No. 04-1324

In the Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Neither the State nor its *amici* make any effort to defend the decision below. The Eleventh Circuit held that: (1) AEDPA's statute of limitations is not controlled by ordinary waiver rules (Pet. App. 4a); and (2) under Habeas Rule 4 and principles of comity, finality, and federalism, courts have an "obligation" to dismiss untimely petitions *sua sponte*. *Id.* at 5a. As to the first holding, the State now concedes (Br. 5, 21) that AEDPA's limitations period is an affirmative defense that can be waived. Here, the State waived the defense by failing to raise it in the district court, as well as by conceding in its answer that Day's petition was timely.

With respect to the second holding, the State does not argue that Habeas Rule 4 applies post-answer. Moreover, it concedes (at 14) that a court is *not* obligated to impose a waived limitations defense. Instead, it now takes the position (at 3, 8) that unwritten policies of finality, comity, and federalism give a court inherent discretionary authority to raise and impose such a defense. Accordingly, the remaining question for this Court is whether the State's waiver forecloses dismissal or is merely one factor the lower courts should have weighed in deciding whether to impose the limitations defense *sua sponte*. Because the Eleventh Circuit took neither approach, reversal is required.

In reversing, this Court should hold that it is error for a court to raise and impose a waived limitations defense *sua sponte*, especially when the State expressly concedes timeliness. AEDPA's text, applicable procedural rules, and the policy balance struck by Congress all support this conclusion. Yet even if this Court disagrees, concluding instead that courts have discretion to impose the defense, the State has not overcome the strong presumption against doing so here. At minimum, the Court should prescribe factors to guide such discretion and remand for the lower courts to apply them.

I. THE DISTRICT COURT ERRED BY DISMISSING DAY'S PETITION *SUA SPONTE* BASED ON A DEFENSE THE STATE NEVER ADVOCATED.

Paying little heed to the text of the statute and rules, the State attempts to bring this case within the holding of *Granberry* v. *Greer*, arguing that principles of finality, comity, and federalism give courts inherent authority not only to raise a waived limitations defense but also to impose it without any input from the party to whom it belongs. Yet the exhaustion requirement addressed in *Granberry* is different from limitations; not all habeas defenses were created equal.

While exhaustion is a unique common-law limit on habeas relief created by this Court and given special properties based on comity and federalism,[1] AEDPA's statute of limitations is exclusively a creature of Congress. 28 U.S.C. § 2244(d). Consideration of Congress's intent with respect to *sua sponte* imposition of limitations starts with the text of the statute and the relevant procedural rules. Unlike the exhaustion requirement, the words chosen by Congress here—"period of limitation"—have a settled meaning outside the habeas context and under the Civil Rules. Pet. Br. 9-14.

Civil Rule 81 and Habeas Rule 11 confirm that this meaning applies in the habeas context because it is "not inconsistent" with the habeas statutes and rules. Pet. Br. 19-31. This Court had no reason to conduct a Rule 81/11 analysis in *Granberry* because the exhaustion requirement is unique to habeas cases. But when the matter in question is addressed by a Civil Rule, this Court's decisions begin with that rule and consider whether the habeas statutes or rules "limit [its] application * * * to the present case." *Gonzalez*, 125 S. Ct. 2646; *Mayle*, 125 S. Ct. at 2569-70, 2574-75. The State and

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[1] *Granberry*, 481 U.S. at 133 (focusing on common-law "history of the exhaustion doctrine" to determine whether courts could insist on exhaustion *sua sponte*); Pet. Br. 40-41. Procedural default, nonretroactivity, and abuse of the writ were also created by this Court.

its *amici* ignore this analytical approach and the settled meaning of limitations.

A. AEDPA's Text, Applicable Rules, And Relevant Policies Show That Courts May Not Impose A Waived Limitations Defense *Sua Sponte*.

1. Under the adversary system of the Civil Rules, a "period of limitation" like the one Congress chose in § 2244(d) is a non-jurisdictional affirmative defense. Civil Rules 8(c), 12(b), and 15 require a defendant to plead limitations in an answer or amended answer, and courts hold the defense waived if it is not raised in compliance with these rules. Pet. Br. 9-10, 30-31.

"Since [limitations] is a waivable defense, it ordinarily is error for a district court to raise the issue *sua sponte*." *Haskell*, 864 F.2d at 1273; 5 Wright & Miller § 1278, at 644-45 & n.12 (waiver of limitations defense "results in * * * its exclusion from the case"); Tex. Br. 1 ("courts generally do not dismiss cases based on waived affirmative defenses"); Pet. Br. 13-14 & n.17. This conclusion follows from the Civil Rules as well as the fundamental adversary "rule that points not argued will not be considered." *Burke*, 504 U.S. at 246 (Scalia, J., concurring).

