No. 04-1324

In the Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

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

Respondent.

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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

28 U.S.C. § 2244(d) establishes a one-year limitations period for federal habeas corpus petitions filed by state prisoners. When Patrick Day filed his federal habeas petition, the magistrate judge examined it as required by Habeas Rule 4 and ordered the State to respond. In its answer, the State did not raise a limitations defense. Instead, it expressly conceded that Day's petition was timely. Nevertheless, almost a year after the petition was filed and eight months after the parties finished briefing the merits of Day's claims, the magistrate judge recommended *sua sponte* that the petition be dismissed as untimely. The district court adopted that recommendation and the Eleventh Circuit affirmed. Acknowledging a conflict with decisions of the Sixth and Ninth Circuits, the Eleventh Circuit held that the State's failure to plead limitations was not a waiver and that Rule 4 – contrary to its plain text – authorizes a court to dismiss a habeas petition *sua sponte* after an answer has been filed.

This case presents the following important questions on which the courts of appeals are divided:

1. Does the State waive a limitations defense to a habeas corpus petition when it fails to plead or otherwise raise that defense and expressly concedes that the petition was timely?

2. Does Habeas Rule 4 permit a district court to dismiss a habeas petition *sua sponte* after the State has filed an answer based on a ground not raised in the answer?

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 391 F.3d 1192. The report and recommendation of the magistrate judge (Pet. App. 8a-15a) and the order of the district court adopting that recommendation and dismissing the petition (*id*. at 7a) are unreported.

JURISDICTION

The court of appeals entered judgment on November 29, 2004. Justice Kennedy extended the time for filing a certiorari petition to March 30, 2005, and the petition was filed on that date. This Court granted the petition on September 27, 2005. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

Pertinent portions of 28 U.S.C. §§ 2244(d) and 2263, Federal Rules of Civil Procedure 8, 12, and 81, Habeas Rules 4, 5, and 11, and former Habeas Rules 4 and 5 are set out in an Addendum at the end of this brief.

STATEMENT

A. Rules Governing The Habeas Statute Of Limitations

When a state prisoner files a petition for a writ of habeas corpus in federal court, one defense that the State may assert is limitations. Under 28 U.S.C. § 2244(d)(1), the prisoner has one year from the date his conviction and sentence become final on direct review to file a federal habeas petition. The courts of appeals have held that direct review is complete – and the limitations period begins to run – upon either the conclusion of certiorari proceedings in this Court or the expi-

ration of the 90-day period for seeking certiorari.[1] If the prisoner later files an application for state post-conviction review, the federal limitations period is tolled while that application is "pending." 28 U.S.C. § 2244(d)(2).

When a state prisoner's petition is untimely under this statute, courts have held that a judge may dismiss it summarily before ordering the State to answer. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rule 4") provides that "the judge must promptly examine [the petition]. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief * * *, the judge must dismiss the petition * * *. If the petition is not dismissed, the judge must order the respondent to file an answer * * *."[2]

While this case was pending below, the Habeas Rules contained no procedures for considering a limitations issue following an order to answer. Thus, the Federal Rules of Civil Procedure ("Civil Rules") supplied those procedures. See Fed. R. Civ. P. 81(a)(2); Habeas Rule 11. The Civil Rules provide that "[i]n pleading to a preceding pleading, a party *shall* set forth affirmatively * * * statute of limitations * * * and any other * * * affirmative defense." Fed. R. Civ. P. 8(c) (emphasis added). Similarly, the rules require that "[e]very defense, in law or fact, to a claim for relief in any pleading * * * shall be asserted in the responsive pleading thereto if one is required * * *." Fed. R. Civ. P. 12(b). This mandatory pleading requirement has recently been incorpo-

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[1] *E.g., Locke* v. *Saffle*, 237 F.3d 1269, 1272-73 (10th Cir. 2001); *cf. Clay* v. *United States*, 537 U.S. 522, 524-25, 527 (2003) (reaching same conclusion under § 2255).

