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No. 10-9995

IN THE
Supreme Court of the United States

PATRICK WOOD,

Petitioner,

v.

KEVIN MILYARD, WARDEN, STERLING CORRECTIONAL FACILITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does an appellate court have the authority to raise *sua sponte* a 28 U.S.C. § 2254(d) statute of limitations defense?

2. Does the State's declaration before the district court that it "will not challenge, but [is] not conceding, the timeliness of Wood's habeas petition," amount to a deliberate waiver of any statute of limitations defense the State may have had?

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OPINIONS BELOW

The Tenth Circuit's opinion in *Wood v. Milyard*, 403 Fed. Appx. 335 (10th Cir. 2010), is reproduced at App. 135a-144a. The district court's decision denying Wood's 28 U.S.C. § 2254 petition is reproduced at App. 96a-111a.

JURISDICTION

The Tenth Circuit Court of Appeals decided Wood's case on November 26, 2010. As allowed by the circuit court, Wood filed a petition for rehearing on January 3, 2011, which the court denied on January 7, 2011. As required by Supreme Court Rule 13, Wood's petition for writ of certiorari was filed within ninety days of the order denying rehearing. This Court granted the petition on September 27, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND STATUTORY PROVISION INVOLVED

The text of relevant rules is attached as Appendix A to this brief. These rules include Federal Rules of Civil Procedure, Rules 1, 8(c), 12(b), 15(a) and 81(a)(2), and the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"), Rules 4, 5 and 12.

28 U.S.C. § 2244(d) provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.

STATEMENT OF THE CASE[1]

On February 5, 2008, Patrick Wood filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the District of Colorado. App. 13a. Wood raised six constitutional claims, four of which were ultimately dismissed for non-exhaustion and two of which were denied by the district court on the merits. App. 74a-82a, 105a-110a. These latter claims involved constitutional claims that Wood's right to trial by jury had been violated and that his two convictions for murder of a single person violated double jeopardy.

The district court denied Wood a certificate of appealability, but the Tenth Circuit granted him one. App. 10a, 112a-130a. The circuit court appointed counsel for Wood and authorized the appeal of his two remaining claims, but the court also directed the parties to brief both the timeliness of Wood's § 2254 petition and any state procedural rules that might bar consideration of his claims. App. 113a, 129a.

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1. The record in this case consists of one volume of federal district court pleadings and orders, and the state court record, which consists of one pleadings volume and a compact disc containing transcripts of pre-trial and trial proceedings. Citations to the record will be to the Joint Appendix ("App." with page number) whenever possible. When materials are not in the Joint Appendix, counsel will cite to the federal-court record by reference to "Record" and page number, and will cite to the state-court proceedings by volume and page number of the proceedings (*e.g.*, v1p8). Citations to matters contained in Appendices to this brief will be to the Brief Appendix and page number (*e.g.,* Br.App. 1a). Citations to pleadings filed in the Tenth Circuit Court of Appeals that are not included in the Joint Appendix will reference the date of the pleading and abbreviated title.

The timeliness of Wood's petition, however, had not been challenged by the state in the district court. App. 69a-72a, 87a. As explained below, although the state had identified a possible argument that Wood's petition was untimely, it also recognized that it was "unclear" whether the petition was, in fact, timely under the tolling provisions in § 2244(d)(2). App. 70a. Having identified a potential timeliness argument, the same one that would ultimately be adopted by the Tenth Circuit, the state nonetheless told the district court, "Respondents are not challenging, but do not concede, the timeliness of the petition." App. 87a.

The questions before this Court concern: (1) whether the state lost any right they had to assert the affirmative defense of timeliness once it informed the district court that it was not challenging the timeliness of Wood's petition, and once the district court ruled on the merits of Wood's claims; and (2) whether the appellate court lacked authority to raise *sua sponte* the timeliness of Wood's petition under these circumstances.

1. State conviction, trial and sentence (District Court of Adams County, Colorado, Case No. 86CR123)

In 1986, Wood was charged in Colorado state court with two counts of first degree murder, (after deliberation and felony murder), one count of attempted aggravated robbery, two counts of menacing, and one count of aggravated robbery. v1p2-11,154.

The charges arose from an incident in January of 1986 in which Wood was accused of entering a pizza store, attempting to rob it, and killing the assistant store

manager. v1p17-18. Two other employees disarmed Wood when he attempted to flee and restrained him until the police arrived. v1p17-18.

The prosecution initially sought the death penalty against Wood. v1p23-24. At the first trial, the jury deadlocked on count one (after deliberation first degree murder), but signed verdict forms on all other counts, and the court declared a mistrial. v1p183-185; 273, 281. The foreman's signature on the verdict form for felony murder is, however, scribbled out. v1p182. The Tenth Circuit's review of this record led it to observe in its decision, "[a] lthough the jury was deadlocked on the murder counts, the jury's foreman had signed the guilty verdicts on the robbery and menacing counts. [v1p183-185]. It appears, however, that the subsequent bench trial involved all of the original charges filed against Wood, not just the murder charges. [v1p190-94, 196]." App. 136a-137a, n.1.

After the mistrial, Wood signed a jury trial waiver, v1p187-188, the constitutional validity of which he has raised in this habeas proceeding, and his case was tried to the court. App.23a-24a. The trial court acquitted Wood of first degree murder (after deliberation) and convicted him of the lesser included offense of second degree murder, as well as all of the other charges, including felony murder. v1p190-194, 274. The court sentenced Wood to life in prison for murder (merging for purposes of sentencing the felony murder, second degree murder and aggravated robbery counts), and to concurrent 4-year terms for menacing. v1p196.

2. Direct appeal (Case No. 87CA0273)

Wood was represented on direct appeal by the same lawyer who represented him in the trial court. v1p34, 38, 281-82. On appeal, this lawyer challenged only the district court's denial of Wood's motion to suppress his statements. v1p197-202.

The Colorado Court of Appeals affirmed Wood's conviction in an unpublished decision issued May 4, 1989. v1p197-202; Record 207-215. The Colorado Supreme Court denied certiorari on December 10, 1989. v1p260; Record 220.

3. 1994 federal habeas proceeding (Case No. 94-K-219)

In 1994, prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, § 101 *et seq.*, 110 Stat. 1214, Wood filed a *pro se* habeas petition pursuant to 28 U.S.C. § 2254. This petition raised eight claims, five of which the magistrate judge determined, and Wood conceded, had never been raised in state court. The district court accordingly dismissed the mixed petition on March 21, 1995. v1p125.