The State complains that this analysis gives short shrift to a court's inherent authority. Not so. Day certainly agrees that courts have inherent powers, particularly in areas where they have "the sanction of wide usage" and "ancient origin" (*Link*, 370 U.S. at 630-31), where there is a fundamental breakdown in the adversary process,[2] or where the court's actions are unconstrained by existing rules. See Fed. R. Civ. P. 83(b); *Carlisle* v. *United States*, 517 U.S. 416, 425-28 (1996). But limitations does not fall within any of these categories. Civil

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[2] *E.g.*, *Arizona* v. *California*, 530 U.S. 392, 412 (2000) (res judicata "in special circumstances"); *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (per curiam) (failure to defend by fugitive); *Link*, 370 U.S. at 629 (failure to prosecute).

Rules 8, 12, and 15 specifically address how the limitations defense should be raised, and the authorities cited above confirm that *sua sponte* dismissal based on limitations is far from widely used.[3] Accordingly, the notion of inherent power does not alter the conclusion that it is error for a court to impose a waived limitations defense *sua sponte*.[4]

2. When Congress chose to include the settled civil concept of a "period of limitation" in AEDPA, it adopted this principle that *sua sponte* treatment is error. Pet. Br. 15-18, 22; *Scott*, 286 F.3d at 931. As this Court recently confirmed,

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."

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[3] Aside from *Bendolph*, the State and its *amici* cite only one case in which a court dismissed *sua sponte* based on a waived limitations defense outside the PLRA context (where such dismissals are authorized by statute, see Pet. Br. 27). In that case, the other defendants—not the court—raised the defense. *Grand Rapids Plastics, Inc.* v. *Lakian*, 188 F.3d 401, 405, 407 (6th Cir. 1999).

[4] Some courts express this conclusion in terms of power or authority rather than error. *E.g.*, *Nardi*, 354 F.3d at 1141 (district court "lacks the authority" to dismiss petition as time-barred when State fails to plead limitations defense); *Wagner*, 307 F.2d at 412 (district court "had no right" to apply waived limitations defense *sua sponte*). Under either rubric, however, the result in this case is the same: the district court's judgment dismissing the petition *sua sponte* should be reversed. *Cf. Unitherm Food Sys., Inc.* v. *Swift-Eckrich, Inc.*, 126 S. Ct. 980, 985 (2006) (court lacks power to order relief absent proper motion by party); *id.* at 990 (Stevens, J., dissenting) (order may be abuse of discretion).

INS v. *St. Cyr*, 533 U.S. 289, 312 n.35 (2001) (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)).

Civil Rule 81 provides a second reason why the Civil Rules governing waiver and *sua sponte* imposition of the limitations defense apply to habeas cases. While Habeas Rule 11 states that federal courts "may" apply the Civil Rules in habeas cases, Civil Rule 81(a)(2) implements this authority by declaring that the Civil Rules "*are* applicable" to habeas proceedings "to the extent that the practice * * * is not set forth in statutes of the United States * * * or [the Habeas Rules], and has heretofore conformed to the practice in civil actions" (emphasis added).

The State has no response to Rule 81 and does not dispute that its conditions for applying the Civil Rules on waiver and *sua sponte* treatment are met.[5] As our opening brief explains (at 20-21), habeas pleading practice was historically adversarial and placed the burden on the State to plead reasons why the writ should not issue. See also NACDL Br. 16-17 n.3 (collecting pre-Civil Rules cases regarding pleading and waiver of habeas defenses).

Furthermore, nothing in "the text of" the habeas statute or rules indicates that Congress intended to depart from the traditional principle that an unpleaded limitations defense may not be imposed *sua sponte*. *Gonzalez*, 125 S. Ct. at 2646; see Pet. Br. 21-31. The summary dismissal provisions of Habeas Rule 4 do not apply post-answer, and new Habeas Rule 5 confirms the State's duty to raise the limitations defense in its answer. Pet. Br. 28-30. The State asserts (at 18-19) that nothing in these rules or the habeas statute eliminates a court's discretion to raise a waived limitations defense *sua sponte*, but it identifies no textual basis for inferring that such discretion exists in the first place. Under Rule 81 and the

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[5] Indeed, the State concedes (at 5) that ordinary waiver rules apply to the habeas statute of limitations.

doctrine of implied repeal, statutory silence is not enough to defeat the application of the Civil Rules. Pet. Br. 33.