[2] The quoted language is from the rule currently in force. Although the rule was amended effective December 1, 2004, after the lower courts' decisions in this case, the Advisory Committee notes state that no substantive change was intended regarding the quoted portion of the rule. The prior rule appears in the Addendum, *infra*.

rated into Habeas Rule 5(b), which says that "[t]he answer * * * *must* state whether any claim in the petition is barred by * * * a statute of limitations." (Emphasis added).

As the Eleventh Circuit acknowledged, a party's failure to plead an affirmative defense as required by these rules constitutes a waiver of that defense. Pet. App. 4a. In this case, Day contends – and other circuits agree – that the State implicitly waived (*i.e.*, forfeited) any limitations defense by failing to plead or otherwise raise it in the district court. The State also expressly waived the defense by conceding in its answer that Day's petition was timely.

B. Day's Trial And Direct Appeal

The relevant events begin with Day's trial and direct appeal. For the Court's convenience, a timeline of significant dates appears in the Appendix to the Petition at page 16a.

Day was indicted for first-degree murder and tried in the Circuit Court of Escambia County, Florida. In September 1998, the jury convicted him of second-degree murder and found that he carried a weapon during the offense. J.A. 1, 10.[3] Although the sentencing range for this crime was approximately 21-35 years, the trial judge departed upward and sentenced Day to 55 years in prison. The judge based this sentence on his own findings that (1) Day's record indicated an escalating pattern of criminal conduct, and (2) Day engaged in an elaborate cover-up of the crime. J.A. 1, 23.[4]

The public defender appealed Day's sentence to Florida's First District Court of Appeal. On December 21, 1999, the

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[3] See also Ex. A-3. Materials regarding Day's trial, direct appeal, and state post-conviction motion were attached as exhibits to the State's federal habeas corpus answer (Dkt. No. 7), excerpts of which appear at J.A. 23-25. In this brief, all citations to "Ex." refer to exhibits to the State's answer unless otherwise noted.

[4] See also Ex. C; Ex. D at 3.

court affirmed. *Day* v. *State*, 746 So. 2d 1219 (Fla. 1st DCA 1999). It rejected the trial judge's first reason for departure, holding that Day's record did not show an escalating pattern of criminal conduct. *Id.* at 1220. As to the second reason, although the Florida Supreme Court had held that efforts to cover up a murder were not a valid ground for departure,[5] the court of appeal concluded that Day's trial counsel did not preserve that argument. *Ibid.*

Day did not file a petition for a writ of certiorari asking this Court to review the court of appeal's decision.[6] His last day to do so was March 20, 2000. See Sup. Ct. R. 13.

C. Day's State Post-Conviction Review

On March 9, 2001, Day filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. J.A. 10-13. The *pro se* motion alleged several claims of ineffective assistance by trial counsel. The state trial court denied the motion, J.A. 2, and Day appealed.

On October 9, 2002, the court of appeal affirmed the denial of Day's motion without opinion. J.A. 14. Day's motion for rehearing was denied on November 15. J.A. 15. The court of appeal issued its mandate on December 3, 2002. J.A. 16. Day did not file a certiorari petition with this Court, and his last day to do so was February 13, 2003. Sup. Ct. R. 13.3.

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[5] *Smith* v. *State*, 620 So. 2d 187 (Fla. 1993) (per curiam); *Connelly* v. *State*, 704 So. 2d 590, 591 (Fla. 4th DCA 1997); see also *Rendon* v. *State*, 690 So. 2d 645, 647-48 (Fla. 4th DCA 1997) (discussing continued validity of *Smith*).

[6] Because the court of appeal was the highest state court in which a decision could be had, this Court had jurisdiction to review that decision by writ of certiorari. 28 U.S.C. § 1257(a); see Pet. 5 n.5.