4. State court postconviction proceedings in the trial court

a. 1995 Colorado Rule of Criminal Procedure 35(c) Motion to Vacate Judgment

On June 29, 1995, a few months after Wood's federal habeas petition was denied for failure to exhaust state court remedies, Wood filed a pro se Motion to Vacate

Judgment of Conviction and Sentence, pursuant to Colo. R. Crim. Proc. 35(c), in state court, along with a motion for appointment of counsel. v1p204-212. In his motion, Wood challenged only his class one felony conviction for first degree murder.[2]

On October 30, 1995, after approximately three months passed with no activity on his motions, Wood filed a Motion to Request a Ruling on Previously Filed Motions. v1p213-214. On December 1, 1995, the state district court appointed postconviction counsel for Wood. v1p215. To date, the record reflects Wood's 1995 state postconviction motion has not been ruled upon. App. 133a-134a.

b. 2004 State Petition for Postconviction Relief

On August 30, 2004, Wood filed in state court a pro se Petition for Postconviction Relief Pursuant to Colo. R. Crim. P. 35(c). v1p217-226.

Four days after the motion was filed, the state court denied it without a hearing. Record 167. The state court ruled that all claims, other than ineffective assistance of counsel, were procedurally barred by Wood's failure to raise the claims on direct appeal.[3] The court reached

2. Under Colorado law, there is no statutory time limit for filing a postconviction challenge to a class one felony conviction. *See* Colo. Rev. Stat. § 16-5-402(1). There is a three-year limitations period for challenging all other classes of felony convictions. *See id.*

3. The state district court's procedural default ruling, although affirmed by the Colorado Court of Appeals and defended by the state in the federal courts, is patently wrong. The state courts relied on Colo. R. Crim. P. 35(c)(3)(VII), which creates a

this conclusion even though it acknowledged that "[t]he Court does not have available the appellate record or the appellate decision issued by the Colorado Court of Appeals. The Court finds, however, that with each and every one of the grounds asserted could have been presented by the Defendant after his conviction." Record 168; v1p229. The court denied the ineffective assistance claim on the merits. *Id*.

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procedural bar to claims that could have been raised on direct appeal but were not. This Rule, however, was adopted in 2004. When Wood filed his direct appeal in 1987, state law permitted individuals to bring claims in postconviction proceedings even if the claims could have been raised on direct appeal. *See* Colo. R. Crim. P. 35(c)(2) (1984); *see also People v. Rodriguez,* 914 P.2d 230, 254 (Colo. 1996) (rejecting government's contention that claims available on direct appeal may not be brought in a postconviction proceeding absent special circumstances); *People v. Bradley*, 169 Colo. 262, 455 P.2d 199, 200 (1969) (one may raise constitutional issues in a postconviction motion "although the same issues could have been effectively raised on [appeal]").

As a matter of due process, Wood could not lawfully be barred from asserting claims under § 2254 by virtue of a state procedural rule that did not exist when the rule would have required him to act to preserve his claim. "[I]f a petitioner could not reasonably have been aware that a procedural rule would prevent the court from addressing the merits of his claim, his violation of that rule cannot bar federal review." *Osborn v. Shillinger,* 861 F.2d 612, 618 -621 (10th Cir. 1988); *see also Beard v. Kindler,* 130 S.Ct. 612, 619 (2009) (Kennedy, J. concurring)("We have not allowed state courts to bar review of federal claims without adequate notice to litigants who, in asserting their federal rights, have in good faith complied with existing state procedural law."); *Ford v. Georgia,* 498 U.S. 411, 423 (1991) ("the sufficiency of such a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure").

It appears the state court did not review the court file before ruling, since both the Colorado Court of Appeals decision, which the trial court indicated it did not have available, and a written jury waiver can easily be found in the court's file. v1p187-188, 197-203. Moreover, the file reflects that Wood's 1995 postconviction motion was still pending and that counsel had been appointed to represent Wood on that motion.

c. 2004 Motion to Re-Examine Defendant's Petition for Postconviction Relief

On October 7, 2004, Wood filed a motion asking the state court to re-examine his petition for postconviction relief. Record 170-171. Wood asked that, if the court were correct and the failure to raise issues on appeal created a procedural default, he be allowed to add a claim of appellate ineffective assistance against his appellate lawyer, who had also represented him at trial. *Id*.

The district court denied Wood's motion without considering the merits of Wood's request, ruling that "unfortunately no statutory right" to seek reconsideration existed.[4] v1p234-5.

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4. This ruling is demonstrably wrong. *See, e.g., People v. Albaugh,* 949 P.2d 115, 116 (Colo.App. 1995); *Stone v. People,* 895 P.2d 1154 (Colo. App. 1995); *People v. Janke,* 852 P.2d 1271 (Colo. App. 1992). Although there is no "statutory right" to seek reconsideration of final orders in criminal cases, Colorado courts recognize that reconsideration motions may be filed and ruled on so long as they are ruled on while the district court still has jurisdiction, *i.e.* before the 45-day deadline for a notice of appeal expires. *See, e.g., People v. Albaugh*, 949 P.2d 115, 117 (Colo. App.1997); *see also* Colo. App. R. 4. Wood's motion was filed 33 days after the date of the court's order and 12 days before his notice of appeal was due.

5. State postconviction appeal (Case No. 04CA2252)

The state court denied Wood's request for appointment of counsel on appeal, and he was pro se in the state appellate courts. v1p256-259.

On August 3, 2006, the court of appeals affirmed the district court's order denying postconviction relief. Record 207; v1p262-269. Like the district court, the state court of appeals rejected all but one of Wood's challenges, because of the purported procedural default based on Wood's failure to raise issues on direct appeal, a "procedural default" rule that did not exist at the time of defendant's direct appeal. Record 211-212; v1p266-67. *See* n. 3, *supra* at p.9. The court rejected Wood's ineffective assistance of counsel claim on the merits. v1p267-268.

The Colorado Supreme Court denied Wood's petition for writ of certiorari on February 5, 2007. v1p260.

6. Federal habeas proceedings in the district court (Case No. 08-cv-00247)

Wood filed his 28 U.S.C. § 2254 habeas petition on February 5, 2008, within a year of the state supreme court's order denying certiorari, and raised six claims. App. 13a.

a. District Court's Initial Decision to Dismiss Petition as Untimely

Pursuant to Habeas Rule 4, the district court, which was not aware of Wood's pending 1995 state postconviction

motion, initially dismissed Wood's § 2254 petition as untimely without seeking a response from the state. App. 41a-46a. Wood filed a motion asking the court to reconsider, App. 47a, and the court vacated the dismissal and directed the state to file a pre-answer response limited to the issues of timeliness and procedural default. App. 61a, 64a.

b. State's Decision Not to Challenge the Timeliness of Wood's Petition

The district court's order requiring the state to file a pre-answer response directed the state to notify the court if it intended to raise a limitations defense. Specifically, the court ordered that:

> Respondents are directed pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts to file a Pre-Answer Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and/or exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A). If Respondents do not intend to raise either of these affirmative defenses, they must notify the Court of that decision in the Pre-Answer Response.

App. 64a-65a.

In its pre-answer response, the state challenged some of Wood's claims as unexhausted, but chose not to challenge the timeliness of his petition. App. 67a-70a. Although the state recognized the existence of a possible argument that

Wood's petition was untimely, it also recognized that the impact of Wood's filing of the state postconviction motion in 1995 was "unclear," i.e., it was unclear whether the 1995 motion may have tolled the limitations period under § 2244(d)(2), until the 2004 motion was filed. Such tolling would render Wood's habeas petition timely filed. App. 70a.