The State also attempts to avoid the civil principle against *sua sponte* treatment by quibbling about the degree to which habeas proceedings are civil in nature. That is beside the point. Day agrees that there are significant distinctions between civil and habeas proceedings. Because Congress chose to adopt the civil concept of a "period of limitation" in AEDPA, however, the statute should be interpreted accordingly. Moreover, under Civil Rule 81, Habeas Rule 11, and this Court's cases, the Civil Rules apply to habeas proceedings to the extent they are not inconsistent with the habeas statute or rules. Pet. Br. 19-20. The State has shown no such inconsistency here.

3. The State's brief largely ignores the analysis above, arguing instead that its non-textual interest in finality (and through it comity and federalism) gives a habeas court discretion to impose a waived limitations defense *sua sponte* without any input from the party to whom it belongs. This argument, however, does not alter the conclusion that *sua sponte* dismissal based on limitations is not a "well-acknowledged" inherent power. *Link*, 370 U.S. at 631. Nor does it provide any indication that Congress intended to replace the traditional civil principle that it is error for a court to impose a waived limitations defense *sua sponte* with a new discretionary practice.

Yet even if this Court were to consider non-textual policies, the State's interest in finality would not trump the adversary system. Our "adversary system is designed around the premise that the *parties* * * * are responsible for advancing the facts and arguments entitling them to relief." *Castro*, 540 U.S. at 386 (Scalia, J., concurring in part and concurring in judgment) (emphasis added). As discussed above, the history of habeas pleading practice shows that it is an adversary process. Moreover, this Court recently confirmed that the adversary system governs AEDPA's limitations defense spe-

cifically. In *Pliler* v. *Ford*, the Court held that having judges "advise" *pro se* litigants about how to avoid that defense "would undermine [their] role as impartial decisionmakers." 542 U.S. at 231. Instead, "calculating [the AEDPA] statute[] of limitations [is a] task[] normally and properly performed by trained counsel." *Ibid.*

The State has no answer to *Pliler*. It does not dispute that the adversary process is equally undermined when a judge investigates whether a State litigant has a viable limitations defense that it failed to raise and, if so, dismisses the petition *sua sponte*. Indeed, it would be fundamentally unfair for a court to aid the State's lawyer but not a *pro se* petitioner with "the potentially burdensome, time-consuming, and fact-intensive task of making a case-specific investigation and calculation of * * * the AEDPA limitations period." *Pliler*, 542 U.S. at 232. A State litigant must play by the same rules as other litigants; it is not entitled to favored treatment.

Moreover, it is especially damaging to the adversary system when a court goes beyond simply flagging a defense for the parties' belated consideration (*cf. Bendolph*, 409 F.3d at 168) and actually asserts and adjudicates it without any input from the party to whom it belongs. *United States* v. *Wiseman*, 297 F.3d 975, 980 (10th Cir. 2002). That is precisely what happened here: the magistrate judge did not merely "raise" the limitations defense and have "some say" in whether to apply it, as the State would have this Court believe. See Resp. Br. 3, 5, 8, 11, 15. Instead, the judge overrode the State's express concession of timeliness and imposed the defense *sua sponte* without ever considering whether the State wished to pursue the defense. In so doing, the judge stepped into the role of advocate for the State, depriving Day of an impartial forum and stripping the State of the prerogative to determine its own defenses.[6] The adversary system should not tolerate such actions.

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[6] The State incredibly asserts (at 24) that there was no reason for it to advocate dismissal after the judge's initial order regarding limi-

Congress regularly entrusts the effectuation of even high-priority policies to the adversary process. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 419 (1978). When it intends to create an exception to that process, it is generally quite explicit.[7] *Ibid.* (congressional intent to distort adversary process "cannot be lightly assumed"); *United States* v. *Pryce*, 938 F.2d 1343, 1353 (D.C. Cir. 1991) (Silberman, J., dissenting in part). As discussed above, there is no indication that Congress intended to depart from the traditional principle that it is error for a court to impose a waived limitations defense *sua sponte*. Accordingly, the State's policy interest in finality does not support *sua sponte* dismissal.

4. The State's appeal to the virtues of finality is also flawed because it: (1) fails to distinguish between the value of finality in general versus in the marginal cases where a viable limitations defense has been waived; and (2) fails to account for other policies that weigh heavily against *sua sponte* dismissal. These competing values are best reconciled by holding that it is error to dismiss a habeas petition *sua sponte* based on a waived limitations defense.

