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 RESPONDENTS

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QUESTIONS PRESENTED

1. Does an appellate court have the authority to raise *sua sponte* a 28 U.S.C. § 2244(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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INTRODUCTION

The overriding purpose of the federal Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is to "further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). The statute's one-year limitations period is central to that mission. *See* 28 U.S.C. § 2244(d). It "quite plainly serves the well-recognized interest in the finality of state court judgments" and thus "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan v. Walker*, 533 U.S. 167, 179 (2001). AEDPA thus encourages federal courts to screen and dismiss plainly untimely habeas petitions.

But the fact that Petitioner ("Wood") did not timely file his federal habeas petition is not at issue here. Wood filed the relevant habeas petition eighteen years after his murder conviction became final and seven years after AEDPA's limitations period expired. Moreover, even under Wood's theory that his petition is timely because a 1995 state postconviction motion that he failed to pursue continues to toll the federal limitations period, his petition is procedurally barred for nonexhaustion in any event. Instead, Wood sought this Court's review of his conviction because the United States Court of Appeals for the Tenth Circuit raised *sua sponte* the timeliness of his petition in the course of granting a certificate of appealability ("COA") and ultimately dismissed his petition on that ground.

According to Wood, the Tenth Circuit lacked the authority to raise the Section 2244(d) limitations issue

because Respondent ("the State") "forfeited or waived" the issue by not preserving it before the district court. Brief for Petitioner ("Pet'r Br.") 17. Wood is incorrect. His argument conflates forfeiture and waiver—distinct concepts with distinct consequences. Appellate courts have the authority to raise forfeited issues under appropriate circumstances. *See Granberry v. Greer*, 481 U.S. 129 (1987). That authority is restricted only when the State intelligently waives the issue. *See Day v. McDonough*, 547 U.S. 198, 202 (2006). The latitude to raise a forfeited issue should be especially wide here given AEDPA's goal of promoting finality and the courts of appeals' unique role in screening habeas appeals. If courts cannot add a key threshold issue to a COA, they may decline to authorize appeals in cases where they conclude that the district court and the State missed a lurking procedural defect. The Tenth Circuit instead granted the COA and afforded Wood the opportunity to address the timeliness issue.[1]

The Tenth Circuit had the authority to raise the issue in this case because the State had not intelligently

1. Under Wood's own theory, this Court cannot reach the questions presented. On appeal, Wood addressed the timeliness issue on the merits in response to the Court's COA, but he did not assert that the State had waived or forfeited the Section 2244(d) limitations defense until his panel-rehearing petition. Under circuit precedent, an argument "made for the first time in [a] petition for rehearing and . . . not initially presented to the panel . . . is . . . forfeited." *United States v. Andrus*, 499 F.3d 1162, 1163 (10th Cir. 2007). And it has been "the traditional practice of this Court . . . to decline to review claims raised for the first time on rehearing in the court below." *Wills v. Texas*, 511 U.S. 1097, 1097 (1994) (mem.) (O'Connor, J., concurring in denial of certiorari); *cf. Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001).

waived the Section 2244(d) limitations defense. Unsure of when Wood's 1995 petition had been abandoned and laboring under a mistaken understanding of the law, the State took an equivocal position on the limitations issue, informing the district court that it did not "challenge" but was not "conceding" the timeliness of Wood's petition. That statement was certainly inartful and may well have been insufficient to preserve the issue. But it was not the "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (citations and quotations omitted).

Accordingly, the Tenth Circuit had the authority to decide the case on the forfeited ground so long as, among other reasons, the State was not strategically withholding the defense. The State's behavior here was anything but strategic. It was the State (not Wood) that informed the district court of the existence of the 1995 postconviction motion that Wood relied on for his timeliness argument. The State did not seek to avoid the subject in the district court only to spring it on Wood before the Tenth Circuit. It provided the district court with the relevant information at the earliest stages of this litigation, but failed to fully assert the limitations defense because of its erroneous belief that the 1995 motion had to have been abandoned before 1997 to make Wood's habeas petition untimely. JA 70a. It then lived with that error until the Tenth Circuit asked the parties to brief the issue in conjunction with the decision to grant the COA. Under the circumstances of this case, the court of appeals appropriately exercised its authority to raise the Section 2244(d) limitations issue and dismiss Wood's habeas petition as untimely.

STATEMENT

1. On January 27, 1986, Patrick Wood walked into a pizza delivery store in Westminster, Colorado, armed with a concealed 357 Magnum revolver. After ordering a pizza, Wood pointed the gun at the store's assistant manager, Matthew Sparks, and yelled, "Give me the money! Give me the money!" As Sparks turned toward him, Wood shot Sparks in the head. Wood then pointed the gun at another employee, Keith Knutson, and again demanded money. After Knutson ran to the back office to open the safe, Wood threatened to shoot another employee, Dana Chavez, who was hiding behind an oven. Before Knutson could return, Chavez tackled Wood and yelled for Knutson to help him. Together the two men were able to restrain Wood until police arrived. Sparks was pronounced dead at the scene. Vol. 6 at 26-29, 37, 39-40, 43-49, 51-53, 83-87, 115, 140-41; Vol. 7 at 4-5, 31, 39-41.[2]

2. Wood was charged with first-degree murder after deliberation, felony murder, aggravated robbery, and two counts of felony menacing. A jury found Wood guilty of aggravated robbery and felony menacing but was unable to reach a verdict on the murder charges. In exchange for the prosecution's agreement not to seek the death penalty, Wood waived his right to a jury trial on the murder charges. After holding a bench trial, the court found Wood guilty of felony murder and second-degree murder. Wood was sentenced to life imprisonment for murder with parole after 40 years (merging the robbery and murder counts) and two concurrent four-year terms

2. Citations to "Vol." are to the state court record. Citations to "Doc." are to the district court docket in the present case. Citations to "JA" are to the Joint Appendix.

for menacing. The Colorado Court of Appeals affirmed Wood's convictions, and, in 1989, the Colorado Supreme Court denied certiorari. *See* Doc. 15-1; 15-2 at 2; 15-4 at 11; 15-10 at 1; Vol. 7 at 131-34, 139.

3. In 1994, Wood filed a federal habeas petition in the District Court for the District of Colorado. Because Wood had not exhausted his state court remedies, the district court dismissed his petition. *See Wood v. Furlong*, No. 94-cv-219-JLK-RMB (D. Colo. Mar. 22, 1995); Doc. 15-2 at 5, 9.

4. In June 1995, Wood filed a *pro se* motion in Colorado state court to vacate his sentence under Colo. R. of Crim. P. 35(c). Wood argued that double jeopardy barred his convictions for both felony murder and second-degree murder, that his trial counsel was ineffective in advising him to testify, and that his interrogation statements should have been suppressed. He also filed a motion for appointment of counsel. Four months later, Wood filed a motion requesting a ruling on his motions. In December 1995, the state court granted Wood's motion for counsel, but took no other action in the case. The case then remained inactive for more than eight years.[3] Doc. 15-3 at 6-9, 13; Doc. 15-4 at 12.

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3. The state court docket indicates that Wood wrote a letter to the court in April 2004. The contents of the letter are unknown, however, as the letter is not in the state court file. Doc. 15-4 at 13. It does not appear that Wood took any affirmative steps to pursue resolution of the 1995 state postconviction motion. *See* JA 142a ("It was not until April 2004, when he sent the now-missing letter to the court, and then in August 2004, when he filed a new postconviction application, that [Wood] showed any interest in continuing to pursue relief from his convictions and sentence.").

5. In August 2004, Wood filed a second (and separate) *pro se* motion in Colorado state court to vacate his sentence under Colo. R. of Crim. P. 35(c). Wood again argued that his conviction violated double jeopardy, but raised a different ineffective assistance of counsel claim. The first page of his motion prominently stated: "No other postconviction proceedings [have been] filed." Doc. 15-5 at 1. The court denied the motion, finding Wood's double jeopardy claim to be time-barred under state law and rejecting his ineffective assistance claim on the merits. The Colorado Court of Appeals affirmed, and the Colorado Supreme Court denied certiorari on February 5, 2007. Doc. 15-6; Doc. 15-10; Doc. 15-12 at 21.

6. On February 5, 2008, exactly one year after the Colorado Supreme Court denied certiorari, Wood filed another federal habeas petition in the District Court for the District of Colorado. Doc. 1. Wood's petition raised five constitutional claims: (1) double jeopardy; (2) involuntary waiver of right to a jury trial; (3) violation of privilege against self-incrimination; (4) ineffective assistance of counsel; and (5) conviction obtained under an unconstitutional state statute. *Id.*

In that 2008 federal habeas petition, Wood identified only the 2004 state postconviction motion; he did not mention the 1995 state postconviction motion. JA 17a-18a. The district court ordered Wood to show cause why the petition should not be denied as time barred. JA 32a.[4]

4. The issuance of the show-cause order was in line with the District of Colorado's practice of "order[ing] applicants in habeas corpus actions to show cause why the applications should not be denied as time-barred or for failure to exhaust state court remedies if either or both of those affirmative defenses appeared

On its face, Wood's federal habeas petition was clearly untimely. As the show-cause order explained, "Wood's conviction and sentence became final prior to April 24, 1996," and "[t]herefore, in the absence of any reason to toll the limitations period, Wood should have initiated this action prior to April 24, 1997."[5] *Id*. Wood's 2004 state postconviction motion was filed well after the one-year federal limitations period had expired. Although he filed a lengthy response, Wood again failed to identify the 1995 state postconviction motion. Doc. 4.