Specifically, the state represented to the district court in its pre-answer response:

> As previously noted, Wood filed postconviction motions in the state district court in 1995 and 2004. It is clear that if Wood had filed only the 2004 motion his habeas petition would be untimely because the motion was filed long after his time for filing a habeas petition had passed. But it is unclear how the 1995 postconviction motion, which apparently was never ruled upon, affects the timeliness of Wood's habeas petition. While it is certainly arguable that the 1995 postconviction motion was abandoned before 1995 and thus did not toll the AEDPA statute of limitations at all, [citation omitted], Respondents will not challenge, but are not conceding, the timeliness of Wood's habeas petition in this pre-answer response.

App. 70a.

Once the state filed its pre-answer response in which it informed the court that it "will not challenge, but [is] not conceding, the timeliness" of Wood's petition, the district court did not concern itself further with the timeliness

of the petition. Instead, the court dismissed four claims the state had argued were unexhausted and ordered the state to file an answer in response to the remaining claims. App. 81a, 83a.

The district court's order expressly required the state's answer to "conform[ ] to the requirements of Rule 5 of the Rules Governing Section 2254 Cases." App. 83a. The cited rule requires the respondent to address the allegations in the petition and to "state whether any claim in the petition is barred by failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations." Br.App. 1a.

In compliance with the court's order and Habeas Rule 5(b), the state asserted a procedural default defense to Wood's double jeopardy claim, and, once again, apprised the district court that it was not challenging, but was not conceding, the timeliness of the petition. App. 87a-89a. As it relates to the timeliness of Wood's petition, the state wrote in its answer:

> Under 28 U.S.C. § 2244(d), a one-year limitations period applies to applications for writ of habeas corpus. As noted in the pre-answer response, the Respondents are not challenging, but do not concede, the timeliness of the petition. The Respondents hereby incorporate the arguments raised in the pre-answer response into this answer.

App. 87a.

c. District Court's Decision on the Merits

The district court denied Wood's remaining two claims on their merits. App. 105a-111a. The court did not address the timeliness of Wood's petition, it not having been challenged by the state. App. 96a-111a.

7. Certificate of Appealability

The district court denied Wood a certificate of appealability. App. 10a. Nevertheless, as allowed by the Tenth Circuit, Wood filed a pro se opening brief and application for certificate of appealability in which he argued the merits of the double jeopardy and jury trial waiver claims the district court had decided against him on the merits and that his other claims had been erroneously dismissed as unexhausted. 10.19.9 Application; 10.19.9 Brief.

The state filed a responsive brief opposing the certificate of appealability. The state argued that Wood's dismissed claims were unexhausted and properly dismissed and his remaining claims were without merit. 12.8.9 Response. True to its word in the district court, the state did not challenge the timeliness of Wood's petition. *See id.*

After reviewing the record and pleadings, the Tenth Circuit Court of Appeals granted a certificate of appealability on the two substantive issues the district court had denied on the merits.[5] In addition, the court

5. The circuit court granted a certificate of appealability on "(1) Wood's claim that his simultaneous convictions for felony murder and second degree murder violate his right against double

directed the parties to brief both the issue of timeliness and the issue of procedural default. App. 123a, 126a, 129a. Noting that Wood's petition "presents several complex procedural and substantive issues," and finding that "disposition of this case, and the interests of justice, would be aided by the appointment of counsel," the circuit, pursuant to 18 U.S.C. § 3006A(a)(2), appointed counsel to represent Wood on appeal. App. 113a, 129a.

8. The Tenth Circuit's Decision

In compliance with the certificate of appealability, the parties briefed the merits, as well as the issues of timeliness and procedural default. Notwithstanding the state's express decision not to challenge timeliness in the district court, the Tenth Circuit affirmed the district court's order dismissing Wood's petition with prejudice, solely on the ground the petition was untimely under 28 U.S.C. § 2244(d). App. 135a-144a. The Tenth Circuit did not address the merits of Wood's claims or the respondents' assertion of procedural default.

The Tenth Circuit ruled that Wood abandoned his 1995 state postconviction motion sometime before he filed his 2004 state postconviction motion. The court ruled therefore that the tolling authorized by § 2244(d)(2) had stopped before Wood's § 2254 habeas petition was filed in 2008, resulting in the expiration of the one-year statutory limitations period. App. 143a.

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jeopardy under the Fifth and Fourteenth Amendments to the Constitution, and (2) Wood's claim that his decision to waive a jury trial was not 'knowing, intelligent, and voluntary.'" App. 113a.

The Tenth Circuit, citing to *Day v. McDonough*, 547 U.S. 198 (2006), acknowledged that it could not "override a State's deliberate waiver of a limitations defense" and *sua sponte* dismiss a petition. App. 139a, n.2, quoting *Day*, 547 U.S. at 202. However, the court did not believe that the state's declaration in the district court that "it will not challenge, but [is] not conceding the timeliness of Wood's habeas petition" constituted a waiver or forfeiture of the affirmative defense. App. 139a, n.2. Instead, the court wrote that it did not understand what the state meant when it said it was not challenging, but was not conceding the timeliness of the petition, but whatever the state meant, it did not amount to a deliberate waiver of the defense:

> In their habeas answer, the Respondents provided a cryptic response to the timeliness question. They first incorporated an argument from their pre-answer response about the statute of limitations expiring before Wood filed his habeas petition, and then stated that they were "not challenging, but do not concede, the timeliness of [Wood's][habeas] petition." R., Vol. 1 at 273. While the precise import of this quotation eludes us, we conclude it is not a deliberate waiver, given that it follows an argument as to why Wood's habeas petition would be untimely, and concludes with a refusal to concede that the petition is timely. *Cf. Day*, 547 U.S. at 209 (holding that state's erroneous concession of habeas petition's timeliness did not preclude the district court from *sua sponte* dismissing the petition as untimely).

App. 139a, n.2.

Wood filed a timely petition for rehearing in which he challenged the circuit court's authority to raise the timeliness defense *sua sponte* when the state had specifically chosen to forgo the defense in the district court. 1.5.11 Petition for Rehearing at 3-9. In the alternative, Wood challenged the court's finding that his 1995 state court postconviction motion had been abandoned and was no longer pending, both as a matter of state law and as a matter of fact. *Id.* at 10. The panel denied the petition, and Wood filed his petition for writ of certiorari in this Court on April 7, 2011.

SUMMARY OF THE ARGUMENT

As a general rule, affirmative defenses based on statutes of limitations must be pled, and such defenses are forfeited or waived if not asserted in the district court.[6] Thus, litigants cannot raise a limitations defense for the first time on appeal; nor can appellate courts raise such a defense *sua sponte* for the first time on appeal.