Day agrees that AEDPA's limitations defense promotes finality, and there are many procedures in place to ensure that this policy is protected in run-of-the-mine cases. For example, under Habeas Rule 4, a court may dismiss a facially untimely petition summarily before an answer is filed, or it may authorize the State to file a motion to dismiss based on limitations. Alternatively, the State may plead the limitations defense in its answer or (under certain circumstances) in an

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tations because it agreed the petition was untimely. The judge, of course, had no way to know of the State's tacit agreement.

[7] Thus, the adversary system is the background principle unless it is expressly altered by statute or rule. This view is perfectly consistent with Congress's decision to mandate certain pre-answer *sua sponte* dismissals under Habeas Rule 4. *Cf.* U.S. Am. Br. 15.

amended answer.[8] Thus, post-answer *sua sponte* dismissal generally is not necessary to accommodate finality.

In the rare case where an untimely petition survives these procedures, the policies against imposing the waived limitations defense *sua sponte* vastly outweigh any marginal finality benefit from *sua sponte* dismissal.[9] These policies include judicial neutrality and restraint, the adversary system, efficiency,[10] the uniform application of procedural rules, and the importance of keeping the habeas remedy open to meritorious claims. Pet. Br. 35-39; *McCleskey*, 499 U.S. at 492-93. In particular, the State's proposed discretionary standard for *sua sponte* dismissal is vague and likely to create problems of efficiency and uniformity, spawning wasteful satellite litigation on matters far removed from the merits and yielding inconsistent results. Pet. Br. 38-39.

On the other hand, applying the civil rule against *sua sponte* dismissal in these rare cases burdens finality only minimally, if at all. Pet. Br. 42-44. Tellingly, the State has no response to this Court's decisions in *Gonzalez* and *Mayle*,

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[8] Habeas Rule 5; Fed. R. Civ. P. 15(a); see also 28 U.S.C. § 2243. Of course, if this case is remanded, it would be far too late for the State to amend its answer to plead the limitations defense. *Retzer* v. *Wood*, 109 U.S. 185, 187-88 (1883); Pet. Br. 30-31; p. 15, *infra.*

[9] See *Harris* v. *Reed*, 489 U.S. 255, 264 (1989) (holding that "applying [the rule at issue] to habeas burdens th[e] interests [of finality, federalism, and comity] only minimally, if at all. The benefits, in contrast, are substantial.").

[10] As *amicus* Texas notes (at 3, 17-18, 20), the greatest amount of resources usually have been expended once the merits of a habeas petition are fully briefed (as they were here) because petitions are typically decided on the papers. At this point, it often will be highly inefficient for a court to undertake *sua sponte* the burdensome, time-consuming, fact-intensive, and error-prone task of calculating AEDPA's limitations period instead of deciding the fully-briefed merits issues. Pet. Br. 38; *Wiseman*, 297 F.3d at 980.

which confirm that finality is not offended when a generally-applicable civil rule provides an exception to the limitations period. Pet. Br. 25, 43. Furthermore, the finality goal of AEDPA's limitations period is not to produce default but to stimulate prompt federal review of the merits. *Id.* at 24; see Resp. Br. 27 ("Congress did not intend AEDPA to operate as a 'gotcha' system of justice"). Given that non-capital petitioners like Day already have ample incentives to file timely (Pet. Br. 43 n.39), the threat of *sua sponte* dismissal is not necessary to promote this goal.

Importantly, *Granberry* had no need to reconcile competing values because it did not recommend dismissal of unexhausted petitions with prejudice. Rather, it advised courts to consider requiring additional state proceedings prior to federal review, thereby accommodating comity and federalism without harming the other values discussed above. 481 U.S. at 134. Dismissing a petition *sua sponte* based on a waived limitations defense, however, tramples those values with little corresponding benefit to finality. Accordingly, this Court should hold that such a dismissal is error.

5. The State does not press comity and federalism as independent interests justifying *sua sponte* dismissal, but rather treats them as tag-alongs to finality. See Resp. Br. 6, 15. This case is thus quite different from *Granberry*, where comity and federalism were central. 481 U.S. at 133-34.

Unlike exhaustion and the other common-law doctrines on which the State relies, AEDPA's statutory limitations defense is not a mechanism for deference to state courts and their procedures. The State attempts (at 17) to characterize the defense as "a ground that the State did not have the opportunity to address at a prior, appropriate time," *McCleskey*, 499 U.S. at 493, but that is incorrect. Instead, the defense cuts off federal review altogether based on a collateral issue of timing that state courts never consider. Pet. Br. 41; see *Calderon* v. *Ashmus*, 523 U.S. 740, 747-48 (1998). Accordingly, limitations does not implicate comity and federalism.