The district court dismissed Wood's petition as time barred under AEDPA. JA 45a-46a. Because Wood "filed his postconviction proceeding on August 19, 2004, over seven years after the one-year limitations period expired,"

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to be relevant based on the allegations in the applications." *Denson v. Abbott*, 554 F. Supp. 2d 1206, 1207 (D. Colo. 2008). On March 11, 2008, however, the Tenth Circuit held that a district court may not dismiss a petition *sua sponte* simply because it lacks sufficient information to determine timeliness. *Kilgore v. Att'y Gen.*, 519 F.3d 1084, 1089 (10th Cir. 2008). In response, the district court now regularly orders the State to file a "pre-answer response" when these issues arise. The Tenth Circuit has approved of this practice. *See Garza v. Davis*, 596 F.3d 1198, 1205 (10th Cir. 2010).

5. AEDPA imposes a one-year limitations period for filing a federal habeas petition. 28 U.S.C. § 2244(d)(1). Because Wood's conviction became final before AEDPA took effect, the federal limitations period began running on AEDPA's effective date, April 24, 1996, giving Wood one year from that date (in the absence of tolling) to file a federal habeas petition. *See Carey v. Saffold*, 536 U.S. 214, 217 (2002); 28 U.S.C. § 2244(d)(2) (allowing the one-year period to be tolled for 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").

the 2004 "postconviction proceeding did not toll the one-year limitations period." JA 45a. The district court also rejected Wood's claims that he was entitled to equitable tolling. JA 45a-46a.

Wood then filed a motion for reconsideration in which he failed for a third time to identify his 1995 state postconviction motion. JA 47a-60a. Wood instead argued, among other things, that "the AEDPA time limitations do not apply to him at all," that he was entitled to statutory tolling based on the federal habeas petition he previously filed in 1994, and that he was entitled to equitable tolling because he diligently pursued his constitutional claims. JA 49a-51a, 55a-59a.

The district court granted the motion without explanation and ordered the State "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 . . . and/or exhaustion of state court remedies."[6] JA 62a, 64a-65a. The district court instructed the State that it "may not file a dispositive motion as [its] Pre-Answer Response, or an Answer, or otherwise address the merits of the claims in response to this Order." JA 65a. The State was further instructed that, if it did not intend to assert

6. Habeas Rule 4 authorizes district courts to "order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." Rules Governing Section 2254 Cases in the United States District Courts Rule 4 ("Habeas Rules"). Rule 4 "is designed to afford the judge flexibility in a case where either dismissal or an order to answer may be inappropriate." Habeas Rule 4 (1976 Advisory Committee Notes).

either defense, the State "must notify the Court of that decision in the Pre-Answer Response." *Id.*

In its pre-answer response, the State notified the district court that Wood had filed a postconviction motion in 1995 and that the state court had never ruled on the motion. Doc. 15 at 2. After discussing AEDPA's one-year statute of limitations and its tolling mechanism, the State addressed the effect of Wood's previously undisclosed state motion on the timeliness of his petition:

> As previously noted, Wood filed post-conviction 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 1997 and thus did not toll the AEDPA statute of limitations at all, *see People v. Mamula*, 847 P.2d 1135 (Colo. 1993) (Crim. P. 35(b) motion for reduction of sentence deemed abandoned as a matter of law where circumstances were such that 20-month delay in seeking a ruling was unreasonable), Respondents will not challenge, but are not conceding, the timeliness of Wood's habeas petition in this pre-answer response.

JA 70a. The State argued that Wood's petition should be dismissed as unexhausted because it included claims that

were not presented to the state courts. Doc. 15 at 10. In his reply, Wood argued that his petition should be deemed timely because the State had not challenged it on that ground. JA 71a-72a.

On August 15, 2008, the district court held that only Wood's double jeopardy and jury waiver claims were exhausted. Doc. 17 at 5-6. The district court afforded Wood the option to proceed on his exhausted claims, but did not address the timeliness issue. *Id*. After Wood elected to proceed with only his exhausted claims, Doc. 18 at 4, the district court accepted Wood's election, and then ordered the State to file an answer. JA 81a-83a. Again, however, the district court declined to address the timeliness of Wood's petition. The State's answer addressed the merits of Wood's claims, JA 91a-93a, and summarized the State's position on timeliness, which it had first set forth in its pre-answer response:

> 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.

JA 87a.

The State also reasserted its exhaustion argument and raised a new procedural default argument. JA 88a-89a. The district court rejected Wood's double jeopardy and involuntary waiver claims on the merits. The district

court did not address the timeliness of Wood's petition or procedural default. JA 105a-111a.

7. Wood timely appealed. The court of appeals granted a COA on Wood's double jeopardy and involuntary waiver claims. It noted, however, that "both of these claims might be subject to dismissal due to the potential untimeliness of Wood's application for habeas corpus." JA 119a. The court of appeals considered the petition's timeliness an "open question" as the district court had not resolved the issue, and it stressed that the "limitations period contained in AEDPA is central to its purpose of bringing finality to state court criminal judgments." JA 121a-122a.[7] The court appointed counsel for Wood and directed the parties to address both the merits and "the timeliness of Wood's application . . . and any state procedural rules that might bar [the court's] consideration of [Wood's] claims." JA 129a. Wood did not argue that the State had waived the Section 2244(d) limitations defense or that the issue was not properly before the court for another reason. Wood limited his argument to why his petition was timely under Section 2244(d). *See* Brief for Appellant at 19-23 (filed May 5, 2010); Reply Brief at 1-8 (filed Sept. 9, 2010).

The court of appeals affirmed, dismissing Wood's petition as untimely. As the court explained, the only way Wood's petition could be timely would be if his 1995 state petition "remained pending, thereby tolling the limitations period, from April 24, 1996, until August 30, 2004, the day he filed his second postconviction application." JA 141a.

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7. The court of appeals also ordered the parties to brief whether Wood's double jeopardy claim was barred by the independent and adequate state ground doctrine. JA 126a.

But Wood had "made no attempt to communicate with the court for any reason for over eight years," had informed the state court in 2004 that "[n]o other postconviction proceedings [had been] filed," and had repeatedly failed to mention the motion in the proceedings below. JA 142a-143a. As a consequence, the court of appeals held that Wood had abandoned the 1995 state postconviction motion. *Id*. It also noted that under Wood's argument his 1995 state postconviction motion would still be pending. JA 143a.

Because "any break in the pendency of the 1995 motion after AEDPA's enactment renders Wood's 2008 federal habeas petition untimely," the court of appeals recognized it was unnecessary to determine precisely when the petition had been abandoned. JA 143a. Wood waited an entire year from when the Colorado Supreme Court had denied certiorari to file his federal habeas petition. Accordingly, AEDPA's tolling provision was inapplicable and there was "no time left to account for *any* untolled period between AEDPA's April 24, 1996 enactment and Wood's 2004 post-conviction application." JA 144a.

The court of appeals also concluded that the Section 2244(d) limitations defense had not been waived. It recognized that it could not "'override a State's deliberate waiver of a limitations defense' and *sua sponte* dismiss a habeas petition." JA 140a n.2 (quoting *Day*, 547 U.S. at 202). It thus reviewed the State's "cryptic response to the timeliness question"—that the State is "not challenging, but [does] not concede, the timeliness of [Wood's] [habeas] petition"—to determine whether the State had deliberately waived the issue. *Id*. While the "precise import of this quotation elude[d]" the court, it ultimately

concluded that the State had not deliberately waived the limitations defense because the State's statement "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." *Id.* Additionally, the court found its decision to resolve the case on timeliness grounds particularly appropriate because "the issue was raised in the district court and addressed by Wood, the parties have briefed the issue on appeal, and the interests of justice would be served in reaching the timeliness issue given the extensive time period involved." *Id.*

Wood sought panel rehearing. For the first time on appeal, he argued that the State had waived or forfeited the Section 2244(d) limitations defense. *See* Appellant's Petition for Panel Rehearing at 1-8 (filed Jan. 3, 2011). The court of appeals denied the rehearing petition. Wood timely filed a petition for writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

Although Wood fails to grapple with it, the key issue in this appeal is whether the State intelligently waived or merely forfeited the Section 2244(d) limitations defense by informing the district court that it was not challenging but also was not conceding the timeliness of Wood's habeas petition. Because that ambiguous statement was not an intelligent waiver, the court of appeals had the authority to reach the forfeited limitations issue. Having made the determination to raise the Section 2244(d) issue given the circumstances of this case, the Tenth Circuit appropriately dismissed Wood's petition as untimely. The decision below should be affirmed.

