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

## REPLY BRIEF FOR PETITIONER

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## INTRODUCTION

The state agrees that, at a minimum, it forfeited any right it had to raise a 28 U.S.C. § 2244(d) statute of limitations defense on appeal by not asserting the defense in the district court. Resp. Br. 3,13-14. The state also agrees that, pursuant to *Day v. McDonough,* 547 U.S. 198 (2006), the court of appeals would have abused its discretion by *sua sponte* raising the forfeited limitations defense if the state had not just forfeited but had deliberately waived its right to assert the timeliness defense.

The primary points of disagreement between the parties concern:

(1) whether the state deliberately waived any § 2244(d) limitations defense when it twice informed the district court that it "will not challenge, but [is] not conceding," the timeliness of the petition; and

(2) whether an appellate court has authority to *sua sponte* raise the §2244(d) statute of limitations defense when, as here, it has been, at a minimum, forfeited by the state.

Mr. Wood will address each of these disputed points in turn in the argument section below.

## SUMMARY OF REPLY ARGUMENT

1. Respondents did "deliberately waive" the statute of limitations defense in the district court, because they identified the defense, identified the argument they could

make in support of that defense, and then advised the court that they were not raising that defense. Nothing more is required for waiver. Accordingly, pursuant to *Day v. McDonough*, 547 U.S. 198 (2006), the court of appeals reversibly erred when it disregarded the respondents' waiver of the limitations defense.

2. Appellate courts may have discretionary authority to *sua sponte* raise a § 2244(d) limitations defense in certain circumstances. However, the *sua sponte* authority of appellate courts does not extend to cases in which the state has purposefully forfeited the limitations defense in the district court. Appellate courts should not be allowed to override a forfeiture where, as here, the state purposefully gave up the defense, the state gained a strategic advantage in the district court by doing so, and the habeas petitioner is prejudiced by the appellate court's *sua sponte* resurrection of the issue.

## ARGUMENT

### 1. The State Deliberately Waived Any Statute of Limitations Defense It May Have Had When It Twice Told the District Court That It "Will Not Challenge, but [is] Not Conceding the Timeliness of Wood's Petition."

The state claims that it forfeited, but did not waive, the statute of limitations defense.[1] Resp. Br. 3. According to

1. Both sides have cited the definitions for forfeiture and waiver provided in *Olano*: "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*

the state, when it twice told the district court that it was not challenging timeliness, it was not waiving the defense, because (1) it did not go so far as to concede that Wood's petition was timely, (2) its declarations in the district court were equivocal or cryptic, and (3) it "labored under a misunderstanding of law." Resp. Br. at 47. The state's position both misperceives what is required to waive a § 2244(d) defense and lacks record support.

**a. The state intentionally relinquished a known right.**

The state's decision not to challenge the timeliness of Wood's petition qualifies as a deliberate waiver of the § 2244(d) defense. In fact, the state acknowledges several

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*v. Olano,* 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)). Pet. Br. 17, n.6.; Resp. Br. 19. To the extent the state asserts that forfeiture and waiver are mutually exclusive, Resp. Br. 44, it errs. *See, e.g., Freytag v. C.I.R.*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring) (waiver is one means by which forfeiture may occur).

In addition, "[w]hat suffices for waiver depends on the nature of the right at issue." *New York v. Hill*, 528 U.S. 110, 114 (2000). In other contexts involving a lawyer's acquiescence in a particular course of litigation, the Court has found waiver. *See, e.g., id.* at 115 (defendant's right to be tried within period required under the Interstate Agreement on Detainers (IAD) waived by counsel's agreement to trial date beyond that statutory period); *Wisconsin Dept. of Corrections v. Schacht,* 524 U.S. 381, 394-95 (1998) (Kennedy, J., concurring) (suggesting that state's consent to removal of case to federal court may serve as waiver of Eleventh Amendment immunity claim); *see also* Wright & Miller, 5 *Fed. Prac. & Proc. Civ.* § 1278 (equating failure to assert affirmative defense with waiver).

facts that reveal its deliberate relinquishment of a known statute of limitations defense.

First, the state acknowledges Wood's habeas petition revealed an untimeliness issue "on its face." Resp. Br. 38. Second, the state acknowledges it had all of the documents needed to reveal the timing of all relevant proceedings in the case, including the postconviction motion Wood filed in 1995 and pursued with a "motion to request a ruling." Resp. Br. 5 n.3, 40 n.15.