The State's only involvement with the federal limitations defense is as a litigant. As our opening brief explains (at 37), a State litigant is in a far better position than a court to decide whether asserting the limitations defense would serve its interests in comity, federalism, and finality. Indeed, there is no reason to believe the State inadequately protects these interests as a general matter; they certainly are not beyond its concerns as a party. *Cf.* Resp. Br. 5-8. Thus, there is no reason to saddle federal courts with the difficult, time-consuming task of calculating AEDPA's limitations period on their own. See Pet. Br. 38. When the State waives the limitations defense, "the district court should assume that the waiver is justified." *Esslinger*, 44 F.3d at 1528.[11] Curing that waiver through *sua sponte* dismissal is reversible error. Pet. Br. 45; *Nardi*, 354 F.3d at 1142; *Scott*, 286 F.3d at 931.

B. The State's View Ignores Congress's Choices And Would Have Untoward Consequences.

1. The State's arguments in favor of discretionary *sua sponte* dismissal misunderstand the nature of a limitations defense. In contrast to common-law restrictions like exhaustion, a period of limitation is not a "prohibition" on federal habeas relief (Resp. Br. 16), and it "does not operate by its own force as a bar" to review. *Finn* v. *United States*, 123 U.S. 227, 232 (1887). Rather, it is merely a claim-processing rule that defines the time for bringing suit, and its benefits belong to individual parties. Pet. Br. 9; Civ. Pro. Profs. Br. 24. Because limitations is not a flat ban on habeas relief, a court need not preserve it by acting *sua sponte*.

Congress understood this difference between a "period of limitation" and common-law restrictions on granting the writ, and it used prohibitive language only for the latter when it

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[11] See also *Boardman* v. *Estelle*, 957 F.2d 1523, 1537 (9th Cir. 1992) (per curiam) ("Concerns of federalism and respect for a state's criminal judgments are marginal here because the state brought the problem on itself" by failing to raise defense).

codified them in AEDPA. With respect to exhaustion, for example, Congress provided that the writ "shall not be granted unless" state remedies have been exhausted, and it expanded courts' ability to raise exhaustion *sua sponte* by limiting waiver. 28 U.S.C. § 2254(b). The statutory analogues of nonretroactivity and abuse of the writ contain similar language. See 28 U.S.C. §§ 2244(b) ("shall be dismissed unless"), 2254(d) ("shall not be granted * * * unless").

Moreover, Congress explicitly required that certain capital habeas applications "must be filed * * * not later than 180 days after" the completion of direct review. 28 U.S.C. § 2263(a). In contrast, Congress provided that a "1-year period of limitation shall apply" to habeas applications by state prisoners generally. It did *not* say that the writ "shall not be granted" unless an application is filed within one year, nor did it say that an application "must be filed" not later than one year after the relevant trigger date. This difference in language signals that Congress intended to adopt an ordinary statute of limitations defense, not a strict prohibition on habeas relief that courts may be called upon to enforce *sua sponte* after it has been waived.

2. As discussed on pages 8-9 above, there are many different procedures for winnowing out untimely petitions. If the State thinks these existing procedures are not sufficient and desires a different outcome based on certain policy considerations, it should go to Congress or to the Advisory Committee. *Lonchar*, 517 U.S. at 328; *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864 (1984). This Court does not rewrite procedural rules by opinion.

When Congress concludes that certain policies call for an exception to the adversary system, it explicitly authorizes *sua sponte* action. *E.g.*, 11 U.S.C. § 105(a); Fed. R. Crim. P. 52(b); Habeas Rule 4; Pet. Br. 25-27. In the Prison Litigation Reform Act (PLRA), for example, Congress provided for *sua sponte* dismissal "at any time" if the court determines that the prisoner failed to state a claim. 28 U.S.C. § 1915(e)(2).

Courts use this statute to dismiss PLRA cases *sua sponte* based on limitations. U.S. Am. Br. 27.

In habeas cases, however, Congress balanced the relevant policies and chose a "period of limitation"—a concept that has a settled meaning and is governed by settled procedural rules, including the principle that *sua sponte* dismissal based on a waived limitations defense is error. Congress obviously considered the subject of *sua sponte* dismissal, as it provided for pre-answer summary dismissals under Habeas Rule 4. It also included a safety valve in Civil Rule 15(a), which allows defendants to resuscitate waived defenses in certain circumstances by amending their answers.