1. There are three categories into which a party's efforts to address an issue may fall. A party can fully raise and thus preserve an issue for appellate review. At the other extreme, a party may intelligently waive the issue. Finally, a party can do neither and thus forfeit the issue. The different consequences of waiver and forfeiture are critical and central to this dispute. If a party intelligently waives an issue, appellate review generally is foreclosed. But if a party forfeits an issue, an appellate court still may decide the case on that ground even though it was not the basis for the district court's decision. None of the cases on which Wood relies deviates from the rule.

The Court has adhered to this approach in habeas cases. As *Granberry* and *Day* explain, federal courts have the authority to reach a forfeited habeas defense under appropriate circumstances. Contrary to Wood's assertion, *Day* did not confine that authority to the district courts in the context of Section 2244(d). *Granberry* held that the court of appeals could reach a forfeited nonexhaustion defense, and *Day* held that the Section 2244(d) limitations defense should be treated similarly as it also advances AEDPA's interest in federalism, comity, and finality. Thus, there is no justification for distinguishing between those cases and Wood's.

Nor is the rule different when the court of appeals raises the issue *sua sponte*. Appellate courts have inherent authority to raise forfeited issues on their own motion. This Court has itself embraced that authority on a number of occasions. And as reflected in this Court's endorsement of the many decisions in which the courts of appeals have raised claim and issue preclusion on their own motion, it is particularly appropriate to exercise such authority

when the forfeited issue implicates important interests beyond the parties. Neither AEDPA nor any other federal law deprives the courts of appeals of this authority in the context of habeas appeals.

Indeed, given the unique nature of habeas practice and the special concerns underlying federal review of state-court convictions, the courts of appeals should have especially wide latitude to consider a forfeited issue that can terminate the appeal expeditiously. AEDPA imposes obligations and procedures that are foreign to ordinary civil litigation. The State is required to address the petition's timeliness and, in Colorado at least, it often assists the district court in performing its gatekeeping function. If this were ordinary civil litigation, the State's first filing could have been a Rule 12 motion to dismiss based on the allegations in Wood's petition. Instead, the particular habeas process used here required the State to file a pre-answer response and forbade it from filing a dispositive motion. It was in the course of following these instructions that the State notified the district court of the 1995 state-court motion and the State's (mistaken) understanding of its potential impact on the habeas petition's timeliness.

AEDPA also imposes unique obligations and procedures on the courts. In addition to the gatekeeping duties that Habeas Rule 4 imposes on district courts, the statute also requires the courts of appeals to review unsuccessful petitions and allow an appeal only where there is a colorable claim for relief. Here, the Tenth Circuit added the Section 2244(d) limitations issue at the COA stage and permitted the appeal to proceed. This allowed Wood the opportunity to address the limitations issue

through appointed counsel. Had the Tenth Circuit lacked the authority to raise the forfeited issue, it could well have denied a COA. This Court should not adopt a rule that forces the courts of appeals to choose between denying a COA or allowing an appeal of constitutional issues that it believes to be untimely under AEDPA. It should instead encourage the courts of appeals to follow the sensible example set by the Tenth Circuit in this case.

At bottom, adopting Wood's position would wrongly merge waiver and forfeiture, concepts this Court has been careful to keep distinct. It also would mean that courts of appeals have less discretion to consider a forfeited issue in federal habeas cases than in ordinary civil litigation, a result contrary to Congress' manifest goals, longstanding habeas practice, and this Court's decisions. This case illustrates precisely why such an alteration to existing law is unnecessary and unwise. Wood filed his federal habeas petition 22 years after he murdered Matthew Sparks, 18 years after his convictions became final, and nearly 12 years after Congress imposed a one-year time limit on such petitions. The only arguable basis for finding the petition timely is a state-court motion that Wood filed 13 years earlier that he not only abandoned, but that he neglected to mention until after the State brought it to the district court's attention in its pre-answer response. The State's inartful handling of this issue should not have forced the Tenth Circuit to devote substantial resources to resolve Wood's constitutional claims when his habeas petition was clearly untimely.

2. As this Court has explained many times and in many settings, an intelligent waiver is the intentional relinquishment of a known right. There must be a clear

intent to relinquish the issue and the decision must not be based on a mistake of fact or law. Thus, an equivocal or ambiguous statement is not an intelligent waiver. To reach a contrary conclusion here, the Court would need to abandon its longstanding framework or create a special rule for habeas defenses. As *Day* makes clear, that would not be warranted.

The "cryptic comment" at the heart of this dispute—in which the State refused to concede but did not contest the petition's timeliness—was not an intelligent waiver. The statement was not an intentional relinquishment of the issue because the one thing the State made clear was that it was not conceding the petition's timeliness. As in *Day*, moreover, the statement was not a knowing relinquishment because it was predicated on a mistake of law. Although the State identified the Section 2244(d) limitations issue in the early stages of this litigation, it cannot deny that its incomplete and inartful handling of it failed to preserve the issue. An equivocal statement such as this thus may be insufficient to preserve the issue. Under any reasonable definition, however, the statement falls far short of this Court's standard for an intelligent waiver. Therefore, the Tenth Circuit retained the discretion to consider it and dismiss the petition as untimely if it believed that circumstances justified that action.

3. Whether the court of appeals' determination that it was equitable to decide the case on timeliness grounds is not included within the questions presented. Regardless, the Tenth Circuit did not abuse its discretion. Before reaching the forfeited issue, under *Day* and *Granberry* the Tenth Circuit was required to provide Wood notice and an opportunity to be heard, determine whether he would

be prejudiced by addressing the issue, decide whether the interests of justice would be better served by deciding the timeliness question or deciding the case on the merits, and ensure that the State had not strategically withheld the defense.

The court of appeals followed these instructions to the letter. It notified Wood that it would be reaching the issue and afforded him the opportunity to address it through appointed counsel. Notwithstanding Wood's wild hypothetical scenarios, there was no evidence suggesting he was prejudiced by the decision to resolve the issue as timeliness had been an issue in the case from the beginning. And the Tenth Circuit reasonably concluded that "the interests of justice would be served in reaching the timeliness issue given the extensive time period involved." JA 140a n.2.

Finally, contrary to Wood's suggestion, the State did not strategically withhold the limitations defense. It was the State that initially brought the 1995 state-court motion to the district court's attention and mistakenly suggested that it might render Wood's petition timely. Moreover, the State did not attempt to prevail on the merits and save the procedural defense for appeal in case it was unsuccessful. The State raised the issue along with other procedural defenses before the district court; and while the State did not fully contest the issue, it pointedly refused to take it off the table. Furthermore, it was the Tenth Circuit—not the State—that raised the issue at the COA stage and asked the parties to brief it. It would have been a curious strategy to forfeit a timeliness argument in the hope that the Tenth Circuit would raise the issue in the course of granting a COA that the State urged it to deny. The

State's handling of the Section 2244(d) limitations issue was flawed. But it was anything but strategic.

ARGUMENT

The Court should affirm the decision below. First, the court of appeals had the authority to raise *sua sponte* Wood's failure to comply with the one-year limitations period set forth in Section 2244(d) so long as the State had not intelligently waived the issue before the district court. Second, the State did not intentionally and knowingly waive the issue in its pre-answer response or answer. Third, although the question is not before the Court, the Tenth Circuit appropriately exercised its authority to reach the forfeited issue and, in turn, to dismiss Wood's habeas petition as untimely.

I. The Court Of Appeals Had The Authority To Raise *Sua Sponte* The Section 2244(d) Limitations Defense

Wood argues from the flawed premise that the Tenth Circuit lacked authority to raise the Section 2244(d) limitations defense on its own motion because the State "waived or forfeited" that issue before the district court. Pet'r Br. 20. But as Wood acknowledges, *see* Pet'r Br. 17 n.6, waiver and forfeiture are not interchangeable concepts. Waiver is the intentional relinquishment of a known right, while forfeiture is merely the failure to preserve an issue for further review. *Olano*, 507 U.S. at 733. This distinction is crucial. The courts of appeals retain wide latitude to resurrect a forfeited defense when (as here) circumstances warrant it, whereas waiver forecloses that option. *See Granberry*, 481 U.S. at 132-36; *Day*, 547 U.S. at 202.

As cases like *Granberry* and *Day* demonstrate, the discretion to resurrect forfeited issues has particular force in the habeas setting where interests of federalism, comity, and finality are at their apex. AEDPA and the Habeas Rules charge federal courts with the obligation to weed out procedurally improper and otherwise meritless habeas petitions and to ensure that only those habeas petitions with colorable claims for relief obtain appellate review. Accordingly, the Tenth Circuit acted consistently with its mandate in raising the Section 2244(d) limitations issue on its own motion.

A. The courts of appeals have the well-recognized authority to raise *sua sponte* an issue that was not preserved for appellate review so long as it was not intelligently waived.

Wood repeatedly argues that the State "waived or forfeited" the Section 2244(d) limitations defense by not preserving it for appellate review. Pet'r Br. 20; *see also id.* 26 ("If a litigant fails to assert an affirmative defense in the district court, it is waived or forfeited for purposes of appeal."); *id.* 17, 25, 27-28 (same). As this Court has made clear, however, waiver and forfeiture are distinct concepts with different consequences. By merging them, Wood obscures a central issue in this case: whether the State's failure to preserve the Section 2244(d) limitations issue was an intelligent waiver *or* mere forfeiture. Because the State did not intelligently waive the limitations defense, the court of appeals retained the discretion to resolve the case on that ground.