In addition, as the state acknowledges, the district court carefully laid out the existence of the exact arguable time bar on which the state now relies. Resp. Br. 78, citing App. 45a. The district court not only directed the state's attention to the issue of timeliness, it twice asked the state clearly and specifically to inform the court whether it intended to raise an untimeliness defense. App. 64-65a, Resp. Br. 8-9; App. 81-83a, Resp. Br. 9-10. Twice, the state complied with the court's orders, stating in its pre-answer response that "Respondents will not," and in its answer that "Respondents are not" challenging the timeliness of Wood's petition. App. 70a, Resp. Br. 9-10; App. 87a, Resp. Br. 10.

In marked contrast to the respondent's obvious mathematical error in *Day,* here the state clearly explained exactly why it was relinquishing the limitations defense. App. 70a. The state did not overlook or miss the defense; it chose not to raise it because of the unsettled nature of state law regarding arguable "abandonment" of a properly filed state postconviction motion. In its pre-answer response, the state told the district court that (1) there was a factual question about whether and, if so,

when Wood abandoned his 1995 postconviction motion, a motion the state courts to this day have never ruled upon, App. 133-34a, (2) the motion, if not abandoned, would toll the statute of limitations, and (3) this was a question the state did not want to litigate in Wood's case. App. 70a, 87a. In short, the state twice informed the district court that it knew it had an arguable limitations defense, but was relinquishing that defense in favor of seeking to resolve the petition on other grounds.

Notwithstanding its clear decision not to assert the defense in the district court, the state insists that its "prominent refusal to *concede* timeliness–even if it was preceded by 'cryptic' analysis–necessarily precludes intentional waiver." Resp. Br. 46 (emphasis added). The state is wrong. In fact, the state's consistent refusal to concede timeliness in its responsive pleadings does the opposite. It confirms that the state was aware of a potentially meritorious defense but chose not to assert it. By refusing to concede timeliness (*i.e.*, refusing to concede that Wood did not abandon his properly filed 1995 postconviction motion), the state took a position that assured its ability to litigate the issue in a future case, one that would perhaps be, from the state's perspective, a better vehicle for resolution of a difficult issue.[2]

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2. The state law governing the possible abandonment of postconviction motions is not settled. *People v. Valdez* is the first Colorado case to hold that a postconviction motion *might* be abandoned if it had been pending for many years without ruling. *Id.*, 178 P.3d 1269 (Colo. App. 2007). It was decided shortly before Wood's petition was filed. And, in contrast to panel decisions in federal courts, state appellate court's decision in *Valdez* is not binding on other panels of the Colorado Court of Appeals. *See, e.g., People v. Pennese*, 830 P.2d 1085, 1087 (Colo. App. 1991).

Contrary to the state's argument, deliberate waiver of an issue does not require a concession that one would lose on the merits of the issue were it asserted. Rather, it is simply the intentional relinquishment or abandonment of a known right, that right being, in this instance, the right to raise a limitations defense. Here, the state identified an argument that could be made that the 1995 state postconviction motion was abandoned and, thus, did not toll the one-year limitations period. App. 70a. Having thus acknowledged the argument, the state deliberately chose not to assert it. Nothing more is required to waive a limitations defense or, as phrased in *Day,* to "'strategically' withh[o]ld the defense or cho[o]se to relinquish it." *Id.* at 211.

There is nothing inconsistent, "ambiguous," "equivocal" or "cryptic" about the state's representations in the district court. To the contrary, the state, in response to the district court's direct inquiries, as well as Habeas Rule 5's requirement that any statute of limitations defense be raised in an answer, told the court that, while it was not conceding timeliness, it was not challenging it.

A deliberate waiver of a § 2244(d) affirmative defense does not require any magic words, nor an express statement that the respondents have "voluntarily and intelligently waived" the defense. Here, the respondents repeatedly stated they "were not challenging" the timeliness of the petition, notwithstanding their express recognition that an argument supporting the affirmative defense could be made. Under the circumstances presented by this case, the state must be deemed to have deliberately waived the defense. Such waiver cannot, as a matter of law, be disregarded by a reviewing court. *See Day,* 547 U.S. at 210, n.11.