But that is as far as Congress went. Its decision not to provide for *sua sponte* dismissal of waived limitations defenses at any time, as it did in the PLRA, is entitled to respect. Because the above rules directly address *sua sponte* dismissal and how waiver may be cured, *Lonchar* holds that courts may not alter those rules through the exercise of general equitable powers. 517 U.S. at 316. The State's position that certain policies are weighty enough to support an inherent discretionary power of *sua sponte* dismissal should be rejected as an impermissible attempt to undermine the balancing of interests undertaken by Congress. *Id.* at 327.

3. Finally, the State's sweeping argument that finality, comity, and federalism support a discretionary dismissal power proves too much outside the exhaustion context, where comity and federalism were directly at issue. The State asserts (at 18) that courts have "discretion to raise [waived] defenses" and "to *deny* relief" when "doing so advances the interests of comity, finality, and federalism." In its view (Br. 17), these interests "are implicated by *any* federal collateral attack on a state court criminal judgment." According to the State, therefore, courts may dismiss or deny any habeas petition in order to protect the state judgment, regardless of what the rules say. Not to be outdone, *amicus* United States makes

the astonishing argument (at 27-28) that compliance with rules is an "empty formalism" with "no purpose."

Obviously, that is not the law. As *McCleskey* recognizes, a "background norm of procedural regularity [is] binding" in habeas cases. 499 U.S. at 490. Indeed, the history of the writ shows "the gradual evolution of more formal judicial, statutory, or rules-based doctrines of law * * * that regularize and thereby narrow the discretion that individual judges can freely exercise." *Lonchar*, 517 U.S. at 322. Contrary to the State's suggestion, courts are "not authorize[d] * * * to ignore this body of statutes, rules, and precedents" or create "ad hoc judicial exception[s]" to accommodate equitable considerations such as comity, finality, and federalism. *Id.* at 323, 328. Adherence to these rules serves several important purposes, including efficiency and uniformity. Pet. Br. 33-34, 37-39; Civ. Pro. Profs. Br. 21-22.

Because the State did not follow the rules for pleading limitations, it procedurally defaulted the defense and must bear the consequences. The district court erred in dismissing *sua sponte* based on that waived defense.

II. THE DISTRICT COURT ERRED BY DISREGARDING THE STATE'S EXPRESS CONCESSION OF TIMELINESS.

1. In both *Granberry* and this case, the State defaulted the defense at issue by failing to raise it in the district court. Yet the State went further here: it expressly conceded in its answer that Day's "petition is timely; filed after 352 days of untolled time." J.A. 24. The district court erred by refusing to give binding effect to this express waiver. Pet. Br. 44-50.

The State responds (at 22 n.4) that its concession does not rise to the level of an "intentional relinquishment of a known right," which is the standard for express waivers of constitutional rights. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). The waiver standard varies, however, depending on the right at stake. *United States* v. *Olano*, 507 U.S. 725, 733 (1993).

With respect to habeas defenses, many courts hold that pleading the opposite of the defense—*e.g.*, the petition is timely, or the claims are exhausted and not procedurally defaulted—constitutes an express waiver. Pet. Br. 44; *Royal* v. *Taylor*, 188 F.3d 239, 247 (4th Cir. 1999).

That holding is particularly appropriate here, as the State acknowledges (at 22) that all the information it needed to make the limitations calculation was attached to the answer in which it conceded timeliness. An explicit concession based on full information certainly should have more effect than a silent failure to raise a defense. See *Fed. Ins. Co.* v. *Gates Learjet Corp.*, 823 F.2d 383, 387 (10th Cir. 1987) (leave to amend to add limitations defense denied where party had been aware of facts for some time). Moreover, the State cannot credibly argue that its concession was inadvertent given that it failed to assert the limitations defense even after the magistrate judge issued his show-cause order. *Cf. Long*, 393 F.3d at 401. Thus, the judge had no reason to suspect that the State wished to retract its concession, and he erred by failing to honor it.

2. The Eleventh Circuit attempted to neutralize the State's concession of timeliness by holding that it was "patently erroneous"[12] and thus no more binding than a default.[13] Pet. App. 4a. As we have consistently argued, however, Day's petition was in fact timely—or, at the very least, *Abela* supports a substantial argument that it was timely. Pet. 19-20; Pet. Reply 8-9; Pet. Br. 6-7, 45-50. Accordingly, the Elev-

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[12] Other courts of appeals agree with the Eleventh Circuit that whether a waived defense is certain or debatable (or, conversely, whether the argument against it is patently erroneous or substantial) affects whether a court should overlook the waiver and raise the defense *sua sponte*. *E.g.*, *Long*, 393 F.3d at 399; *Yeatts*, 166 F.3d at 262; *Smith* v. *Horn*, 120 F.3d at 408-09; *United States* v. *Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991).