D. The District Court Dismisses Day's Federal Petition *Sua Sponte*

Instead, Day drafted a federal petition for a writ of habeas corpus, which he provided to the prison authorities for mailing on January 8, 2003.[7] J.A. 17-20. Day's *pro se* petition generally repeated the claims of ineffective assistance raised in his state post-conviction motion.

The magistrate judge examined the petition as required by Habeas Rule 4 and determined it was "in proper form." J.A. 21-22. She ordered the State to file an answer within 45 days. Consistent with the version of Habeas Rule 5 then in force, the order stated that the answer should address whether Day had exhausted his state remedies and, if not, whether they were procedurally barred. The order provided that those defenses would be waived if not raised in the answer.

On March 19, 2003, the State filed an answer. J.A. 23-25. The State did not assert the limitations bar of 28 U.S.C. § 2244(d) in its answer or in any other district court filing. Moreover, its answer expressly stated that "Respondent agrees the petition is timely; filed after 352 days of untolled time." J.A. 24. The State then spent 28 pages addressing the merits of Day's claims. The magistrate judge allowed Day to file a reply, which he did on April 2, 2003. J.A. 6. In June, the case was referred to a different magistrate judge.

On December 11, 2003, nearly a year after the petition was filed and eight months after the parties finished briefing the merits of Day's claims, the magistrate judge issued a *sua sponte* order stating that the petition was untimely and requiring Day to show cause why it should not be dismissed. J.A. 26-30. Day responded that his petition was timely for three

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[7] The courts of appeals have applied the "prison mailbox" rule of *Houston* v. *Lack*, 487 U.S. 266, 270 (1988), to determine the date on which a prisoner's habeas corpus petition is filed. *E.g., Noble* v. *Kelly*, 246 F.3d 93, 97-98 (2d Cir. 2001) (per curiam).

reasons: (1) the State's answer agreed it was timely; (2) the statutory tolling period included the time for seeking certiorari on state post-conviction review; and (3) the public defender who handled his direct appeal refused to provide him with the trial transcript for almost a year. J.A. 31-32.

The magistrate judge disagreed and issued a report recommending that Day's petition be dismissed. Pet. App. 8a-15a. The judge noted that 353 days had elapsed between the expiration of the time for seeking certiorari on direct review (March 20, 2000) and the beginning of the tolling period for state post-conviction review (March 9, 2001). He stated that Eleventh Circuit precedent excluded from the tolling period the time for seeking certiorari on state post-conviction review. Thus, the judge held that tolling ended when the court of appeal issued its mandate on December 3, 2002, and that the one-year limitations period expired 12 days later on December 16, 2002. Because Day's petition was not filed until January 8, 2003, it was 23 days late. The judge concluded that Day's difficulty obtaining the transcript did not warrant equitable tolling and recommended dismissal of the petition.

Day filed a timely objection to the report, arguing that the magistrate judge's *sua sponte* action was not authorized by Habeas Rule 4 and improperly cured the State's waiver of the limitations defense. J.A. 34-36. The district court adopted the report and dismissed Day's petition. Pet. App. 7a. The court also denied Day a certificate of appealability. The Eleventh Circuit, however, granted him a certificate to determine "[w]hether the district court erred in addressing the timeliness of appellant's habeas corpus petition * * * after the appellee had conceded that [it] was timely." J.A. 37.

E. The Eleventh Circuit Affirms

On appeal, the Eleventh Circuit affirmed the dismissal. Pet. App. 1a-6a. The court began by reviewing the dates relevant to the issue of limitations. It agreed with the magistrate judge that the tolling period ended when the court of appeal

issued its mandate affirming the denial of state post-conviction relief, not when Day's time to seek certiorari review of that decision expired. *Id.* at 2a-3a. Thus, it held that the petition was 23 days late, making the State's concession of timeliness "patently erroneous." *Id.* at 2a, 4a.