**b. The state acted strategically when it chose not to challenge the timeliness of Wood's petition, removing any doubt as to whether its actions constituted a deliberate waiver.[3]**

Before raising a defense *sua sponte*, a court must evaluate whether anything "in the record suggests that the state 'strategically' withheld the defense or chose to relinquish it." *Day*, 547 U.S. at 211. If so, the court "would not be at liberty to disregard that choice." *Id.* at 210 n.11.

The record does not support the state's conclusory assertion that its decision not to challenge timeliness was merely a blunder, not a strategy. Resp. Br. 49-50. In his opening brief, Mr. Wood explained how the state's decision was not only strategic in that it allowed the state to defer resolution of a tricky legal issue until a later case, it conferred other strategic advantages, and concomitant prejudice to Mr. Wood, as well. *See* Pet. Br. 38-42.[4]

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3. The state argues that whether it chose to forgo the limitations defense for strategic reasons is not within the scope of the questions presented, a position apparently premised on the notion that strategic motivation is not relevant to waiver. Resp. Br. 45, 49-50 ("The reasons behind a party's forfeiture of an issue are relevant to an appellate court's decision whether to exercise its discretion to address a forfeited issue--but they cannot convert forfeiture into a waiver"). This is incorrect. As *Day* itself contemplates, to strategically withhold the assertion of a right is to make a deliberate choice not to raise it, which by definition amounts to an intentional relinquishment of the right. *See Day*, 547 U.S. at 211; *see generally United States v. Jaimes-Jaimes*, 406 F.3d 845, 848 (7th Cir. 2005) (collecting cases).

4. For example, the State's decision not to challenge timeliness by raising the factual issue of whether Mr. Wood had abandoned his 1995 motion so that it no longer tolled the one-year

Rather than address or attempt to refute petitioner's argument that its decision to forgo the defense was strategic, the state first posits a ludicrous state strategy and then notes, "[i]t would have been a curious strategy indeed to raise the issue in the district court, but not preserve it, in the hope that the Court of Appeals would resurrect the issue on its behalf." Resp. Br. 50; *see also* Amicus-US 30-31.

But Mr. Wood has not suggested that this was the state's strategy. Rather, what the record shows (by the state's own admission in the district court) is that the state's strategy was to forego litigation of a difficult issue involving unsettled state law in favor of what the state saw as an easier path to victory. As a practical matter, the state's decision also reduced the risk of the district court finding that an evidentiary hearing was necessary, a finding that would also have necessitated the appointment of counsel for Wood. Even if "sandbagging" and these latter consequences were not the motivation for the state's relinquishment of its right to raise a limitations defense here, adoption of the state's position would allow or even invite such tactics in other cases, a result expressly disfavored by this Court. *See Granberry v. Greer,* 481 U.S. 129, 132 (1987); *Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977).

The respondents presume erroneously that the only way they could have acted strategically in forgoing a

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limitations period simplified the litigation, eliminating any need for an evidentiary hearing and permitting the state to focus on the purely legal issues of exhaustion and the merits of Mr. Wood's unexhausted claims. *See* Pet. Br. at 38-42.

timeliness challenge to Wood's petition was if they had withheld the defense with the secret intent of using it later if necessary. Resp. Br. 50. But as just discussed, this is an unduly myopic conception of what it means to act strategically. Having incorrectly constricted the parameters of actual "strategic decisions," the state never deals with the strategic advantages it in fact gained, and the concomitant disadvantages Wood suffered, as the result of the state's choice to eliminate the limitations issue from the case. *See* Pet. Br. 39-42.

Here, not only did the state gain strategic advantages in the district court proceedings, it received a windfall when the Tenth Circuit, on its own initiative, resurrected the statute of limitations defense – a defense the parties and the district court all understood had been eliminated by the state's decision not to challenge timeliness.

Recall that, in the district court, Wood agreed to dismiss four constitutional claims that the state argued, and the district court agreed, were unexhausted. App. 81a. As the state recognized in its pre-answer response, two of the unexhausted claims were still pending in Wood's 1995 unresolved postconviction motion. App. 80; Record 101-102. Nevertheless, when offered the chance to pursue two constitutional claims that could not be challenged as unexhausted, in exchange for dismissing four other claims, Wood chose to go forward on the two claims that were indisputably exhausted. Record 248-269; App. 80a-82a.