1. Although waiver and forfeiture are often "confused," they are "distinct" concepts. *United States v. Leggett*, 162

F.3d 237, 249 (3d Cir. 1998). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (other citations omitted)); *see also Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004); *Puckett v. United States*, 129 S. Ct. 1423, 1428 (2009); *Freytag v. CIR*, 501 U.S. 868, 895 n.2 (1991) (Scalia, J., concurring in part, concurring in the judgment in part). "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the [party's] knowledge thereof and irrespective of whether the [party] intended to relinquish the right." *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995).

The distinction between waiver and forfeiture is not semantic—the consequences differ significantly. If a party waives an issue, appellate review generally is foreclosed. *See Puckett*, 129 S. Ct. at 1430-31. But if a party forfeits an issue, the court of appeals retains the discretion to "resurrect" it "on [the party's] behalf." *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009); *see, e.g.*, *Powell v. Alexander*, 391 F.3d 1, 21 n.24 (1st Cir. 2004) ("This court may, in its discretion, excuse forfeiture, and we choose to do so here to resolve this important issue.") (citing *Chestnut v. City of Lowell*, 305 F.3d 18, 20 (1st Cir. 2002) (en banc) (per curiam); *United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006). If there has not been an intelligent waiver, "the court of appeals has authority to order correction, but is not required to do so." *Olano*, 507 U.S. at 735.

2. The Court has emphasized the importance of this distinction in the context of federal habeas review. In *Granberry*, the district court dismissed the habeas petition on the merits. On appeal, the State contended, for the first time, that the petitioner had failed to exhaust state remedies. *Granberry*, 481 U.S. at 130. The petitioner argued that "the State had waived that defense by failing to raise it in the district court." *Id.* The Seventh Circuit rejected the petitioner's waiver argument, confronted the exhaustion issue, and dismissed the habeas petition on that ground. *See id.*

This Court affirmed, declining to deem the State's failure to preserve the issue "a procedural default precluding the State from raising the issue on appeal." *Id.* at 131. Yet it also declined to "treat nonexhaustion as an inflexible bar to consideration of the merits of the petition by the federal court" in every case. *Id.* at 132. The Court instead adopted an "intermediate approach" under which the "appellate court is not required to dismiss for nonexhaustion notwithstanding the State's failure to raise it, and the court is not obligated to regard the State's omission as an absolute waiver of the claim." *Id.* at 131, 133. The key question was "whether the interests of comity and federalism [would] be better served by addressing the merits forthwith" or dismissing the habeas petition as unexhausted even though the State did not preserve the issue for appellate review. *Id.* at 134.

Although *Granberry* preceded decisions, such as *Day*, which have clarified the distinction between intelligent waiver and forfeiture, the Court in *Granberry* drew the same line in ruling that the State's failure to preserve the issue of nonexhaustion did not amount to waiver. The

Court acknowledged that the State had not preserved the issue before the district court. *See Granberry*, 481 U.S. at 133. At the same time, the failure to preserve the issue did not foreclose appellate review because there had been no "absolute waiver of the claim." *Id.* In other words, the State's treatment of the exhaustion issue fell into the middle category between preservation and intelligent waiver: it had been forfeited. *See Day*, 547 U.S. at 206 (noting that *Granberry* held "that federal appellate courts have discretion to consider the issue of exhaustion despite the State's failure to interpose the defense at the district-court level").[8]

Schiro v. Farley, 510 U.S. 222 (1994), and *Caspari v. Bohlen*, 510 U.S. 383 (1994), applied this same reasoning to nonretroactivity defenses under *Teague v. Lane*, 489 U.S. 288 (1989). In both cases, the Court reiterated that appellate courts have the authority, but not the obligation, to excuse forfeiture and reach the *Teague* issue. *See Schiro*, 510 U.S. at 229 ("Although we undoubtedly have the discretion to reach the State's *Teague* argument, we will not do so in these circumstances."); *Caspari*, 510 U.S. at 389 (explaining that because the nonretroactivity principle "is not jurisdictional in the sense that [federal courts] must raise and decide the issue *sua sponte* . . . a federal court may, but need not, decline to apply *Teague* if the State does not argue it") (citations and internal quotation

8. The Court remanded for further proceedings because the Seventh Circuit had simply assumed it was obligated to address the State's exhaustion argument and thus had "made no attempt to determine whether the interests of justice would be better served by addressing the merits of the habeas petition or by requiring additional state proceedings before doing so." *Granberry*, 481 U.S. at 136.

marks omitted). Like *Granberry*, these decisions confirm that the courts of appeals retain the authority to address forfeited habeas issues on appeal.

3. The Tenth Circuit's decision to raise the issue at the COA stage does not alter the equation.[9] "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *see also Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962). On occasion, this Court has exercised that authority to decide an issue that was neither pressed nor passed on below, *see, e.g.*, *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Pollard v. United States*, 352 U.S. 354, 359 (1957); *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 412 (1947), and like the Tenth Circuit here, has even done so on its own initiative, *see, e.g.*, *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088 (2009) ("[W]e called for supplemental briefing addressed to the question whether *Michigan v. Jackson* should be overruled.").

The settled approach to claim and issue preclusion illustrates the point. When "a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised." *Arizona v. California*, 530 U.S. 392, 412 (2000). "This result is fully consistent with the

9. If anything, the Tenth Circuit's decision to raise *sua sponte* the 2244(d) limitations issue demonstrates that the State was not engaging in the gamesmanship that might make it inappropriate to reach the forfeited issue. *See infra* at 49-50.

policies underlying res judicata: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste." *Id.* (quotations omitted); *see also Jackson v. N. Bank Towing Corp.*, 213 F.3d 885, 889-90 (5th Cir. 2000) (explaining that the court of appeals "may raise the issue of res judicata *sua sponte* as a means to affirm the district court decision below"); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4405 (2d ed. 2002) (collecting cases and explaining that claim and issue preclusion "can be raised by an appellate court for the first time on appeal").

As a general matter, then, the courts of appeals have inherent authority to raise forfeited legal issues on their own motion. *See Thomas v. Crosby*, 371 F.3d 782, 793 (11th Cir. 2004) (Tjoflat, J., specially concurring) ("It is beyond dispute that, in general, we have the power to consider issues that a party fails to raise on appeal, even though the petitioner does not have the right to demand such consideration."); *see, e.g.*, *Cruz v. Melecio*, 204 F.3d 14, 22 n.7 (1st Cir. 2000); *United States v. Heater*, 63 F.3d 311, 332 (4th Cir. 1995). Raising the preclusion defense *sua sponte* would be ultra vires otherwise, contrary to settled law. In the end, therefore, an appellate court's "refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate," but "there are times when prudence dictates the contrary." *Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring); *see also Silber v. United States*, 370 U.S.

717, 717-18 (1962).[10] There is no basis for departing from this general rule in the context of habeas appeals.

4. Indeed, courts of appeals should have especially wide latitude to raise threshold AEDPA issues given the important interests the statute vindicates. As this Court has explained many times, federal review of state-court convictions implicates "[p]rinciples of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines. Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts." *Williams*, 529 U.S. at 436. "While civil in nature, habeas corpus cases are different from ordinary civil cases where only the interests of the parties are involved." *Long v. Wilson*, 393 F.3d 390, 402 (3d Cir. 2004); *see also Calderon v. Thompson*, 523 U.S. 538, 554 (1998) (recognizing "the profound societal costs that attend the exercise of habeas jurisdiction" (internal quotation omitted)). AEDPA's screening procedures are foreign to ordinary civil litigation. Consequently, "it is not exclusively up to the parties to decide whether habeas

10. There may even be circumstances when an appellate court can set aside a party's intelligent waiver of an issue. *See Studio Art Theatre of Evansville, Inc. v. City of Evansville, Ind.*, 76 F.3d 128, 130 (7th Cir. 1996). The Court has indicated it may be inappropriate in the habeas context. *See Day*, 547 U.S. at 210 n.11. But given the proliferation of habeas litigation and the failure of AEDPA to fulfill its statutory mission of streamlining habeas litigation, there may be reason to reconsider that determination in an appropriate case. *See* Nancy J. King & Joseph L. Hoffmann, Habeas for the Twenty-First Century 81 (2011). It is not necessary to reevaluate that issue here, however, because the State did not intelligently waive its Section 2244(d) limitations defense. *See infra* at 46-49.

procedural issues should be raised or waived." *Long*, 393 F.3d at 403 (citing *Szuchon v. Lehman*, 273 F.3d 299, 321 n.13 (3d Cir. 2001)).

Federal law vindicates these interests in concrete ways. Habeas Rule 4, for example, requires a district court to *sua sponte* dismiss a habeas petition before ordering the State to respond "[i]f it plainly appears . . . that the petitioner is not entitled to relief." At this screening stage, district courts must dismiss habeas petitions that are, among other reasons, untimely, unexhausted, defaulted, or procedurally barred for another reason. *See Day*, 547 U.S. at 207. "This power is rooted in 'the duty of the court to screen out frivolous petitions and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer.'" *Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) (quoting 28 U.S.C. foll. § 2254 Rule 4 Advisory Committee Notes); *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) (same).