The one-year federal limitations period in 28 U.S.C. § 2244(d) for filing habeas petitions is an affirmative defense, subject to waiver or forfeiture. Accordingly, when, as in Wood's case, the state has the opportunity in the district court to assert a statute of limitations defense and chooses not to do so, the state waives the affirmative

6. Although jurists and litigants often use the words waiver and forfeiture interchangeably, "forfeiture is the failure to make the timely assertion of a right," and "waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano,* 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)); *see also Kontrick v. Ryan*, 540 U.S. 443, 458, n.13 (2004).

defense, and an appellate court lacks the authority *sua sponte* to revive that affirmative defense on the state's behalf.

That the authority of the circuit courts is circumscribed in this way is consistent with: precedent; the historical treatment of statute of limitations defenses; the applicable civil and habeas rules; judicial economy; and the adversarial process, which contemplates both the principle of party presentation and the principle that judges will not act as advocates on behalf of one side or the other.

This Court in *Day v. McDonough*, 547 U.S. 198 (2006), carved out a limited exception to the well-settled principle that a litigant who fails to plead an affirmative defense waives any right to assert it. Pursuant to *Day,* a district court may, in certain circumstances, *sua sponte* raise a §2244(d) limitations defense, *e.g.*, where the respondent's failure to argue the defense was the result of a clear and inadvertent computation error.

The *Day* exception should not be extended to appellate courts, as it is justified in significant part by the authority given district courts to freely allow amendments to pleadings while a matter is still pending. Since Habeas Rule 4 permits a district court to dismiss a petition on timeliness grounds without even seeking the respondent's position, and Fed. Rule. Civ. Proc. 15(a) permits district courts to freely grant respondents leave to amend their pleadings, this Court in *Day* perceived little difference between (1) permitting a magistrate judge to act *sua sponte* and raise timeliness, and (2) requiring the magistrate judge to inform the state of its obvious computation error and allow it to amend its answer to raise a § 2244(d) defense.

Appellate courts, as opposed to district courts, lack the same flexibility or authority to permit litigants to change their claims or advance new ones for the first time on appeal. In contrast to the relative freedom and flexibility in the district courts to add or amend claims, by the time a case gets to the appellate courts, the parties are generally limited to the issues that have been preserved in the district court. Accordingly, an affirmative defense that has not been raised in the district court is a non-issue for purposes of appeal. And, as this Court as held in other cases involving non-jurisdictional, claim-processing time bars, a litigant cannot raise a time bar for the first time after the district court has already ruled on the merits. *See, e.g., Eberhart v. United States,* 546 U.S. 12, 19 (2005).

The Tenth Circuit is alone among the circuits in holding that an appellate court can raise a § 2244(d) defense *sua sponte*, the other two circuits to have addressed the issue having ruled to the contrary. *See Sasser v. Norris,* 553 F.3d 1121 (8th Cir. 2009); *Grigsby v. Cotton,* 456 F.3d 727 (7th Cir. 2006). Those circuits are correct. Applying traditional principles of forfeiture, the state cannot on appeal raise a § 2244(d) defense that it elected not to assert in the district court. Nor can the appellate court raise on behalf of the state the very defense the state forfeited in the district court.

Even if a circuit court could, as a general matter, properly raise the §2244(d) limitations defense on appeal, the Tenth Circuit's application of the statute of limitations to Wood's petition violates the clear dictate in *Day* that a court is not free to disregard a state's deliberate choice not to raise a statute of limitations defense in the district court. Here, the district court ordered the state to brief the issue of timeliness, and in response the state identified

a potential timeliness argument available to it, but consciously chose not to assert it, informing the district court that it "will not challenge, but is not conceding the timeliness of Wood's petition." This statement reflects a considered choice to not plead or assert the affirmative defense of timeliness and, thus, constitutes both a deliberate waiver and a forfeiture of the defense. The Tenth Circuit abused its discretion and strayed outside the bounds of the adversarial process in disregarding the state's waiver and raising the limitations defense on its own.

ARGUMENT

I. Appellate Courts Lack Authority to Raise *Sua Sponte* a 28 U.S.C. § 2244(d) Limitations Defense When, as in Wood's Case, the State Has an Opportunity to Raise the Affirmative Defense in the District Court, Does Not Assert the Defense, and the District Court Rules on the Merits.

As a general rule, affirmative defenses are waived or forfeited unless asserted by a litigant. The statute of limitations in § 2244(d) is an affirmative defense and, as such, it is subject to waiver. *See Day v. McDonough,* 547 U.S. 198, 205 (2006). If a litigant fails to assert a non-jurisdictional time bar in the district court, and the court rules on the merits, the litigant cannot assert the limitations defense for the first time on appeal. *See, e.g., Eberhart v. United States,* 546 U.S. 12, 19 (2005).

a. The Section 2244(d) limitations defense is an affirmative defense that is generally forfeited if not raised by the state.

Historically, the passage of time did not bar an application for habeas corpus. *See* Wright & Miller, 17B Fed. Pract. & Proc. Juris. § 4268.2 (3d ed.). A change to this doctrine occurred in 1977 when former Habeas Rule 9(a) became effective. *See id.* This rule provided for dismissal of a petition on grounds of prejudicial delay. *See generally* 2 Hertz & Liebman, Federal Habeas Corpus Practice and Procedure § 24.2 at 1273-1286 (6th ed. 2011).

Between 1977 and the adoption of AEDPA, habeas petitions could be dismissed for prejudicial delay, but only if specific criteria were met: first, the respondent had to plead and prove that the petitioner delayed initiating state exhaustion proceedings; and, second, the respondent had to plead and prove, and the court had to find explicitly, that the petitioner's delay prejudiced the state in some particular way that prevented the state from defending against the petitioner's habeas claims. *See id.* at 1273-1274.

In 1996, with AEDPA, Congress adopted a straightforward one-year statute of limitations, which is triggered by one of several dates, most often the date the petitioner's state court conviction became final. *See* § 2244(d)(1).[7] The limitations period is statutorily tolled by the pendency of a properly filed application for state court postconviction or other collateral review. *See* § 2244(d)(2).

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7. The text of 28 U.S.C. § 2244(d) is set forth *supra* at 2.

When Congress chose to adopt this one-year statute of limitations for the filing of § 2254 habeas petitions, it did so against a backdrop of the courts' traditional approach to statute of limitations defenses, by which such defenses were forfeited if not raised by a litigant:

> It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule [of Civil Procedure] 8(c) results in the waiver of that defense and its exclusion from the case.

Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1278, "Effect of Failure to Plead an Affirmative Defense" (3d ed.).

A rule of forfeiture when the state does not raise the statute of limitations in the district court is consistent with the historical understanding of such defenses. If Congress had intended to avoid traditional principles of forfeiture or waiver vis-a-vis the statute of limitations defense in § 2244(d) it could have, but it did not. For example, when Congress enacted AEDPA it provided in 18 U.S.C. § 2254(b)(3) that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." No similar statute limits the application of traditional principles of forfeiture and waiver to the statute of limitations defense in § 2244(d).

b. Governing case law holds that the right to assert a non-jurisdictional limitations defense is lost if not raised by a party before the merits of a case are determined by the district court.