Turning to the State's failure to assert the limitations bar, the court noted that limitations is an affirmative defense that is waived if not pleaded "[i]n an ordinary civil case." Pet. App. 4a. Yet it held that habeas cases are not controlled by this rule. Even after the State files an answer that does not plead limitations, the court reasoned, Habeas Rule 4 allows the district judge to dismiss the petition as untimely *sua sponte*. *Id.* at 4a-5a. It also concluded that federal courts have "an obligation to enforce the federal statute of limitations * * * to promote comity, finality, and federalism." *Id.* at 5a.

SUMMARY OF ARGUMENT

The fundamental issue in this case is whether the State waived the limitations defense of 28 U.S.C. § 2244(d). The State did not plead that defense or otherwise bring it to the district court's attention. To the contrary, it expressly conceded in its answer that Day's habeas petition was timely. Nevertheless, almost a year after the petition was filed, the court dismissed it *sua sponte* as untimely. On these facts, the State waived the limitations defense in two ways.

First, the State implicitly waived the defense by failing to raise it, and the district court erred by imposing the waived defense *sua sponte*. In the adversary system of the Civil Rules, limitations is an affirmative defense that is waived if not pleaded, and courts may not dismiss *sua sponte* based on waived defenses. Under Civil Rule 81, these two rules also apply to habeas cases because they are not inconsistent with AEDPA or the Habeas Rules. AEDPA and the Habeas Rules do not authorize courts to impose defenses *sua sponte* after an answer has been filed, nor do they alter the traditional understanding of limitations as a personal, waivable defense.

Moreover, because Congress has expressly modified the rules of waiver and *sua sponte* dismissal with respect to other defenses, the Court should presume that it did not intend to modify them for AEDPA's limitations defense.

Sound policy supports the conclusion that a district court may not impose a waived limitations defense *sua sponte*. Giving courts discretion to impose such a defense would undermine judicial neutrality, the adversary process, and procedural efficiency and certainty. In addition, there is no need to permit post-answer *sua sponte* dismissals in order to vindicate interests of comity, finality, or federalism. As this Court has recognized, finality is not offended when a generally-applicable Civil Rule provides an exception to AEDPA's limitations period. Furthermore, the limitations period does not implicate comity and federalism because it is not a mechanism for deference to state courts; rather, it cuts off federal habeas review based on a timing rule that state courts never consider. The State's involvement with the federal limitations period is as a party, and federal courts show a State litigant no disrespect by entertaining a claim that it does not contend is barred.

Second, the State expressly waived the limitations defense by conceding that Day's petition was timely. The district court erred by failing to give binding effect to the State's concession, especially given that it was correct. AEDPA's limitations period is tolled by statute while an application for state post-conviction relief is "pending," and this Court has held that an application is pending until its resolution is "final." Because a state court denial of post-conviction relief is not final and remains subject to revision until the time to petition for certiorari expires, tolling continues during the certiorari period. Under this tolling rule, Day's petition was timely and should not have been dismissed. For these reasons, the court of appeals' judgment affirming the dismissal should be reversed.

ARGUMENT

I. A "PERIOD OF LIMITATION" IS AN AFFIRMATIVE DEFENSE THAT COURTS MAY NOT IMPOSE *SUA SPONTE* AFTER IT HAS BEEN WAIVED.

In 28 U.S.C. § 2244(d)(1), Congress created a one-year "period of limitation" for habeas cases. The statute provides no procedures, however, for raising or deciding whether that period has expired. Nor did the Habeas Rules provide any such procedures at the time this case was pending in the district court.[8] In this situation, Congress has determined that courts should resort to the Federal Rules of Civil Procedure ("Civil Rules"), which are "applicable as a general matter to habeas cases." *Slack* v. *McDaniel*, 529 U.S. 473, 489 (2000); see Fed. R. Civ. P. 81(a)(2); Habeas Rule 11. The Civil Rules provide that a limitations defense is waived by default – that is, forfeited[9] – if not pleaded in the answer or otherwise raised in compliance with the procedural rules.

A. Under The Civil Rules, A Litigant Waives Limitations By Failing To Plead It.

A statutory "period of limitation" like the one in § 2244(d)(1) defines the time for bringing suit on a claim; it does not extinguish the right that is the basis for the claim. *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 416-17 (1998); see also *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S.