Second, AEDPA requires district courts and the courts of appeals to review habeas petitions before allowing an appeal. Only habeas applicants with colorable constitutional claims may obtain a COA. *See* 28 U.S.C. § 2253. "The COA process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels." *Gonzalez v. Thaler*, --- S. Ct. ---, 2012 WL 43513, at *7 (Jan. 12, 2012). The court of appeals thus "may deny a COA if there is a plain procedural bar to habeas relief, even though the district court did not rely on that bar." *Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005). That course of action, while certainly lawful, denies the petitioner the chance to address the issue. The alternative, then, is to follow

the path the Tenth Circuit chose here—*i.e.*, add the procedural issue and grant the COA. "Courts of appeals regularly amend COAs . . . to add issues." *Gonzalez*, 2012 WL 43513, at *7 (citing *Saunders v. Senkowski*, 587 F.3d 543, 545 (2d Cir. 2009) (per curiam)).

Habeas Rule 4 and the COA procedure both advance Congress' recognized goal of "streamlining federal habeas proceedings" and "encouraging finality" of state-court convictions. *Rhines v. Weber*, 544 U.S. 269, 277 (2005); *see also United States v. Bendolph*, 409 F.3d 155, 163 n.13 (3d Cir. 2005) ("Congress plainly intended strict reform of habeas corpus in passing the AEDPA, and the practical problems of attempting to re-litigate matters which are many years old are obvious."). Nothing in AEDPA's text or legislative history, or in any of this Court's decisions for that matter, curtails "the otherwise broad power of a circuit court to entertain matters *sua sponte* that a [party] failed to raise on appeal." *Thomas*, 371 F.3d at 795 (Tjoflat, J., specially concurring).

Quite the opposite, forbidding courts of appeals from appropriately exercising their inherent discretion to raise forfeited issues in habeas cases would misdirect scarce judicial resources by allowing meritless appeals to crowd out serious claims for relief. *See Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result).[11] Faced with the choice of granting the COA on

11. As the COA provision illustrates, Congress was concerned with the need to preserve limited judicial resources for habeas petitions with colorable constitutional claims. *See, e.g.*, 141 Cong. Rec. S7803-01 (daily ed. June 7, 1995) (statement of Sen. Nickles) ("[H]abeas procedures are wasteful. The current system is wasteful of limited resources. At a time when both State and Federal courts face staggering criminal caseloads, we can ill afford

those terms, or denying the COA on a ground that was forfeited below, many courts of appeals may choose the latter, especially when the procedural issue should have been caught by the district court at the initial screening stage. As it has in the past, this Court should encourage the courts of appeals to exercise their inherent authority to "'prevent frivolous appeals from delaying the States' ability to impose sentences, including death sentences' while at the same time protecting the right of petitioners to be heard." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Rejecting the Tenth Circuit's approach would not only force courts to expend scarce resources on plainly frivolous appeals, but would also undermine a petitioner's interest in being heard on the procedural issue instead of simply having the COA denied.[12]

B. This authority extends with equal force to Section 2244(d) limitations defenses that were not preserved for appellate review.

Although his brief is unclear, Wood does not appear to contest an appellate court's inherent authority to raise a forfeited issue. Nor does Wood contest the district court's authority under Habeas Rule 4 to *sua sponte* dismiss

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to make large commitments of judicial and prosecutorial resources to procedures of dubious value in furthering the ends of justice.").

12. Moreover, adopting an inflexible rule that the courts of appeals can never address forfeited issues in habeas cases would disserve petitioners as well, as they too may forfeit issues that merit appellate review. *See, e.g.*, *Thomas*, 371 F.3d at 794 (Tjoflat, J., specially concurring) ("[T]he fact that Thomas did not mention the §§ 2241/2254 issue in his COA petition does not bar us from exercising our discretion to rule *sua sponte* on this critical threshold issue.").

the petition as untimely without a response from the State. And he clearly does not contest a district court's established authority, under *Day*, to *sua sponte* raise the Section 2244(d) limitations defense at a later point in the proceeding so long as the issue was not intelligently waived. *See* Pet'r Br. 32. Wood instead argues that *only* a district court has that authority and the Tenth Circuit thus could not reach the issue on appeal. Pet'r Br. 32-34. Neither *Day* nor any of this Court's other decisions supports Wood's argument.

1. In *Day*, the Court held that a district court had the authority to *sua sponte* raise the Section 2244(d) limitations defense and dismiss the petition as untimely even though the state's answer had expressly conceded the issue. 547 U.S. at 202. Because Section 2244(d) is not jurisdictional, "courts are under no *obligation* to raise the time bar *sua sponte*." *Id.* at 205. Even still, "the limitations defense resembles other threshold barriers—exhaustion of state remedies, procedural default, nonretroactivity—courts have typed 'nonjurisdictional,' although recognizing that those defenses 'implicat[e] values beyond the concerns of the parties.'" *Id.* at 205 (quoting *Acosta*, 221 F.3d at 123). In light of *Granberry*, *Caspari* and *Schiro*, among other decisions, the district court was "permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." *Id.* at 209.

Thus, the district court had the authority to raise the Section 2244(d) limitations issue so long as the state had not waived it. "The considerations of comity, finality, and the expeditious handling of habeas proceedings that motivated AEDPA . . . counsel against an excessively rigid or formal approach to the affirmative defenses now listed in Habeas Rule 5." *Id.* at 208 (citing *Granberry*, 481 U.S.

at 131-34). The Court recognized that "it would make scant sense to distinguish in this regard AEDPA's time bar from other threshold constraints on federal habeas petitioners." *Id.* at 209. "'AEDPA's statute of limitations advances the same concerns as those advanced by the doctrines of exhaustion and procedural default, and must be treated the same.'" *Id.* (quoting *Long*, 393 F.3d at 404). However, "should a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice," *id.* at 210 n.11, as it would be improper "to override a State's deliberate waiver of a limitations defense," *id.* at 202.

The Court determined that the district court had "confronted no intelligent waiver on the State's part, only an evident miscalculation of the elapsed time under a statute designed to impose a tight time constraint on federal habeas petitioners." *Id.* at 202; *see also id.* at 203 (explaining that the state had miscalculated the deadline by "[o]verlooking controlling Eleventh Circuit precedent"). Accordingly, the district court had the discretion to raise the issue. But "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions," it must "assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue," and it must "determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time barred." *Id.* at 210 (quoting *Granberry*, 481 U.S. at 136) (other citations and quotations omitted).

The Court affirmed the Eleventh Circuit's decision under this standard. The petitioner had been afforded the opportunity to address the issue, he had not been prejudiced by the delay, and "nothing in the record

suggests that the State 'strategically' withheld the defense or chose to relinquish it." *Id.* at 210-11. "From all that appears in the record, there was merely an inadvertent error, a miscalculation that was plain under Circuit precedent, and no abuse of discretion in following this Court's lead in *Granberry* and *Caspari* . . . ." *Id.* at 211.

Day confirms that the Tenth Circuit did not exceed its authority in raising the timeliness issue on its own motion. The Court made clear that the *Granberry* principle applies with equal force to the Section 2244(d) limitations defense. That principle, as explained above, permits the courts of appeals to raise *sua sponte* a threshold AEDPA defense that was forfeited in the district court so long as the State had not intelligently waived it. That is precisely what the Tenth Circuit did here.

2. Wood argues that the reasoning of *Day* is limited to district court proceedings because AEDPA's limitations defense "does not raise the same comity and federalism concerns as exhaustion or procedural default." Pet'r Br. 27 (citation omitted). *Day* pointedly rejected that proposition. The Court found that Section 2244(d)'s limitations defense limitations "is explicitly aligned with those other defenses under the current version of Habeas Rule 5(b)." *Day*, 547 U.S. at 208; *see also id.* at 209 (noting that Habeas Rule 5(b) places "'a statute of limitations' defense on par with 'failure to exhaust state remedies, a procedural bar, [and] non-retroactivity'"). Distinguishing *Granberry* from *Day* on this ground makes "scant sense." *Id.* at 214.

In any event, other decisions similarly confirm that "[t]he 1–year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state

court judgments. This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan*, 533 U.S. at 179 (citation omitted); *see also Rhines*, 544 U.S. at 276 (same); *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (noting that "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases" (internal quotation marks and citations omitted)); *Williams*, 529 U.S. 362, 386 (2000) (Stevens, J.) ("Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law."). Moreover, Section 2244(d) not only establishes a "reasonable time" to challenge a final conviction, but "safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh." *Acosta*, 221 F.3d at 123. Like AEDPA's other threshold defenses, rigorous enforcement of AEDPA's limitations period "promotes judicial efficiency and conservation of judicial resources." *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 322 (1995)).