In this case, the state told the district court that it was not challenging the timeliness of Wood's petition, and the district court then ruled on the merits. Under these circumstances, the Tenth Circuit's decision to raise *sua sponte* the state's affirmative defense of timeliness and deny Wood habeas relief on that ground conflicts with this Court's precedent. *See Kontrick v. Ryan,* 540 U.S. 443 (2004) (debtor's non-jurisdictional timeliness defense is forfeited if not raised before bankruptcy court rules on merits of claim); *Eberhart v. United States,* 546 U.S. 12 (2005) (government's timeliness defense to Fed. R. Crim. Proc. Rule 33 motion for new trial is forfeited if not raised until after trial court has ruled on motion).

In *Kontrick,* this Court held that any defense based on the time limitations in Federal Rules of Bankruptcy Procedure 4004 and 9006 was forfeited when the debtor took too long to challenge the timeliness of a creditor's complaint. This Court distinguished between rules governing subject matter jurisdiction and "inflexible claim-processing rule[s]." 540 U.S. at 455-456. A court's subject-matter jurisdiction can be raised at any time and cannot be expanded by the parties' litigation conduct, "a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Id.* at 456.

It was uncontested in *Kontrick* that the creditor had waited too long to file his amended complaint objecting

to the debtor's discharge. The sole issue was whether the debtor had, nonetheless, forfeited his right to challenge the timeliness of the creditor's objection by not raising the defense until after the amended complaint was adjudicated on the merits. This Court recognized that "[o]rdinarily, under the Bankruptcy Rules as under the Civil Rules, a defense is lost if not included in the answer or amended answer." *Id.* at 459. Since the debtor's objection was not to the court's jurisdiction, but merely to the timeliness of the creditor's complaint, this Court held the debtor's objection could not be heard after the bankruptcy court had ruled against him on the merits. *See id.* at 459-60.

Kontrick's distinction between claim-processing rules and jurisdiction was applied again by this Court in *Eberhart v. United States,* 546 U.S. 12 (2005) (per curium). In *Eberhart*, the defendant failed to comply with the rigid seven-day deadline in Federal Rule of Criminal Procedure 33 for filing motions for new trial. The prosecution responded to the merits of the motion for new trial and did not challenge its timeliness under Rule 33. The government lost the motion for new trial and appealed. On appeal, the government challenged the district court's ruling on the merits, but also raised the timeliness of the defendant's motion for the first time. The circuit court reversed, finding that the limitations period was jurisdictional, and this Court granted certiorari. 546 U.S. at 13-15.

In pertinent part, this Court held that Rule 33 of the Federal Rules of Criminal Procedure, like the Bankruptcy Rules examined in *Kontrick,* was not a jurisdictional limitations period, but rather was a claim-processing rule and was, thus, subject to forfeiture. *See Eberhart* at 18-19. This Court again found that such claim-processing rules

can "assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Id.* at 19. Because the government "failed to raise the defense of untimeliness until after the District Court had reached the merits, it forfeited that defense. The Court of Appeals should therefore have proceeded to the merits." *Id.*

Similarly, the one-year statute of limitations in § 2244(d) is not jurisdictional, and it can be forfeited or waived. *See, e.g., Holland v. Florida,* 130 S. Ct. 2549, 2560 (2010), citing *Day v. McDonough,* 547 U.S. at 205. Accordingly, when, as in Wood's case, the § 2244(d) timeliness defense is raised for the first time on appeal, it is error for a court of appeals to decide the case on the basis of timeliness when a timeliness defense was not raised in the district court, and the district court instead ruled on the merits.

The § 2244(d) time bar, just like the rigid claim-processing rules examined in *Kontrick* and *Eberhart,* is not jurisdictional and should be deemed forfeited when, as here, the respondent has not asserted it until after the district court has ruled on the merits of a petitioner's claims.

c. The Federal Rules of Civil Procedure and the Habeas Rules also require that affirmative defenses be asserted by a litigant in a timely manner.[8]

The Federal Rules of Civil Procedure apply to § 2254 habeas corpus proceedings to the extent these rules are

8. The Appendix to this brief contains the text of the rules cited in this section.

not inconsistent with applicable federal statutes and rules. *See, e.g., Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005) (citing Habeas Rule 11; Fed. R. Civ. Proc. 81(a)(2)).

The rules of civil procedure require a litigant to plead or raise a non-jurisdictional statute of limitations defense. *See* Fed. R. Civ. Proc. 8(c); 12(b). If a litigant fails to assert an affirmative defense in the district court, it is waived or forfeited for purposes of appeal. *See* Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1278 (3d ed.).

The civil rules are not inconsistent with the habeas rules in this regard. Habeas Rule 5, which governs the respondent's answer in § 2254 proceedings, requires a respondent to file an answer only when the judge so orders. Br.App. 1a. But when, as in Wood's case, the court orders the respondent to file an answer, it "must state whether any claim in the petition is barred by failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations." Habeas Rule 5(b). Thus, the habeas rules, like the civil rules, contemplate the assertion of an affirmative defense in a responsive pleading.

d. The traditional prohibition against appellate courts considering statute of limitations defenses for the first time on appeal applies to the § 2244(d) limitations defense in § 2254 habeas proceedings.

As explained above, the relevant federal civil and habeas rules, and this Court's precedent, dictate that rights under non-jurisdictional claim-processing rules are forfeited if not timely raised before the district court rules on the merits of the claim. This doctrine has many virtues,

and they apply with equal force to habeas proceedings on appeal.

A clear requirement that the state raise any § 2244(d) limitations defense in the district court has the virtue of simplicity and ease of enforcement. It advances judicial economy by requiring that dispositive limitations defenses be raised and resolved before judicial resources are needlessly expended in deciding the merits of a case or other difficult issues of exhaustion or procedural default. Such requirement discourages sandbagging, preventing a party from initially withholding a limitations defense for strategic advantage, in the hope of prevailing on other claims or defenses. It advances the adversary and party presentation principles underlying the American judicial system, by requiring issues to be presented by the parties to the court. And, finally, it advances the judicial neutrality and appearance of impartiality that is essential to our system of justice.

Section 2244(d) is a federal timing or claim-processing rule, which does not raise the same comity and federalism concerns as exhaustion or procedural default. *See Holland v. Florida,* 130 S.Ct. 2549, 2563 (2010). There is no reason why a respondent should not be deemed to have waived or forfeited any § 2244(d) statute of limitations defense when it has had the opportunity to assert the defense in the district court, and it chooses not to. The statute of limitations in § 2244(d) is a traditional statute of limitations and, as such, is subject to forfeiture when not raised. *See Kontrick v. Ryan*, 540 U.S. 443, 448 (2004).

