.Y.S.2d 472, 473-74 (3d  
3 Dep’t 2008) (rejecting ineffective-assistance claim premised on counsel’s “alleged  
4 failure to secure an interpreter for defendant’s various appearances,” which  
5 depended on defendant’s “professed difficulties understanding the English  
6 language,” because the claim was “belied by a review of the transcript at issue—  
7 most notably, defendant’s plea allocution”). Here, by contrast, Pierotti has never  
8 admitted that he could hear witness testimony. To the contrary, he now claims  
9 that he could *not* hear the witnesses who were testifying against him.

10 In the absence of any New York authority indicating that claims like  
11 Pierotti’s must be raised on direct appeal under Section 440.10(2)(c), “we can  
12 only conclude that the state court’s reliance on [Section] 440.10(2)(c) to bar  
13 [Pierotti’s] claim represents an ‘exorbitant application’ of the state rule.” *Fulton*,  
14 802 F.3d at 264 (quoting *Lee*, 534 U.S. at 376). Thus, Section 440.10(2)(c) was  
15 “inadequate” to foreclose review of Pierotti’s ineffective assistance of trial  
16 counsel claim. On remand, the district court should decide the merits of the  
17 claim.

**CONCLUSION**

1

2

For the foregoing reasons, we VACATE the judgment of the district court

3

and REMAND for further proceedings consistent with this opinion.