At base, Section 2244(d) "implicates values beyond the concerns of the parties" in the same way as AEDPA's other threshold defenses. *Id.*; *see also Long*, 393 F.3d at 404 ("AEDPA's statute of limitations advances the same concerns as those advanced by the doctrines of exhaustion and procedural default, and must be treated the same.") (citations omitted). "Like the other procedural bars to habeas review of state court judgments, the statute of limitation implicates the interests of both the federal and state courts, as well as the interests of society, and therefore it is not inappropriate for the court, on its own

motion, to invoke the doctrine." *Acosta*, 221 F.3d at 123 (citation and quotation omitted). Any other conclusion is foreclosed by *Granberry* and *Day*.[13]

3. Wood argues that *Kontrick v. Ryan*, 540 U.S. 443 (2004), and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curium), indicate otherwise. Pet'r Br. 23-25. That too is incorrect: both are routine forfeiture cases. In *Kontrick*, the Court held that "a debtor *forfeits* the right to rely on" a particular time-bar in the Bankruptcy Rules if he "does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge." 540 U.S. at 447 (emphasis added). In *Eberhart*, the Court similarly held that although the defendant had untimely moved for a new trial under Federal Rule of Criminal Procedure 33, because "the Government failed to raise a defense of untimeliness until after the District Court had reached the merits, it *forfeited* that defense." 546 U.S. at 19 (emphasis added).

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13. Wood also incorrectly argues that Section 2254(b)(3) undermines the State's argument. Pet'r Br. 22. The Court was aware of this provision in *Day*, but did not consider it a basis for distinguishing exhaustion from timeliness. *See Day*, 547 U.S. at 206 & n.4. In fact, that provision appears to have been inserted to address confusion about the exhaustion defense that persisted after *Granberry*. *See Clayton v. Gibson*, 199 F.3d 1162, 1170 (10th Cir. 1999); *Brown v. Maass*, 11 F.3d 914 (9th Cir. 1993). Congress's failure to enact a similar provision regarding the limitations period reflects only the fact that there was no ongoing dispute regarding the limitations period; indeed, there had been no limitations period until AEDPA. But once division surfaced in the lower courts, *see Day*, 547 U.S. at 205, the Court resolved it by holding that the limitations defense should be treated the same as the exhaustion defense, *see supra* at 30-32.

Wood correctly observes, therefore, that the statute-of-limitations defenses at issue in *Kontrick* and *Eberhart* were "subject to forfeiture." Pet'r Br. 24. But that does not aid his cause. In neither case did forfeiture deprive the court of appeals of the authority to raise the limitations issue on its own motion. As in *Granberry* and *Day*, it required the court to evaluate whether the particular statute "implicates judicial interests beyond those of the parties" such that "it may be appropriate for a court to invoke the rule *sua sponte* in order to protect those interests." *United States v. Mitchell*, 518 F.3d 740, 750 (10th Cir. 2008).[14] While "[t]he presumption . . . is to hold the parties responsible for raising their own defenses," the court of appeals may raise the defense *sua sponte*, especially when it "implicates the court's power to protect its own important institutional interests. This principle was at work in *Day* where the court looked to the important values the habeas scheme was designed to protect and determined they went beyond the interests of the parties." *Id*. at 749.

14. Wood's reliance on *Grigsby v. Cotton*, 456 F.3d 727 (7th Cir. 2006), is misplaced. Pet'r Br. 29-31. There, the state forfeited the Section 2244(d) limitations defense by failing to raise it in the district court. *See Grigsby*, 456 F.3d at 731. Contrary to Wood's suggestion, however, the Seventh Circuit did not conclude that it was powerless to address the forfeited issue on appeal. It merely declined to do so because it would have been "inappropriate" under the circumstances of that case. *Id*. As *Grigsby* shows, forfeiture and waiver will result in the same outcome where the appellate court finds it inappropriate to reach the unpreserved issue. As *Granberry*, *Caspari*, and the decision below all illustrate, however, that is not always true.

4. Last, Wood argues that the decision below is inconsistent with traditional habeas practice, Pet'r Br. 21-22, as well as the Federal Rules of Civil Procedure and Habeas Rules, *id.* 25-26. But that argument was likewise rejected in *Day*. The dissent contended that application of the generic civil rules to Section 2244(d)'s limitations provision should bar courts from addressing the issue if it is not preserved in the answer. *See Day*, 547 U.S. at 213 (Scalia, J., dissenting). The majority disagreed and the issue is now settled. *See CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2636 (2011) ("'Considerations of *stare decisis* have special force in the area of statutory interpretation . . . .'" (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)). If anything, the dissent confirms that *Day*'s extension of "the *Granberry* regime" to Section 2244(d) "allows the forfeited procedural defense to be raised for the first time on appeal, either by the State or by the appellate court *sua sponte*." *Day*, 547 U.S. at 217 (Scalia, J., dissenting).

Even if *Day* had not decisively rejected Wood's argument, there are other reasons for allowing the court of appeals to raise the Section 2244(d) limitations issue under circumstances where it might be inappropriate in an ordinary civil case. As explained above, Section 2244(d) implicates finality and conservation of judicial resources in ways that the affirmative defenses generally governed by Rule 8(c) of the Federal Rules simply do not. *See supra* at 32-33. From a substantive perspective, the defense more closely resembles claim or issue preclusion, which the court of appeals similarly may raise *sua sponte* notwithstanding Wood's narrow interpretation of the Federal Rules. *See Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) ("Claim preclusion, like issue preclusion, is an

affirmative defense." (citing Fed. Rule Civ. P. 8(c)) (other citations omitted)). If the Federal Rules do not prevent the court of appeals from raising claim or issue preclusion *sua sponte*, the result should be no different here: both rules implicate concerns beyond those peculiar to the parties before the court.

Section 2244(d)'s limitations defense also is subject to vastly different procedural constraints than the run-of-the-mine affirmative defense. As an initial matter, the COA process has no analogue in ordinary civil litigation. But the differences between habeas and ordinary civil litigation appear far before an appeal is noticed. Under the Federal Rules, a defendant ordinarily may assert an affirmative defense in its answer or it may instead remain silent on the issue. That is not the case in federal habeas litigation. As noted above, Habeas Rule 4 requires the district courts to weed out federal habeas petitions that can be dismissed without a response from the State. In the District of Colorado, however, the court rarely dismisses habeas petitions on its own motion. *See Kilgore*, 519 F.3d at 1089. Instead, as it did here, the district court requires the State to submit a pre-answer response. In that response, the State must address timeliness and exhaustion and must notify the court if it intends to assert either defense. And if the district court orders the State to file an answer, Habeas Rule 5 instructs it to "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." Indeed, the Committee most recently charged with revising the habeas rules declined to label the defenses in Rule 5 as "affirmative defenses" because it "believed that the term was a misnomer in the context of habeas petitions." Report of the Advisory Committee

on Criminal Rules, GAP Report—Rules Governing § 2254 Proceedings (May 15, 2003).

Habeas Rules 4 and 5 (especially as implemented in Colorado) thus are geared less at imposing a purely adversarial system as at assisting the district court in fulfilling its obligation to weed out faulty habeas petitions. This is remarkably different from the adversarial system of civil litigation on which the Federal Rules are premised. The defenses set forth in Habeas Rule 5 are simply nothing like the "affirmative defenses" that are deemed waived under Federal Rule 8(c) if they are not asserted in the answer. *See Mitchell*, 518 F.3d at 750 ("At the core of the Court's opinion in *Day* is the notion that habeas proceedings are different from ordinary civil litigation and, as a result, our usual presumptions about the adversarial process may be set aside."). It is the Habeas Rules—not the Federal Rules, which apply to "proceedings for . . . . habeas corpus" only "to the extent that the practice in such proceedings is not set forth in statutes of the United States" or "the Rules Governing Section 2254 cases," Fed. R. Civ. P. 81(a)(4)—that drive the outcome of this case.

The key role the Habeas Rules and the pre-answer response played in this case reveal the marked difference between habeas litigation and traditional civil litigation. Wood's habeas petition was untimely on its face as the one-year limitations period had expired seven years before he filed his 2004 state postconviction motion and more than a decade before he filed in federal court. If this were traditional litigation, the State simply could have filed a motion to dismiss based on the allegations in Wood's complaint and it would have prevailed.

But Habeas Rule 4 tasks the district court with the responsibility to screen untimely petitions in order to relieve the State of the burden of responding to the flood of frivolous habeas petitions that are filed in federal court each year. At first, the district court performed its function and dismissed Wood's petition as untimely. After Wood sought reconsideration, however, the court reversed itself without explanation and ordered the State to file a pre-answer response. Importantly, the court specifically ordered the State to address timeliness, instructed it to attach any documents relevant to the issue, and forbade the State from a filing a motion to dismiss. Having been drafted into service by the district court, the State faithfully identified Wood's 1995 postconviction motion and mistakenly offered the "cryptic" response that Wood now claims should be deemed a waiver of the limitations issue. Whether or not this is a prudent system of screening habeas petitions, it clearly is nothing like ordinary, adversarial civil litigation.