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[8] New Habeas Rule 5(b) is consistent with the Civil Rules discussed in this part of the brief. See p. 3, *supra*; Part II.C., *infra*.

[9] Strictly speaking, failure to plead an affirmative defense results in a "forfeiture," not a "waiver." Forfeiture is "the failure to make a timely assertion of a right," while waiver is "the intentional relinquishment or abandonment of a known right." *Kontrick* v. *Ryan*, 540 U.S. 443, 458 n.13 (2004). Because most courts use the term "waiver" to describe the result of failing to plead an affirmative defense under Civil Rule 8(c), this brief uses that term as well.

497, 504 (2001). Thus, the Civil Rules treat a "statute of limitations" as an "affirmative defense," not a jurisdictional bar. Civil Rule 8(c); *Cent. States, Se. & Sw. Areas Pension Fund* v. *Navco*, 3 F.3d 167, 173 (7th Cir. 1993) ("[P]eriods of limitations in federal statutes * * * are universally regarded as non-jurisdictional."). Because limitations is a non-jurisdictional affirmative defense, the defendant has the burden of raising it. See *Gomez* v. *Toledo*, 446 U.S. 635, 640 (1980); *Foulk* v. *Charrier*, 262 F.3d 687, 697 (8th Cir. 2001).

It is well established that affirmative defenses generally – and the limitations defense specifically – are waived if a defendant does not plead them in an answer or otherwise raise them in compliance with the rules of procedure. *Kontrick* v. *Ryan*, 540 U.S. 443, 458-59 (2004) ("Time bars * * * generally must be raised in an answer or responsive pleading * * *. Ordinarily, * * * under the Civil Rules, a defense is lost if it is not included in the answer or amended answer.").[10] The principle that failure to plead an affirmative defense results in an implicit waiver of the defense is based on the mandatory language of Civil Rule 8(c), which states that, "[i]n pleading to a preceding pleading, a party *shall* set forth affirmatively

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[10] See also *Eberhart* v. *United States,* 126 S. Ct. 403, 407 (2005) (per curiam) ("[W]here the Government failed to raise a defense of untimeliness until after the District Court had reached the merits, it forfeited that defense."); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("[A] statute of limitations * * * is subject to waiver, estoppel, and equitable tolling."); Pet. App. 4a; 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1278, at 644-45 (3d ed. 2004) ("It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case * * *."); *id.* at n.12 (collecting cases applying this proposition to limitations defenses). Civil Rule 12(h) alters this waiver rule with respect to certain defenses, but limitations and the other defenses listed in Rule 8(c) are not among them.

* * * statute of limitations." (Emphasis added).[11] Civil Rule 12(b) contains similar mandatory language: "Every defense * * * *shall be asserted* in the responsive pleading," except for certain listed defenses not including limitations. (Emphasis added). Taken together, these rules establish that affirmative defenses are waived if not timely raised.[12]

One rationale for this settled principle of waiver by omission is judicial efficiency. By requiring defendants to raise affirmative defenses early in the litigation, Civil Rule 8(c) gives the court and all parties notice of the issues that will be raised in a case. As a result, the court can quickly identify successful defenses and terminate the proceedings, saving time and expense for itself and the parties. See *Robinson* v.

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[11] *Doubleday & Co.* v. *Curtis*, 763 F.2d 495, 503 (2d Cir. 1985) ("[Rule 8(c)'s] mandatory language has impelled us to conclude that a party's failure to plead an affirmative defense bars its invocation at later stages of the litigation."); see also *Coleman* v. *Ramada Hotel Operating Co.*, 933 F.2d 470, 474-75 (7th Cir. 1991) (quoting Rule 8(c) and stating that "[b]y negative inference, a defendant's omission of an affirmative defense should therefore amount to a waiver."); Wright & Miller, *supra*, § 1278, at 664 ("[T]he waiver of affirmative defenses can be supported upon general statutory construction principles in view of the mandatory character of the language of Rule 8(c).").