When Wood made this choice, he did so with full assurance that his two remaining claims would not be challenged as untimely. App. 70a. If, instead, the state had elected to challenge the timeliness of Wood's petition

in the district court, his options would have been quite different. As previously explained, the state's assertion of the timeliness issue could have resulted in a hearing on the issue and the appointment of counsel. Moreover, it could have resulted in Wood continuing to pursue the issues that were deemed unexhausted but had been raised in Wood's still un-ruled upon 1995 motion. Record 133-140.

**c. The state's decision not to raise the limitations defense was not a mistake.**

The state's decision not to challenge the timeliness of Wood's petition because of the unsettled nature of Colorado law bears no resemblance to the inadvertent counting mistake that led the respondent in *Day* to erroneously concede timeliness. Rather, the state's decision here was a deliberate waiver, or relinquishment of a known right.

Because *Day* affords district courts discretion to bypass and correct a respondent's patently erroneous concession of timeliness, the state strains to characterize its decision not to raise a timeliness defense as similarly mistaken. This case, however, is the opposite of *Day,* where the state's obvious error led it to erroneously concede timeliness. Here, the state affirmatively refused to concede timeliness, noting that the petition was in fact arguably out of time, and then expressly elected not to raise the issue.

The state claims that its deliberate decision not to challenge timeliness was merely a blunder, that it "labored under a mistaken understanding of law." The state insists that it did not act "intelligently" when it decided not to seek resolution in Wood's case of a difficult and unsettled question of Colorado law. Instead, the state insists, it

was unintelligent in making a decision it now regrets, having been "mistaken," "inartful," and "cryptic" when it apprised the district court that it was not challenging, but was not conceding, timeliness. Resp. Br. 3, 15-19, 39, 41, 47.

These claims are belied by the record, which contradicts the state's assertion, an assertion of recent vintage, that its lawyer was mistaken about either the law or the facts, or both, when she informed the district court that, "[w]hile it is certainly arguable that the 1995 postconviction motion was abandoned before 1997 and thus did not toll the AEDPA statute of limitations at all, [citation and parenthetical omitted], Respondents will not challenge, but are not conceding the timeliness of Wood's petition in this pre-answer response." App. 70a. There is no mistake in this statement. The state's lawyer was correct. It was indeed arguable – but far from certain – that Wood's 1995 conviction could be deemed to have been abandoned and thus not to have tolled AEDPA's limitations period. Also correct were the assertions that preceded that one: "Because Wood's conviction was final in 1989 before the effective date of the AEDPA, his time for filing a petition began to run on April 24, 1996, when the AEDPA became effective. Thus, he had until April 24, 1997, *plus any tolling periods*, to timely file his habeas petition." App. 69-70a (emphasis added).

**2. The State's Admitted Forfeiture of the § 2244(d) Statute of Limitations Defense Should Preclude the Appellate Court from Raising the Very Limitations Defense the State Itself Could Not Raise on Appeal.**

The first question presented, as framed by the Court, is: "[d]oes an appellate court have the authority to raise *sua sponte* a 28 U.S.C. § 2244(d) statute of limitations

defense?" The Respondents and Solicitor General, as amicus, assert that the answer to this question is "yes" so long as the state has not "deliberately waived" the defense. Resp. Br. 2-3; US-Amicus 9. Petitioner agrees that an appellate court may have authority to *sua sponte* raise a § 2244(d) limitations defense in certain circumstances.[5] But he urges this Court to, at a minimum, draw a line where, as here, the state's forfeiture of the limitations defense is purposeful and to hold that courts are not free to disregard such "purposeful forfeitures" of § 2244(d) limitations defenses on appeal.[6]

Traditionally, when a district court rules on the merits of an issue after a litigant has had an opportunity to raise the statute of limitations defense and has chosen not to, the affirmative defense is no longer part of the case. *See Kontrick v. Ryan,* 540 U.S. 443, 459-60 (2004)*; Sasser v. Norris,* 553 F.3d 1121, 1128 (8th Cir. 2009); *see also* Wright & Miller, 5 *Fed. Prac. & Proc. Civ.* § 1278. Consequently, an appellate court lacks authority to raise the defense on its own.

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5. For example, it is not uncommon for habeas cases to be decided in the district courts and the appellate courts without the state even being required to file a response. *See generally* Habeas Rules 4, 5(a); 10th Cir. R. 22.1(B) ("Respondents-appellees shall not file a brief until requested to do so by this court."). In such cases, an appellate court may raise a petition's timeliness on its own initiative; otherwise the timeliness of the petition could never be considered.