[13] In this way, the Eleventh Circuit decided the issue of whether Day's petition was timely. See Pet. Br. 6-7; *cf.* Resp. Br. 22, 29.

enth Circuit erred in excusing the State from its binding concession by labeling it patently erroneous.

The State attempts to dodge the timeliness issue by arguing (at 27-29) that it is not fairly included in the questions presented. See Sup. Ct. R. 14.1(a). Its argument, however, rests on a misstatement of our position. Day does not assert the timeliness of his habeas petition as a free-standing ground for reversal. Instead, he argues that its timeliness is "essential to [the] analysis" of and "intimately bound up with"[14] the question whether "the State waive[d] a limitations defense to [Day's] habeas corpus petition when it * * * expressly concede[d] that the petition was timely." Pet. I (first question presented). The Eleventh Circuit correctly recognized, and the State's brief shows (at 22-23), that the timeliness issue plays a significant role in determining the effect of the State's express concession—*i.e.*, whether it should be treated as a binding waiver or disregarded as patently erroneous. Moreover, the State correctly argues (at 26-27) that timeliness affects whether the *sua sponte* dismissal prejudiced Day. See Part III, *infra*. For these reasons, the Court should decide whether Day's petition was timely (or at least whether there is a substantial argument for timeliness).

3. The State's argument against timeliness does not withstand scrutiny. It offers no response to the structural analysis in our opening brief (at 47-50), which shows that 28 U.S.C. § 2244(d)(2) tolls limitations during the post-conviction certiorari period. Instead, it asks this Court to rewrite the statute. Although § 2244(d)(2) states that limitations is tolled while an "*application* for State post-conviction * * * review" is pending, the State urges (at 31) that tolling should last only

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[14] *Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 540 (1999); *Procunier* v. *Navarette*, 434 U.S. 555, 559-60 n.6 (1978); see *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996) (considering whether "issue * * * is a 'predicate to an intelligent resolution' of the question presented" (quoting *Vance* v. *Terrazas*, 444 U.S. 252, 258-59 n.5 (1980)); see also *City of Sherrill*, 125 S. Ct. at 1490 n.8.

while "State court *proceedings*" are pending. In its view (at 30, 32), tolling always stops at the conclusion of state court proceedings, regardless of whether the prisoner subsequently files a certiorari petition concerning his state application and regardless of this Court's action on the petition.

The short response to this view is that Congress did not write the statute that way. *Russello*, 464 U.S. at 23. "State" refers to the character of the "application" as a remedy created by state law, not to the character of the court presently conducting proceedings on that application. Thus, an "application" for post-conviction relief retains its state character and remains pending while this Court can be called upon to review a judgment on that application under 28 U.S.C. § 1257. *Abela*, 348 F.3d at 170-71. It becomes final—and tolling ends—only when certiorari is denied or "the time for filing a certiorari petition expires." *Clay*, 537 U.S. at 527. Under this rule, Day's petition was timely and the State's concession of that fact is binding. Pet. Br. 45; Pet. App. 16a.

This Court did not hold otherwise in *Carey*, which only considered whether an application remained pending between two levels of state court proceedings. 536 U.S. at 217-18. *Carey*'s statement that a state application remains pending until it "has achieved final resolution through the State's post-conviction procedures" (*id.* at 220) merely answers this question; it does not exclude this Court's review of a state application from the tolling period. *Cent. Va. Cmty. Coll.* v. *Katz*, 126 S. Ct. 990, 996 (2006) (court not bound by dicta when point at issue was not debated in the prior case).

Moreover, restricting the tolling period to state proceedings would yield harmful and absurd results. Given the running statute of limitations, many state prisoners would need to file federal habeas petitions in district court while still preparing or awaiting a ruling on certiorari petitions that raise the same claims in the state post-conviction context. These duplicative proceedings would waste judicial resources and produce troublesome conflicts of jurisdiction. In addition, it

is ridiculous to think that a state post-conviction application transforms into a federal post-conviction application when this Court can review it under 28 U.S.C. § 1257 and then reverts to a state application if this Court remands to state court, leaving a tolling gap in between. Yet that is precisely the consequence of the State's position. The Court should reject that position and hold that Day's petition was timely.

III. ALTERNATIVELY, THE PROPER DISCRETIONARY FACTORS DO NOT SUPPORT DISMISSAL.

For these reasons, it is error for a district court to dismiss a habeas petition *sua sponte* based on a waived limitations defense. Given that the State not only failed to plead the defense but affirmatively conceded timeliness and never advocated dismissal even after the district court raised the limitations issue *sua sponte*, dismissal certainly was improper here. The Court should reverse and remand for consideration of Day's petition on the merits.