[12] Current Civil Rule 8(c) finds it roots in the English Rules Under the Judicature Act (The Annual Practice, 1937) O.19, r.15. See Advisory Committee Note of 1937 to Civil Rule 8(c). The English Rules in force at the time of Civil Rule 8(c)'s adoption read, in pertinent part, that "[t]he defendant or plaintiff * * * must raise by his pleading all matters which show the action or counterclaim not to be maintainable * * * as for instance, * * * Statute of Limitations * * *." The accompanying commentary explained that "no evidence of such matters can, as a rule, be given at the trial if they be not expressly pleaded." These historical roots confirm that the drafters of Rule 8(c) intended that affirmative defenses would be waived if not pleaded.

Johnson, 313 F.3d 128, 134 (3d Cir. 2002). Similarly, one of the primary purposes of limitations is to promote finality and judicial efficiency by relieving courts of "the burden of trying stale claims." *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 428 (1965).[13] If a defendant is not required to raise limitations early in the litigation, however, these efficiency benefits are lost. *United States* v. *Bendolph*, 409 F.3d 155, 173 (3d Cir. 2005) (en banc) (Nygaard, J., dissenting).

Statutes of limitations also serve other purposes, such as ensuring notice of adverse claims and protecting settled expectations against a fact-finding process impaired by "memories [that] have faded" and "evidence [that] has been lost." *Burnett*, 380 U.S. at 428.[14] Because the defendant is in the best position to determine whether these concerns are present in a given case, it is most efficient and appropriate to allow the defendant – not the court – to decide whether it needs the protection of limitations.

B. Under The Civil Rules, Courts May Not Dismiss *Sua Sponte* Based On A Waived Affirmative Defense Unless Authorized By Statute Or Rule.

When a defendant has waived an affirmative defense under the Civil Rules, a court may not use that defense to dis-

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[13] See also *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) (stating that, among other purposes, "the AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources"); *McCuskey* v. *Cent. Trailer Servs., Ltd.*, 37 F.3d 1329, 1333 (8th Cir. 1994).

[14] See also *Bd. of Regents* v. *Tomanio*, 446 U.S. 478, 487 (1980) (explaining that statutes of limitations bar claims that are "likely either to impair the accuracy of the fact-finding process or to upset settled expectations"); *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) ("Statutes of limitations * * * represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time.").

miss the case *sua sponte* unless expressly authorized by statute or rule. The Civil Rules authorize *sua sponte* dismissal only for lack of subject matter jurisdiction,[15] not for limitations or the other affirmative defenses listed in Civil Rule 8(c). The drafters of the Civil Rules thus knew how to authorize *sua sponte* dismissals and chose not to do so with respect to those defenses. Accordingly, under the principle of *expressio unius est exclusio alterius*,[16] courts lack the authority to apply a waived limitations defense *sua sponte* in an ordinary civil case. *Haskell* v. *Washington Twp.,* 864 F.2d 1266, 1273 (6th Cir. 1988) ("Since [limitations] is a waivable defense, it ordinarily is error for a district court to raise the issue *sua sponte*."); *Wagner* v. *Fawcett Publ'ns*, 307 F.2d 409, 412 (7th Cir. 1962) (district court "had no right to apply the statute of limitations sua sponte" after defendant failed to raise it).[17]

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[15] See Fed. R. Civ. P. 12(h)(3) ("*Whenever* it appears by suggestion of the parties *or otherwise* that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." (emphasis added)).

[16] *Leatherman* v. *Tarrant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 168 (1993) (applying "*expressio unius*" to Civil Rules).