6. The term "purposeful forfeiture" is used in this brief to distinguish a forfeiture that occurs as a result of a litigant's deliberate decision not to assert a defense from a forfeiture that occurs as a result of a litigant's silence or inadvertence.

The application to habeas proceedings of this longstanding, well-accepted rule governing the loss of forfeited affirmative defenses is consistent with 1) Congressional intent, as discerned from Congress's adoption in AEDPA of a traditional statute of limitations, 2) this Court's precedent governing non-jurisdictional claims-processing rules, and 3) the applicable federal rules of civil procedure. *See* Pet. Br. Arg't I at 23-31. Application of the traditional forfeiture rule to the § 2244(d) limitations defense would also advance AEDPA's goals of streamlining habeas proceedings, judicial economy and conservation of judicial resources, by ensuring that district courts may efficiently dismiss untimely petitions at the outset without expending unnecessary resources. *See generally Rhines v. Weber,* 544 U.S. 269, 276-277 (2005).

The state asserts, however, that traditional forfeiture rules do not prevent an appellate court's *sua sponte* exercise of authority to consider a § 2244(d) limitations defense, because traditional forfeiture principles do not apply to any habeas defenses since they implicate values beyond the concerns of the parties. But, as this Court has recognized, AEDPA's statute of limitations does not implicate the same federalism and comity concerns as other habeas defenses. *See e.g.*, *Holland v. Florida*, 130 S.Ct. 2549, 2563 (2010) (distinguishing procedural default rules, which concern "a *state court's* procedural rules" and "*federal* timing rules," which do not)*; Day v. McDonough*, 547 U.S. at 214-15 (Scalia, J., dissenting) (distinguishing the statute of limitations from other habeas defenses that were created by the courts themselves, in the exercise of their traditional equitable discretion); *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) ("For purposes of determining what are 'filing' conditions, there is an

obvious distinction between time limits, which go to the very initiation of a petition and a court's ability to consider that petition, and the type of 'rule of decision' procedural bars . . . , which go to the ability to obtain relief."). Accordingly, the authority of appellate courts to *sua sponte* raise non-statutory habeas defenses does not necessarily extend to the § 2244(d) statute of limitations defense.

Petitioner acknowledges that *Granberry* permits appellate courts to address the exhaustion requirement when raised for the first time on appeal. *See id.,* 481 U.S. at 133. And he also acknowledges the language in *Day* that it makes "scant sense" to distinguish AEDPA's time bar "from other threshold constraints on federal habeas petitioners." 547 U.S. at 209. But the forfeitures at issue in *Day,* and in *Granberry* – an "inadverten[t]" failure to assert the defense by a prosecutor who "was not even aware of the exhaustion requirement," – bear little resemblance to the state's actions in this case. 481 U.S. at 132, n.5. And there remain good reasons for this Court to draw a line at appellate consideration of purposefully forfeited § 2244(d) limitations defenses.

First, as discussed in petitioner's brief at 18-19, 32, one of *Day*'s primary reasons for allowing a district court to raise the defense on its own motion does not apply to appellate courts: that requiring enforcement of the traditional forfeiture rule in the district court would amount to meaningless formalism in light of the fact that a district court's authority to allow free amendment of pleadings would permit it to simply inform the state of its error in conceding the defense. The same is not true on appeal, and neither the state nor its amici argue otherwise.

Second, while district courts are empowered (indeed, required) to *sua sponte* review habeas petitions for obvious procedural defects, *see* Habeas Rule 4, the courts of appeal lack such authority. The state seeks to equate the appellate courts' authority to issue or deny a certificate of appealability (COA) with the Rule 4 pre-screening authority vested in district courts, Resp. Br. at 27-28, but the two are hardly equivalent. The COA power does not give appellate courts, as Rule 4 gives the district courts, the free-roving authority to peruse a habeas petition for reasons to dismiss it. It simply allows an appellate court to decide which of the claims asserted by a habeas petitioner can go forward on appeal. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). The circuit courts' authority to cull weak issues from strong ones by no means implies the authority to entirely dismiss a petition based on a procedural defense no one has raised.