Yet even if the State were correct that *Granberry* gives a district court discretion to impose a waived limitations defense *sua sponte*, reversal would still be required because the courts below never had an opportunity to exercise that discretion under the proper standards. Instead, the Eleventh Circuit erroneously held that it was *obligated* to impose the defense.[15] Thus, if the Court holds that *Granberry* applies to the limitations defense created by Congress, it should prescribe factors to guide the lower courts' discretion. *Martin* v. *Franklin Capital Corp.*, 126 S. Ct. 704, 710 (2005) ("Discretion is not whim, and limiting discretion according to legal

[15] Pet. App. 4a. Aside from rejecting Day's argument for equitable tolling, the magistrate judge simply dismissed the petition after concluding it was untimely. *Id.* at 10a-15a. He "made no attempt to determine whether the interests of justice would be better served" by imposing the limitations defense *sua sponte* on these facts. *Granberry*, 481 U.S. at 136.

standards helps promote the basic principle of justice that like cases should be decided alike.").

The State concedes (at 21) that waiver of the limitations defense (whether intentional or inadvertent) is a factor to be considered in determining whether to raise the defense *sua sponte*. Furthermore, this Court has recognized a "presumption" against adjudication of issues not raised through normal habeas procedures. *McCleskey*, 499 U.S. at 490;[16] *cf. Arizona* v. *California*, 530 U.S. 392, 412-13 (2000) (raising forfeited defense *sua sponte* should be reserved for "special circumstances" to avoid "eroding the principle of party presentation so basic to our system of adjudication"). This presumption is particularly weighty here because the State affirmatively conceded timeliness based on full information and never advocated the limitations defense even after the magistrate judge raised it. *Wiseman*, 297 F.3d at 980 ("The government's complete failure to assert the * * * defense weighs heavily against its *sua sponte* enforcement.").

Another relevant factor, as the State points out (at 24), is whether Day was prejudiced by the *sua sponte* dismissal. Given that Day's petition was timely as explained above, dismissing it as untimely was obviously prejudicial. Other elements of prejudice include the State's unexplained 18-month delay in advocating the limitations defense, which it did for the first time in its appellees' brief, and the significant delay caused by the magistrate judge's *sua sponte* decision to invoke an inapplicable defense the State correctly did not raise. *Long*, 393 F.3d at 399-400. That decision has forced

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[16] See also *Howard* v. *Bouchard*, 405 F.3d 459, 476 (6th Cir. 2005) (courts should not "embrace *sua sponte* raising of procedural default issues as a matter of course"); *United States* v. *Barron*, 172 F.3d 1153, 1156-57 (9th Cir. 1999) (waiver of procedural default overlooked only in "extraordinary circumstances"); *Hardiman*, 971 F.2d at 505 ("[I]n an adversarial system such as ours, it will generally be better to consider only those defenses that are properly raised by the parties.").

Day to sit in prison and litigate the limitations issue for over two years in order to obtain resolution of his significant, fully briefed claims for habeas relief on the merits.

Other factors that weigh against imposing the limitations defense *sua sponte* here include: the substantial arguments regarding timeliness (p. 15 & n. 12, *supra*); the lack of prejudice to the State, viewed in terms of the policies behind the limitations defense, from Day's (at worst) 23-day delay in filing his petition;[17] and the balance of policies against *sua sponte* dismissal (pp. 6-11, *supra*).

None of these factors was considered by the courts below. If this Court wishes to apply them in the first instance, it should hold that the State has not overcome the presumption against imposing the waived limitations defense *sua sponte* and remand for consideration of the merits. If the Court concludes that the above factors are not dispositive, it should at minimum list the factors it considers relevant and remand. Giving the parties an opportunity to develop and present arguments tailored to those factors will enable the lower courts to exercise their discretion properly.[18] *Cf. Granberry*, 481 U.S. at 136.

CONCLUSION

For these reasons, as well as those stated in our opening brief, the court of appeals' judgment should be reversed.

Respectfully submitted.

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[17] Pet. Br. 12, 43 n.38; Tex. Br. 20; see *Henderson* v. *U.S. Fid. & Guar. Co.*, 620 F.2d 530, 534 (5th Cir. 1980); *cf. Rideau* v. *Whitley*, 237 F.3d 472, 478 (5th Cir. 2000)

[18] Some factors, such as the merits of Day's underlying claims (see Tex. Br. 20), have not been addressed by either party on appeal.

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FEBRUARY 2006