Forfeiture or waiver of the § 2244(d) limitations defense on appeal is not inconsistent with traditional

habeas practice, since there was no time bar for habeas proceedings until the enactment of AEDPA in 1996. *See* Wright & Miller, 17B Fed. Pract. & Proc. Juris. § 4268.2 (3d ed.). In contrast to other habeas defenses, which were created by the courts in an exercise of their traditional equitable authority, the § 2244(d) time bar is a statutory affirmative defense that cannot be raised for the first time on appeal if not raised in the district court. *Compare Granberry v. Greer,* 481 U.S. 129 (1987) (exhaustion may, in certain circumstances, be raised for the first time on appeal) and *Kontrick*, 540 U.S. at 458 (untimeliness argument forfeited where not raised until after adjudication on merits).

e. The Tenth Circuit's decision to consider s*ua sponte* the timeliness of Wood's petition for the first time on appeal conflicts with the decisions of other circuits, which have refused to consider a § 2244(d) limitations defense for the first time on appeal.

The Tenth Circuit invoked the general proposition that appellate courts may affirm on any ground supported by the record to support its decision to raise *sua sponte* the § 2254(d) statute of limitations. This general proposition, however, does not empower an appellate court to rely on an affirmative defense to uphold a lower court's merits decision, since, as explained above, affirmative defenses are waived or forfeited if not raised in the district court.

The Tenth Circuit's assertion of authority to address *sua sponte* the § 2244(d) timeliness defense when raised for the first time on appeal conflicts with the only other circuits to have considered the issue. *Compare Sasser v.*

Norris, 553 F.3d 1121, 1128 (8th Cir. 2009) ("The discretion to consider the statute of limitations defense *sua sponte* does not extend to the appellate level.").

Not only have other circuit courts refrained from raising § 2244(d) limitations defenses *sua sponte*, they have not allowed respondents themselves to raise such defenses for the first time on appeal when they had the opportunity to raise the defense in the district court and failed to do so.

In the wake of *Day v. McDonough*, two circuits, in addition to the Tenth Circuit, have considered whether § 2244(d) timeliness challenges to habeas petitions can be made for the first time on appeal. *See Barnett v. Roper,* 541 F.3d 804, 807 (8th Cir. 2008); *Grigsby v. Cotton,* 456 F.3d 727, 731 (7th Cir. 2006). The timeliness challenges in these cases, unlike in Wood's, were made by the respondents for the first time on appeal, not by the circuit court acting *sua sponte*.

The Eighth Circuit has drawn a clear line between a district court raising a § 2244(d) defense *sua sponte*, which is permitted under certain circumstances in *Day,* and an appellate court considering the defense when raised for the first time on appeal. The Eighth Circuit holds that when the state fails to raise a timeliness objection to a § 2254 petition in the district court, it forfeits any such objection and cannot raise it for the first time on appeal. *See Barnett,* 541 F.3d at 807.

The Eighth Circuit acknowledged that this Court, in *Day,* carved out an exception to the general rule that limitations defenses are forfeited unless pled. *See id.*

However, the Eighth Circuit declined to extend the *Day* exception, which permits a district court to raise the timeliness of a state prisoner's habeas petition *sua sponte,* to appellate courts. *See id.; accord Sasser v. Norris,* 553 F.3d at 1128.

In part, the *Barnett* Court refused to extend *Day* to the appellate level because of this Court's decision in *Kontrick* that a timeliness objection cannot be raised after the case has been decided on the merits. *Barnett, supra,* citing, *Kontrick v. Ryan,* 540 U.S. 443 (2004). In *Barnett,* the petitioner conceded that his application was 25 days late. *See id.,* 541 F.3d at 807. Nevertheless, the appellate court determined that the state had forfeited any timeliness defense by not raising it in the district court and held the state could not raise it for the first time on appeal. *See id.* at 807-808; *accord Sasser*, 553 F.3d at 1128 ("Because the government did not timely assert the statute of limitations defense, the statute of limitations defense is forfeited").

The Seventh Circuit also refused to consider the timeliness of a state prisoner's habeas petition when the timeliness defense was not raised in the district court. *See Grigsby v. Cotton,* 456 F.3d at 731. The *Grigsby* Court wrote:

> We will not enforce the alleged untimeliness of Grigsby's petition. ... [I]t was the state's duty to raise [the limitations defense] in the district court, and it has provided us no reason to excuse its failure to do so. [citation omitted]. The timeliness of the petition, regardless of the claims it raised, was clear at the time the state filed its response. The period of limitations set

> out in 28 U.S.C. § 2244(b)(3) is not jurisdictional, and thus we are not bound to enforce it against a petitioner. *See Day*, 126 S.Ct. at 1681. In this case, it would be inappropriate for us to reach a timeliness argument that the state did not raise in its response in the district court, and which did not form the basis for the district court's ruling. *Compare Day*, 126 S.Ct. at 1684 (district court may raise timeliness *sua sponte* despite state's erroneous concession that habeas petition was timely), with *Eberhart v. United States*, [546 U.S. 12, 19] (2005) (per curiam) (government forfeited timeliness of defendant's Federal Rule of Criminal Procedure 33(b) motion by raising it after district court ruled on motion's merits).

Id., 456 F.3d at 731; *compare Jones v. Hulick,* 449 F.3d 784, 787-88 (7th Cir. 2006).[9]

Thus, the *Grigsby* Court held that it would be "inappropriate" for it to reach the timeliness argument when it was not raised by the state in its response and did not provide a basis for the district court's decision.

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9. In *Jones v. Hulick*, 449 F.3d 784 (7th Cir. 2006), a case the Tenth Circuit relied on in this case, App. 139a., the habeas petition was dismissed in the district court before the state filed a response. Thus, the respondent's first opportunity to raise the defense was on appeal. Under these circumstances, the appellate court agreed to decide the timeliness issue, emphasizing that "the State raised the defense at its first realistic opportunity." *Id.*, 449 F.3d at 787. In this case, by contrast, the state had every opportunity to raise a § 2244(d) defense in the district court and chose not to do so.

f. The limited exception this Court recognized in *Day v. McDonough* to the requirement that affirmative defenses be pled, which exception permits a district court to raise a limitations defense *sua sponte*, does not apply in the appellate courts.

In *Day*, the state failed to plead the § 2244(d) statute of limitations defense as a result of clear and inadvertent "computation error." 547 U.S. at 210. Under such circumstances, this Court recognized that a district court may overlook a respondent's failure to plead and assert the limitations defense and raise the defense on its own. 547 U.S. at 210. *Day* did not address whether an appellate court may do the same.

The exception recognized in *Day* to the traditional requirement that litigants must plead, or else forfeit, a statute of limitations defense rests in significant part on the authority given district courts to freely allow amendments to pleadings while a matter is still pending. *See id.* at 209 (citing Fed. R. Civ. Proc. 15(a) and 28 U.S.C. § 2243). Because the district court in *Day* had the discretion to inform the state of its obvious calculation error and invite the state to amend its answer to correct the mistake, this Court saw no reason to forbid the district court from accomplishing the same result through *sua sponte* consideration of the defense. *See id.* ("Recognizing that an amendment to the State's answer might have obviated this controversy, we see no dispositive difference between that route, and the one taken here.").