In the appellate context presented here, the statute of limitations defense should be governed by the Federal Rules of Civil Procedure, given that the federalism and comity concerns that authorize appellate courts to consider other habeas defenses *sua sponte* do not apply to the limitations defense. Accordingly, a § 2244(d) defense, like all non-jurisdictional statutes of limitation, should not be resurrected by an appellate court where, as here, the state had the opportunity to raise the defense and failed to do so before the district court ruled on the merits.

The Solicitor General, as amicus, however, asserts that "[a]fter *Day,* it is clear that a federal court is not bound by a State's failure to comply with the letter of the federal civil or habeas rules–both of which require a litigant to raise a statute of limitations defense in a

responsive pleading–and petitioner's continued reliance on those rules is unavailing." Amicus-US Br. 20-21. This argument goes too far.

Admittedly, *Day* did not require hyper-technical compliance with Habeas Rule 5, which requires a respondent to state in its answer if a claim is time-barred. But the result in *Day* was consistent with both the Habeas Rules and the Federal Rules of Civil Procedure, in that Habeas Rule 4 authorizes courts to dismiss petitions that are clearly untimely, and Fed. R. Civ. Proc. 15(a)(2) provides that courts "should freely give leave [to amend pleadings] when justice so requires." Accordingly, at the district-court stage of the case at issue in *Day*, the applicable rules would have allowed the state to amend its answer and raise the defense itself. In contrast, the result urged by amici and the state, which would allow *appellate* courts to raise *sua sponte* forfeited limitations defenses in habeas cases, is contrary to the governing civil rules, which do not allow parties to raise affirmative defenses for the first time on appeal. *See* Pet. Br. 25-28.

Even in areas of law that implicate interests beyond those of the parties, such as AEDPA and the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321-66, as amended, 42 U.S.C. § 1997e *et seq.*, this Court recognizes the need for clear and predictable procedural rules. *See e.g., Jones v. Bock*, 549 U.S. 199, 212 (2007) ("courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns."). Nothing in either the language of AEDPA or the applicable federal rules suggests Congress intended that the § 2244(d) statute of limitations defense would be immune from forfeiture or waiver if not asserted in a timely fashion. *Compare* 28

U.S.C. § 2254(b)(3) ("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, waives the requirement") (emphasis added).

In addition, the concerns underlying AEDPA are not limited to "federalism, finality and comity" as stressed by the state. AEDPA is also designed to safeguard habeas review of meritorious federal issues, and to promote judicial efficiency and conservation of judicial resources. *See, e.g., Panetti v. Quarterman,* 551 U.S. 930, 946 (2007); *Day*, 547 U.S. at 205-206. These concerns were advanced in the district court scenario presented in *Day*, where the district court noticed that the state had erroneously conceded timeliness, and consequently ordered the petitioner to show cause why his petition should not be dismissed. These same concerns are not promoted in the least when, as here, the state does not raise the limitations defense in the district court, that court then expends considerable effort and resources deciding substantial exhaustion and merits issues, and the court of appeals then *sua sponte* raises the limitations defense and decides the case on that basis.

This case well illustrates the virtues of applying to habeas appeals the traditional rule governing statute of limitations defenses, whereby the defense is lost if not timely raised. There are two sets of interests at stake in habeas proceedings: the parties' interest in the preservation of the adversarial system and the courts' interest in timely and efficient proceedings. The timely assertion of a limitations defense in the district court furthers both interests, and is required by the rules. *See* Habeas Rule 5; Fed. R. Civ. Proc. 8(c); 12(b).

### 3. The Court of Appeals Abused its Discretion and Erred When it *Sua Sponte* Raised the § 2244(d) Statute of Limitations Defense and Affirmed The District Court's Merits Decision Based Solely on its Determination that Wood's Petition was Untimely.

The state argues that the Tenth Circuit "appropriately resolved the forfeited limitations issue" when it *sua sponte* raised the statute of limitations and held that Wood's petition was untimely. Resp. Br. 49-51, Arg't III. At the same time, the state claims the issue it raises is not within the scope of either question presented. *Id.* at 49. Nevertheless, since the state has raised this issue separately, Mr. Wood will respond to it briefly.[7]

Assuming *arguendo* that it was permissible for the Tenth Circuit to raise the timeliness issue after the state purposefully forfeited the defense, the court of appeals was still required to assure itself that Wood was not significantly prejudiced by the delayed focus on the limitations issue and to "'determine whether the interests of justice would be better served' by addressing the merits or by dismissing the petition as time barred." *Day*, 547 U.S. at 210, quoting *Granberry*, 481 U.S. at 136.