Moreover, requiring the State to take a position on timeliness early in the litigation is often particularly demanding as "the practical reality of habeas is that the government may lack, for long periods of time, the file documents necessary to knowledgeably analyze timeliness," and "[e]ven when the record papers are obtained, it can be difficult to decipher what a *pro se* habeas movant has done, meaning many 'waivers' will not actually have been the result of a purposeful or deliberate decision to forego the defense." *Bendolph,* 409 F.3d at 167 (internal quotation marks omitted); *see also Pliler v. Ford*, 542 U.S. 225, 232 (2004) ("[D]istrict judges often will not be able to make [AEDPA limitations] calculations based solely on the face of habeas petitions" and thus "[s]uch calculations

depend upon information contained in documents that do not necessarily accompany the petitions."). Accordingly, "as a matter of elapsed time, the first practicable chance to knowledgeably raise a timeliness issue often arises later in the life of a habeas case than it would in an ordinary civil one." *Bendolph*, 409 F.3d at 168 n.19.[15]

In sum, the "practical reality" of habeas litigation confirms both the logic of *Granberry* and *Day* and the fallacy of treating Section 2244(d) as an typical affirmative defense. At least in Colorado, instead of responding to the petitioner's allegations in the ordinary course, the State is required by rule and practice to neutrally examine the petition's timeliness, often before it has sufficient information to make an informed judgment, in order to assist the court in performing the function assigned to it by Habeas Rule 4. An incomplete or inaccurate response thus cannot be considered an intelligent waiver absent strong evidence that the State was intentionally and knowingly relinquishing the issue. The requirement that the State "intelligently choose to waive a statute of limitations defense" before appellate review is foreclosed is the only appropriate standard given the uniqueness of this process. *Day*, 547 U.S. at 202 n.11.

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15. Although the State had the relevant documents in this case, the facts here likewise show the impossibility of imposing traditional civil litigation standards on federal habeas defendants. As noted above, Wood never mentioned the now-pivotal 1995 state postconviction motion; it was the State that discovered it and raised the issue with the district court in its pre-answer response in accordance with its duties under the Habeas Rules.

II. The State Did Not Intelligently Waive The Section 2244(d) Limitations Defense.

Wood incorrectly contends that the State waived the Section 2244(d) limitations defense by stating that it "will not challenge, but [is] not conceding, the timeliness of Wood's habeas petition." Pet'r Br. 34. This statement falls far short of the Court's standard for waiver, which is the intentional relinquishment of a known right. The State stressed that it was "not conceding" the issue. To be sure, the assertion that the State neither "challeng[ed]" nor "conced[ed]" the timeliness of Wood's petition renders the statement somewhat ambiguous. But the ambiguity only underscores the importance of maintaining the clear distinction between waiver and forfeiture. The State's inartful statement was the product of the unique obligation thrust on the State to file a pre-answer response on this issue, Wood's repeated failure to identify his 1995 state postconviction motion, and, as in *Day*, the State's confusion as to the state of the law. Together, these circumstances confirm that the State did not intentionally and knowingly relinquish its Section 2244(d) limitations defense.

A. A State does not intelligently waive the Section 2244(d) limitations defense unless it intentionally and knowingly relinquishes the issue.

The Section 2244(d) limitations defense is waived only if it is intelligently relinquished. Under this Court's decisions, the waiver is intelligent if it is intentional and knowing. An equivocal statement, therefore, falls far short of the standard for waiver. Rather, when the State fails to preserve the issue because of mistake or inadvertence,

it has been forfeited. The Court has made clear that it would be inappropriate to reach an issue that has been forfeited for tactical reasons. But whether the State has engaged in sandbagging bears on whether the court of appeals may resurrect a forfeited issue, not whether the issue was intelligently waived.

1. To foreclose further review of the issue, the State must "*intelligently* choose to waive a statute of limitations defense." *Day,* 547 U.S. at 211 n.11 (emphasis added). A waiver is intelligent if it is the "*intentional* relinquishment or abandonment of a *known* right." *Johnson*, 304 U.S. at 464 (emphasis added). In other words, the waiver must be made with "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *see also Edwards v. Arizona*, 451 U.S. 477, 482-83 (1981); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). This is the uniform standard for determining whether there has been an intelligent waiver. *See Kontrick*, 540 U.S. at 458 n.13 (time limitations under the Bankruptcy Rules); *see, e.g.*, *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 395 n.7 (4th Cir. 2004) (Rule 11 of the Federal Rule's "safe harbor"); *Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 922 (D.C. Cir. 2011) (Federal Arbitration Act); *Chestnut*, 305 F.3d at 20 (immunity from punitive damages under 42 U.S.C. § 1983).

In light of its consequences, waiver should not be inferred lightly. The standard for evaluating whether a statement amounts to an intelligent waiver has arisen in all manner of cases, but this Court has been steadfast that an equivocal statement does not constitute an intelligent waiver. *See Johnson*, 304 U.S. at 464 (finding that "courts

indulge every reasonable presumption against waiver"); *Coll. Sav. Bank v. Fl. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680-82 (1999) (holding that the waiver must be "unequivocal" for it to be "voluntary" and "intentional"); *see also* Federal Practice & Procedure § 4405 ("An ambiguous statement of position . . . may not be treated as a waiver."); *see, e.g.*, *Lurie v. Wittner*, 228 F.3d 113, 123 (2d Cir. 2000) (holding that "[w]hatever counsel was saying," the state attorney's "cryptic" discussion of applicant's claim was not an "express" waiver of exhaustion); *Deutsch v. Flannery*, 823 F.2d 1361, 1365 n.2 (9th Cir. 1987) (holding that the statement that defendants would "not oppose Deutsch's right to file a new complaint arising out of matters involved in the case" while also reserving the "right to file any and all motions addressed to [such] a . . . complaint" did not amount to waiver of issue preclusion).[16]

To conclude otherwise, the Court would need to abandon this framework or create a special rule for habeas

16. With respect to waiver of Eleventh Amendment immunity, the Court has rejected the concept of a constructive or implied waiver. *See Coll. Sav. Bank*, 527 U.S. at 681-83. "The interests of federalism require that such a waiver be clear and unequivocal." *Burke v. Beene*, 948 F.2d 489, 493 (8th Cir. 1991) (citing *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306-07 (1991). Those same federalism concerns are present whenever a State is haled into federal court to defend the constitutionality of a criminal conviction. As such, a rule against constructive waiver makes sense in this context as well. The Court need not create such a rule in this litigation, however, because whether the State intelligently waived the Section 2244(d) limitations defense turns on the meaning attributed to its statements in the pre-answer response and answer—not implications that might be drawn from its conduct.

cases under which something short of an unequivocal statement will constitute an intelligent waiver. There is no reason to contort established law here. An equivocal statement can never demonstrate that the State has intentionally and knowingly waived one of AEDPA's threshold defenses given the concerns implicated by federal review of state-court convictions.

2. Forfeiture, on the other hand, is best defined by what it is not: neither waiver nor preservation of an issue. In other words, forfeiture occurs when a party fails to preserve an issue yet does not intelligently waive it. *See Kontrick*, 540 U.S. at 458 n.13. *Puckett* illustrates the point. There, the defendant's counsel failed to object at sentencing to the government's breach of a plea agreement. 129 S. Ct. at 1427. The Court rejected Puckett's argument that he could avoid plain-error review because the government's broken promise vitiated the "knowing and voluntary character" of the plea agreement. *Id*. "Puckett's argument confuse[d] the concepts of waiver and forfeiture. Nobody contend[ed] that Puckett's counsel has *waived* —that is, intentionally relinquished or abandoned—Puckett's right to seek relief from the Government's breach." *Id*. at 1430-31. "Puckett *forfeited* the claim of error through his counsel's failure to raise the argument in the District Court." *Id*. at 1431.

Under the Court's jurisprudence, forfeiture is commonly marked by mistake, inadvertence, or confusion. *See, e.g.*, *Granberry*, 481 U.S. at 132 & n.5 (referring to "inadvertence" and "mistake"). This makes sense given waiver must be intentional and knowing. In *Day*, for example, the State expressly conceded that the habeas petition had been timely filed. 547 U.S. at 201. But the

Court concluded that the State's concession was premised upon "an evident miscalculation of the elapsed time" that the Court suggested was both a mistake of fact, *id.* at 202, and a mistake of law, *see id.* at 203 (noting that the State "[o]verlook[ed] controlling Eleventh Circuit precedent"). Because there was "no intelligent waiver on the State's part," *id.* at 202, the Court treated the erroneous concession as forfeiture, thereby preserving judicial "discretion to correct the State's error and, accordingly, to dismiss the petition as untimely under AEDPA's one-year limitation," *id.*

3. 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. As *Granberry* explained, it would be "unwise to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in district court while holding [a procedural] defense in reserve for use on appeal if necessary." 481 U.S. at 132. *Day* similarly focused on whether the "State 'strategically' withheld the defense." 547 U.S. at 211. That important concern thus bears on "whether the administration of justice would be better served" by considering the forfeited issue "or by reaching the merits of the petition forthwith." *Granberry*, 481 U.S. at 131. In other words, a State's gamesmanship in failing to timely preserve a defense is but one of many possible "circumstances which the courts of appeals . . . are able to evaluate individually" when exercising their discretion to consider a forfeited threshold defense to a federal habeas petition. *Id.* at 136.