Appellate courts, on the other hand, do not generally permit litigants to raise new claims for the first time on appeal. To the contrary, as a general rule, claims not

raised in the district court cannot be raised on appeal. *See generally United States v. Olano*, 507 U.S. 725, 731(1993) ("'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited ... by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it'" (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). *Day*'s reliance on Fed. R. Civ. Proc. 15(a) and § 2243, which allow the state to amend its answer to add a defense in the district court, does not similarly support allowing consideration of a § 2244(d) limitations defense for the first time on appeal.

The Tenth Circuit's decision to *sua sponte* raise the timeliness defense on behalf of the state, especially after the state's express decision "not to challenge" timeliness, crosses a line. That line separates judging from acting as an advocate for a party. As noted in *Day*, if district courts have no obligation to act as counsel for a pro se litigant, "then, by the same token, they surely have no obligation to assist attorneys representing the State." 547 U.S. at 210. The dissent in *Day* agreed with the majority on this general point and believed that a district court's duty not to intrude on the adversarial process prohibited it from *sua sponte* consideration of the limitations defense even when the state's failure to raise it was based on an obvious calculation error. *Day*, 547 U.S. at 217 n.2 (Scalia, J. dissenting) ("Requiring the State to take the affirmative step of amending its own pleading at least observes the formalities of our adversary system, which is a nontrivial value in itself.")

Requiring the state to plead a § 2244(d) limitations defense in the district court before the defense can be raised on appeal serves to advance the adversary and

party presentation principles underlying the American judicial system. As this Court recognized in *Greenlaw v. United States*, 554 U.S. 237 (2008), "in both civil and criminal cases, in both the first instance and on appeal, we follow the principle of party presentation," under which "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* at 243. To allow appellate courts to resurrect, on the state's behalf, an affirmative defense the state itself had forfeited, would mark a sharp departure from this important and enduring tradition.

II. The State's Declaration Before the District Court That it "Will Not Challenge, but Is Not Conceding, the Timeliness of Wood's Habeas Petition" Amounted to a Deliberate Waiver of any Statute of Limitations Defense it May Have Had.

By recognizing the existence of a potential statute of limitations defense but declaring that it would not raise it, the state manifested an intentional relinquishment of its right to assert the defense. Thus, even assuming that appellate courts possess the general authority to raise a § 2244(d) limitations defense *sua sponte*, the Tenth Circuit abused its discretion in doing so here. *See Day*, 547 U.S. at 202 ("[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense.").

A. Because the state deliberately waived the limitations defense in the district court, the Tenth Circuit abused its discretion by raising the defense *sua sponte.*

For the reasons set forth in Argument I, *Day's* holding that a district court may *sua sponte* raise a § 2244(d)

limitations defense should not be extended to appellate courts. However, assuming arguendo that appellate courts may raise a statute of limitations defense *sua sponte*, the Tenth Circuit still abused its discretion here when it applied the statute of limitations on its own initiative to defeat Wood's claims, which the district court had decided on the merits.

Despite the Tenth Circuit's insistence that it had the authority to affirm the district court's ruling on any ground supported by the record, the Tenth Circuit acknowledged that *Day* would prohibit it from declaring Wood's petition untimely if the state had deliberately waived the defense in the district court. App. 139a-140a n.2. The Tenth Circuit determined, however, that the state's representation that it "will not challenge, but [is] not conceding" the timeliness issue was not a deliberate waiver. The Tenth Circuit's determination is not supported by the record.

In both its pre-answer response and in its answer, the state identified a possible argument that the petition was untimely, and then informed the court that it was not challenging timeliness. The state's pleadings show both that the state was aware of a possible argument that the petition was untimely and that it elected not to raise a timeliness defense. The pleadings thus constitute clear manifestation of an intentional relinquishment of a known right. Nothing more is required for a deliberate waiver, which a court is not at "liberty to disregard." *See Day*, 547 U.S. at 202, 209 n.11.

1. The state's declarations to the district court

As detailed above, *supra* at 11-13, the state informed the district court, in both its pre-answer and answer, that it would not be challenging the timeliness of Wood's petition, though it did not concede the petition was timely. The precise language used by the state in its pleadings is set forth below.

> As previously noted, Wood filed postconviction motions in the state district court in 1995 and 2004. It is clear that if Wood had filed only the 2004 motion his habeas petition would be untimely because the motion was filed long after his time for filing a habeas petition had passed. But it is unclear how the 1995 postconviction motion, which apparently was never ruled upon, affects the timeliness of Wood's habeas petition. While it is certainly arguable that the 1995 postconviction motion was abandoned before 1995 and thus did not toll the AEDPA statute of limitations at all, [citation omitted], Respondents will not challenge, but are not conceding, the timeliness of Wood's habeas petition in this pre-answer response.

App. 70a (Pre-answer).

> Under 28 U.S.C. § 2244(d), a one-year limitations period applies to applications for writ of habeas corpus. As noted in the pre-answer response, the Respondents are not challenging, but do not concede, the timeliness of the petition. The

> Respondents hereby incorporate the arguments raised in the pre-answer response into this answer.

App. 87a (Answer).

2. The Tenth Circuit erred when it concluded that the state's declarations did not constitute a deliberate waiver of any timeliness defense.

The Tenth Circuit examined the two preceding quotations, which are taken verbatim from the state's pleadings, and characterized them as a "cryptic response to the timeliness question." App. 139a n.2. The court stated that, "[w]hile the precise import of [the state's declaration] eludes us, we conclude it is not a deliberate waiver." *Id.* The court based this conclusion partly on the fact that the state identified a potential timeliness argument in its pre-answer response. *Id.* But that fact properly supports the conclusion that the state *did* waive the defense, not that it did not, because in marked contrast to *Day*, it shows that the state was well aware of a potential argument but consciously chose not to make it in the district court. It is not necessary for a respondent to concede that a petition is timely for it to decide that it will not challenge timeliness, and this is what happened here.

It is beyond dispute that the state knew that the timeliness of Wood's petition was a potential issue in the case. Indeed, the district court had initially dismissed Wood's petition as untimely after subjecting it to a preliminary review pursuant to Habeas Rule 4. App. 41a. After reconsidering that decision, the district

court ordered the state to file a pre-answer response and specifically required the state to assert whether it intended to raise a § 2244(d) limitations defense. App. 62a, 64-66a. In response, the state noted the existence of Wood's 1995 state postconviction motion, asserted that its tolling effect was "unclear," and noted the existence of a possible argument that the motion had been abandoned. App. 70a. The respondents, however, deliberately chose not to assert that argument, telling the district court that they "will not challenge, but are not conceding" the timeliness of Wood's petition. App. 70a. By any measure, this conscious choice by the state to refrain from asserting a position it knew to be available to it amounts to an intelligent, deliberate waiver.

This is not a case in which the state overlooked a possible timeliness defense or, as in *Day*, made an inadvertent "computation error." *Day*, 547 U.S. at 204. Indeed, in *Day*, this Court was willing to overlook the state's failure to assert the defense precisely because the state had only made an "inadvertent error" in tallying up the relevant days, not a deliberate decision to forgo the defense, as occurred here. *Id.* at 211.