The Tenth Circuit cited *Day,* App. 139-140a n.2, but the record does not support the findings required by *Day* for the court to have properly raised and decided the timeliness of Wood's petition *sua sponte*. In contrast to

7. Aside from the question of whether this issue is a subsidiary issue fairly included in the questions presented, this argument is moot if this Court rules in Mr. Wood's favor on either of the two issues presented.

*Day*, where the district court confronted a petition that was obviously untimely, here the court of appeals was confronted with a petition that appeared to be timely.[8] In *Day*, the rules, common sense and general policy concerns all favored the district court raising the timeliness of the petition *sua sponte*; the same is not true here where, at most, whether Wood's petition was untimely was debatable.

Also unlike *Day*, Wood was significantly prejudiced by the delayed focus on timeliness. *Nothing* occurred in *Day* between the time the state filed its answer erroneously conceding timeliness and when the magistrate judge

8. In fact, Wood's petition was timely, and the court of appeals erred in concluding otherwise. Although the state boldly asserts that Wood's petition was "clearly untimely," it offers no support for its assertion. Resp. Br. 16. It is undisputed that Wood's 1995 state postconviction motion was "properly filed." Thus, the sole question is whether the 1995 motion was still "pending" when Wood filed his 2004 postconviction motion. If it was, his § 2254 federal habeas petition is timely, since it was filed exactly one year after the Colorado Supreme Court denied certiorari in Wood's appeal from the denial of the 2004 motion. *See Carey v. Saffold,* 536 U.S. 214, 219 (2002) (dictionary defines "pending" as "in continuance" or "not yet decided"); *Lawrence v. Florida,* 549 U.S. 327, 331 (2007)(one-year limitations period runs from state court's denial of certiorari in state postconviction appeal). The Tenth Circuit's decision that Wood's habeas petition was untimely depends on its factual finding that the 1995 motion was abandoned some time before the 2004 motion was filed. However, Colorado law did not even recognize the possibility that a properly filed state postconviction motion could be abandoned due to the passage of time until only recently. *See People v. Valdez,* 178 P.3d 1269 (Colo. App. 2007). Pursuant to *Valdez*, abandonment of a postconviction motion due to the passage of time is a factual question, and an individual is entitled to an evidentiary hearing before his postconviction motion may be deemed abandoned. *See id.* at 1281-82.

noticed the state's calculation error and ordered Day to show cause why his petition should not be dismissed. Here, a great deal happened between the time the state told the district court it was not challenging timeliness and when the court of appeals *sua sponte* raised the timeliness issue and resolved it against Wood. As explained elsewhere, Wood was clearly prejudiced by the delayed focus on the timeliness issue. *See* pp. 9-10, *supra*; Pet. Br. 39-41.

In Wood's case, the court of appeals' finding that "the interests of justice would be served in reaching the timeliness issue given the extensive time period involved"[9] is undermined by its failure to recognize that (1) the state acted strategically in forgoing the defense, and (2) Wood suffered prejudice by the delayed focus on timeliness. In assessing the "interests of justice," the court of appeals also gave no weight to the vital role the writ of habeas corpus plays in protecting constitutional rights. *See Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010); *Slack v. McDaniel,* 529 U.S. 473, 483 (2000).

This is a case in which the Tenth Circuit granted a certificate of appealability on two serious constitutional issues, finding that reasonable jurists could disagree as to the district court's decision to deny relief on Wood's constitutional claims. App. 123-130a.

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9. The passage of time in this case is almost entirely attributable to what transpired in the state courts, since there is no dispute that Wood filed his § 2254 petition within a year of the state courts' resolution of his postconviction claims. Notably, Colorado placed no time-bar on postconviction challenges to class one felony convictions like the one challenged by Wood. *See* Colo. Rev. Stat. § 16-5-402. And, prior to 2004, Colorado placed no time limits on the resolution of postconviction motions.

For the reasons set forth above and throughout petitioner's briefs, the court of appeals abused its discretion when it *sua sponte* raised the limitations defense and ruled against Mr. Wood without considering his and society's interest in resolving the constitutional claims before it.

## CONCLUSION

For the reasons set forth above and in the Brief for Petitioner, 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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