B. The facts of this case show that the State did not intelligently waive the Section 2244(d) limitations defense.

There is no basis for concluding that the State intelligently waived the Section 2244(d) limitations defense. The statement in the pre-answer response and answer was neither an intentional nor knowing relinquishment of the issue. The State's equivocal response may have forfeited the Section 2244(d) issue—but it clearly did not waive it.

1. The State did not intentionally waive the Section 2244(d) limitations defense. In its pre-answer response and its answer, the State stressed that it was "not conceding[] the timeliness of Wood's habeas petition," JA 70a, and "[did] not concede[] the timeliness of the petition," JA 87a. Faced with an unusual scenario—largely of Wood's own making—the State, for better or worse, notified the district court of the 1995 state postconviction motion, questioned whether it rendered Wood's case timely, and ultimately informed the court that "Respondents will not challenge, but are not conceding, the timeliness of Wood's habeas petition in the pre-answer response." JA 70a; *see also* JA 87a. The State's prominent refusal to concede timeliness—even if it was preceded by "cryptic" analysis—necessarily precludes an intentional waiver.

One thing is certain: contrary to Wood's assertion, Pet'r Br. 37-38, the State was not intentionally relinquishing the issue. By refusing to "concede" timeliness, the State did not "grant as a right" or "accept as true" the timeliness of Wood's petition. Webster's Ninth New Collegiate Dictionary 271. Try as he might, Wood cannot ignore the State's express desire to "not conced[e] the

timeliness of Wood's habeas petition." JA 70a; JA 87a. The State's response was not a concession of the timeliness of Wood's habeas petition. At most, the State's position on the timeliness question was ambiguous. But an ambiguous statement is not a waiver. Indeed, even Wood acknowledges that waiver requires a "clear manifestation of an intentional relinquishment of a known right." Pet'r Br. 35. No such clear intent is even remotely present here. The State did not affirmatively consent to the timeliness of Wood's petition.

2. Even if this statement could be viewed as intentional, which it cannot, it was not made *knowingly*. As *Day* makes clear, failing to preserve the timeliness issue is not *knowing* if the State labored under a mistake of law or fact. That is precisely what occurred here. The State's pre-answer response reveals that it was based on a misunderstanding of how AEDPA's limitations period interacts with state-court procedural rules in the context of possible abandonment. After raising the timeliness issue, the sole reason for not pursuing it vigorously was the mistaken belief that Wood's 1995 motion needed to be abandoned "before 1997" for the federal habeas petition to be untimely. JA 70a. As the Tenth Circuit explained, however, this is not the law: "any break in the pendency of the 1995 motion after AEDPA's enactment renders Wood's 2008 federal habeas petition untimely." JA 143a. In other words, if the 1995 motion had been abandoned at any time before the filing of his 2004 state postconviction motion, Wood's federal petition was untimely. That was not debatable.[17] The State's failure to properly argue the

17. Of course, if Wood were correct that the 1995 state conviction motion remained pending until he filed his federal

issue thus was based on a mistake. As in *Day*, because the State's labored under a misunderstanding of the law, it did not knowingly waive the Section 2244(d) limitations defense.

Wood argues that because "the state was aware of a possible argument that the petition was untimely and . . . elected not to raise a timeliness defense," it intentionally waived the issue. Pet'r Br. 35; *see also id.* 37-38. But if awareness of an issue amounted to a knowing waiver, *Day* would have turned out differently; the State was clearly aware of the potential defense in that case. *See* 547 U.S. at 201-02. Indeed, the State had expressly addressed and conceded the issue in its answer. *Id.* Yet this Court concluded that the State's failure to preserve the issue was not knowing. Given that the State did not even concede timeliness here, there is no basis for holding it to a higher standard than the respondent in *Day*. Under *Day*, the State's awareness of a Section 2244(d) limitations issue cannot be decisive in determining whether it has been knowingly waived.[18]

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habeas petition in 2008, then the claims set forth in it are unexhausted and his petition is thus procedurally barred.

18. Moreover, Wood's focus on a party's awareness would blur the clear distinction between intelligent waiver and forfeiture by forcing federal courts to surmise from a party's pleadings whether it was aware of a potential argument it failed to preserve. This Court has rejected such an amorphous approach. *See, e.g.*, *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142-45 (1967) (declining to find waiver by presuming that "the general state of the law . . . was such that [the plaintiff] should . . . have seen 'the handwriting on the wall'").

3. Because the State did not intelligently waive the Section 2244(d) limitations defense, its failure to preserve the issue must be treated as forfeiture. The facts here bear the mark of mistake and inadvertence that commonly lead to the forfeiture of an issue as opposed to indicating that the State intentionally and knowingly relinquished it. In the aftermath of the district court's decision to implement the pre-answer process, it instructed the State to address the petition's timeliness at the outset of this litigation. The State's misunderstanding of the legal framework led it to believe that the limitations question was a far closer call than it actually was and to submit an equivocal response. Wood's failure to alert the district court to the existence of the 1995 state postconviction motion only compounded the problem. These are exactly the kind of circumstances that lead a State to forfeit a threshold defense that, in hindsight, it should have pressed from the beginning.

III. The Court Of Appeals Appropriately Exercised Its Discretion To Resolve The Limitations Defense And Dismiss Wood's Petition As Untimely.

Whether the court of appeals appropriately resolved the forfeited limitations issue is not within the scope of either question presented. Wood's attempt to second-guess that aspect of the decision below thus is not before this Court. In any event, his arguments are entirely misplaced. The Tenth Circuit followed this Court's instructions in *Day* and reasonably concluded that it was appropriate to resolve the issue under the facts of this case.

1. As an initial matter, the State's handling of the timeliness issue was not a tactical ploy. Far from it. The confusion surrounding this issue was the product

of Wood's failure to indicate the existence of the 1995 state-court motion, the State's erroneous understanding of the interaction of AEDPA's tolling and limitations periods, and the complexity of the procedural posture. Contrary to Wood's suggestion, Pet'r Br. 38-42, the State did not "strategically" withhold the limitations issue from the district court, *Day*, 547 U.S. at 200, or refrain from raising it as a matter of "tactics," *Granberry*, 481 U.S. at 132. It was the State (in its pre-answer response) that first alerted the district court to the motion's existence and its potential impact on the petition's timeliness. And it was the Tenth Circuit—not the State—that raised the issue on appeal. There is simply no basis to suggest that the State was sandbagging in an attempt to prevail on the merits instead, especially when the State sought to have the petition dismissed on other procedural grounds. It 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. The State's handling of the limitations issue was far from perfect—but it was anything but strategic.

2. Nor can Wood complain that he was denied notice and an opportunity to present his arguments on the timeliness issue. *See Day*, 547 U.S. at 210. Before the court of appeals dismissed his petition as untimely, Wood had filed no fewer than five briefs addressing whether his petition was timely under Section 2244(d).[19] Nor did new information come to light in later proceedings, as Wood

19. Wood addressed the issue of timeliness in: (1) a response to the show cause order; (2) a motion for reconsideration; (3) a response to the State's pre-answer response; (4) a Tenth Circuit opening brief; and (5) a Tenth Circuit reply brief.

was always aware of his 1995 state-court motion. After all this briefing, notice, and an opportunity to be heard, "[t]he considerations of comity, finality, and the expeditious handling of habeas proceedings that motivated AEDPA," *Day*, 547 U.S. at 208, counseled in favor of dismissal on this ground.

3. Wood also suffered no measurable prejudice from the Tenth Circuit's decision to address the question. Wood hypothesizes that a contrary response from the State in its pre-answer response or answer might have led to an evidentiary hearing or convinced the district court to appoint him counsel, which in turn may have led to a stay and abeyance of his petition so he could somehow exhaust the 1995 motion. Pet'r Br. 38-42. But such speculation ignores the facts of this case. As the court of appeal's decision shows, no evidentiary hearing was needed to resolve this issue. Moreover, the Tenth Circuit appointed appellate counsel to assist Wood in addressing this issue—and yet on appeal he still failed to make the argument he asks the Court to adopt until the panel rehearing stage. No counterfactual scenario could have solved Wood's timeliness problem. And even if it could, the claims he wishes to pursue would still be unexhausted and procedurally barred.

4. The Tenth Circuit carefully exercised its discretion to address the timeliness issue despite the State's mistaken handling of it. As it was required to do, the court of appeals considered whether it would be appropriate to decide the issue notwithstanding the State's forfeiture. It understood the obligation to "assure . . . that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and determine whether the interests of

justice would be better served by addressing the merits or by dismissing the petition as time barred." JA 140a (quoting *Day*, 547 U.S. at 210). The court wisely concluded that "consideration of the timeliness issue is particularly apt in this case, given that the issue was raised in the district court and addressed by Wood, the parties have briefed the issue on appeal, and the interests of justice would be served in reaching the timeliness issue given the extensive time period involved." *Id.* That is a perfectly reasonable exercise of the discretion afforded to the Tenth Circuit under AEDPA, the Habeas Rules, and this Court's decisions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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