B. The Tenth Circuit also abused its discretion by raising the § 2244(d) timeliness defense *sua sponte* when the state's decision not to raise the defense could have been strategic.

This Court has repeatedly "expressed [its] reluctance to adopt rules that allow a party to withhold raising a defense until after the 'main event' in this case, the proceeding in the District Court – is over." *Granberry v. Greer*, 481 U.S. 129, 132 (1987) (citing *Wainwright v.*

Sykes, 433 U.S. 72, 89-90 (1977)). *Day* incorporated this reluctance when it expressly prohibited district courts from disregarding a state's deliberate waiver of a § 2244(d) defense. *See id.,* 547 U.S. at 211 n.11.

The record in this case not only shows that the state deliberately waived any statute of limitations defense, but it also shows that the state's decision to do so was likely a strategic one, designed to streamline the litigation by focusing on the issues that lent themselves to more straightforward argument. *Compare id.* ("nothing in the record suggests that the State 'strategically' withheld the defense or chose to relinquish it").

The question whether Wood had abandoned his 1995 state postconviction motion so that it no longer tolled the limitations period was a complex one.[10] And a decision by the state to raise and argue the issue in the district court may well have resulted in the appointment of counsel or an evidentiary hearing, neither of which could ever benefit the state.[11]

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10. The complexity of the abandonment issue is demonstrated by the briefing that was filed in response to the Tenth Circuit's certificate of appealability. The parties' arguments on the timeliness issue can be found in *Wood v. Milyard*, No. 09-1348, Appellant's supplemental brief at 18-23, filed 5.5.10; Appellee/Respondent's supplemental brief at 17-23, filed 7.26.10; and Appellant's reply brief at 1-8, filed 9.9.10.

11. Just by way of example, one way counsel could have provided assistance to Wood and, in doing so, complicated the litigation for the state, involves the four claims the state successfully argued were unexhausted. The magistrate judge offered Wood two choices: dismiss the unexhausted claims and pursue the claims remaining, or dismiss the entire petition as a

The difficulty of the abandonment issue was heightened by the fact that the Colorado courts had only recently recognized the possibility that a properly filed state postconviction motion could be abandoned or subject to the doctrine of laches. *See People v. Robbins,* 107 P.3d 384 (Colo. 2005) (applying doctrine of laches, for the first time, to bar a postconviction claim where the motion was filed 35 years after conviction became final, notwithstanding Colo. Rev. Stat. § 16-5-402(1), which provides there is no time limit for seeking postconviction review under circumstances of defendant's case); *see also People v. Valdez,* 178 P.3d 1269 (Colo. App. 2007) (holding, as matter of first impression, that failure to pursue a postconviction motion for 7 years after it was filed raised question of fact as to whether defendant had abandoned his claim, requiring a hearing on the issue).

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mixed petition, i.e., a petition with both exhausted and unexhausted claims. App. 75a. In most circumstances, individuals will choose to dismiss their unexhausted claims, because dismissing the entire petition will often result in all of the petitioner's claims being time barred. However, if counsel had been appointed for Wood in the district court, counsel could have pursued a third alternative by requesting a stay and abey order from the court. *See Rhines v. Weber,* 544 U.S. 269, 278-279 (2005) (district court has discretion to stay a mixed petition to allow habeas petitioner to present his unexhausted claims to the state court in the first instance, then return to federal court for review of his perfected petition and all of his claims). Such an order would have complicated matters for the state, but would have benefitted Wood by affording him an opportunity (1) to obtain a favorable result in state court on the merits of an unexhausted claim, or (2) to exhaust additional claims in state court so that the claims could be reviewed in federal court. As it was, Mr. Wood, acting pro se, when given the choice of having his entire petition dismissed or having four of the six claims he raised dismissed, chose the latter course.

Had the district court in Wood's case deemed a hearing necessary – a realistic possibility given both the intricacy of Colorado law and the difficulty of accurately determining the factual question of whether abandonment had occurred – appointment of counsel would have been required. *See* Habeas Rule 8(c). Even if the district court had seen fit to proceed without a hearing, it may well have decided to appoint counsel due to the complexity of the issue alone. *See* 18 U.S.C. § 3006A(a)(2)(B) (court may appoint counsel for § 2254 petitioner whenever it "determines that interests of justice so require"). Notably, when the Tenth Circuit included the abandonment issue in its certificate of appealability, it saw fit to appoint counsel. App. 129a.

In sharp contrast to the state's conduct in this case, in *Day*, the state's concession of timeliness and non-assertion of the defense was "an inadvertent error," and "nothing in the record suggest[ed] that the State 'strategically' withheld the defense or chose to relinquish it." *Day,* 547 U.S. at 211. *Day* made clear that a federal court would not be free to disregard a strategic, deliberate choice by the state to withhold a § 2244(d) limitations defense. *Id.*

Here, the state consciously elected to forgo the litigation of any timeliness or abandonment issue in the district court. The state recognized a possible abandonment issue and disclosed it to the court, and, at the same time, the state declared that "Respondents will not challenge," App. 70a, and "are not challenging" the timeliness of the petition. App. 87a. This is clearly indicative of a strategic choice on the state's part. Instead of attempting to prevail on timeliness grounds, the state elected to argue that several of Wood's claims

were unexhausted, that the double jeopardy claim was procedurally defaulted and that both unexhausted claims should be denied on the merits. App. 75a, 84a-94. This was no inadvertent error.

The state's choices simplified the issues before the district court, reduced the possibility of an evidentiary hearing and the possibility that the district court would appoint an attorney to represent Wood. The state's choice not to raise timeliness fended off potential complications, a quintessentially strategic decision, and the Tenth Circuit should have held the state to its choice.

The Tenth Circuit abused any discretion it had to raise the § 2244(d) limitations defense *sua sponte* for the first time on appeal when it discarded the state's choice to "strategically" withhold and waive the limitations defense. *See Day,* 547 U.S. at 211, n.11.

CONCLUSION

Mr. Wood requests that this Court reverse the decision of the United States Court of Appeals for the Tenth Circuit and remand the cause for further proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT RULES

Wood v. Milyard et al., Case No.: 10-9995

Rules Governing Section 2254 Cases in the United States District Courts

Habeas Rule 4: Preliminary Review; Serving the Petition and Order

The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the juge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

Habeas Rule 5: The Answer and the Reply

(a) **When Required**. The respondent is not required to answer the petition unless a judge so orders.

(b) **Contents: Addressing the Allegations; Stating a Bar.** The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.

Habeas Rule 12: Applicability of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

Federal Rules of Civil Procedure

FRCP Rule 1: Scope and Purpose of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

FRCP Rule 8(c): General Rules of Pleading

....

(c) **Affirmative Defenses**

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

....

- laches;
- statute of limitations; and
- waiver.

FRCP Rule 12(b): Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(b) **How to Present Defenses** . Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense

or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

FRCP Rule 15: Amended and Supplemental Pleadings

(a) **Amendments Before Trial**.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

FRCP Rule 81: Applicability in General

(a) **To What Proceedings Applicable**.

. . . .

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extenet that the practice is such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.