[17] See also *Bendolph*, 409 F.3d at 172 (Nygaard, J., dissenting) ("[G]enerally it is not appropriate for a court to *sua sponte* raise non-jurisdictional defenses not raised by the parties."); *Hutcherson v. Lauderdale County*, 326 F.3d 747, 757 (6th Cir. 2003); *Kropelnicki* v. *Siegel*, 290 F.3d 118, 130 n.7 (2d Cir. 2002); *Marshall-Mosby* v. *Corporate Receivables, Inc*., 205 F.3d 323, 327 (7th Cir. 2000); *Warnock* v. *Pecos County*, 116 F.3d 776, 778 (5th Cir. 1997); *Davis* v. *Bryan*, 810 F.2d 42, 44 (2d Cir. 1987); *Doubleday*, 763 F.2d at 502 ("[T]he legal parameters of a given dispute are framed by the positions advanced by the adversaries, and may not be expanded *sua sponte* by the trial judge."); Wright & Miller, *supra*, § 1278, at 687-88 ("Several courts of appeals have held that the district court may dismiss a claim *sua sponte* based on an af-

This rule against courts imposing waived affirmative defenses *sua sponte* is supported by the structure of our adversary system as well as practical considerations. As a structural matter, an adversary system requires parties and not courts to raise relevant issues. *McNeil* v. *Wisconsin*, 501 U.S. 171, 181 n.2 (1991). The adversary process is compromised when a court unilaterally assists one party in conceiving and applying affirmative defenses that the party has waived. *Doubleday & Co*. v. *Curtis*, 763 F.2d 495, 502 (2d Cir. 1985) (framing of issues by parties is a "cardinal principle" of the adversarial system and *sua sponte* consideration runs "counter to the spirit of fairness embodied in the Federal Rules of Civil Procedure"); see *Smith* v. *Horn*, 120 F.3d 400, 409 (3d Cir. 1997) ("[W]here the [S]tate has never raised the issue at all, in any court, raising the issue sua sponte puts us in the untenable position of ferreting out possible defenses upon which the state has never sought to rely. When we do so, we come dangerously close to acting as advocates for the [S]tate rather than as impartial magistrates.").

In addition, if courts could apply affirmative defenses *sua sponte* despite a defendant's failure to plead them, the waiver doctrine of Rule 8(c) "would have little meaning." *Haskell*, 864 F.2d at 1273; see also *Bendolph*, 409 F.3d at 175 (Nygaard, J., dissenting) (allowing *sua sponte* dismissal "renders the concept of waiver a nullity"); *Scott* v. *Collins*, 286 F.3d 923, 930 (6th Cir. 2002) (holding that *sua sponte* dismissal "was an impermissible curing of the respondent's waiver"). Absent waiver, a party could seek a favorable ruling on the merits while strategically holding a limitations defense in reserve, thus undermining the judicial efficiency purpose of the defense.

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firmative defense * * * *as long as the defendant has not waived the defense*." (emphasis added)).

C. The Civil Rules On Waiver And *Sua Sponte* Dismissal Apply To AEDPA's Limitations Defense.

The rules governing limitations defenses in ordinary civil cases also apply to the "one-year period of limitation" in § 2244(d)(1). Lower courts agree that AEDPA's limitations period is not a jurisdictional provision but "an affirmative defense that the state bears the burden of asserting." *Hill* v. *Braxton,* 277 F.3d 701, 705 (4th Cir. 2002); see *Nardi* v. *Stewart*, 354 F.3d 1134, 1140 (9th Cir. 2004) ("There is no dispute that AEDPA's statute of limitations is an affirmative defense."); *Bendolph*, 409 F.3d at 164 (reaffirming holding that "limitations period is not jurisdictional and therefore is subject to * * * waiver.").[18]

"Because the § 2254(d) statute of limitations is an affirmative defense, [Civil] Rule 8(c) * * * requires that a party raise it in the first responsive pleading to avoid waiving it." *Scott*, 286 F.3d at 927; see also *Nardi*, 354 F.3d at 1140-41. Several courts have held that Civil Rules 6, 8(c), and 12(b) govern the procedure for calculating and asserting AEDPA's affirmative defense of limitations.[19]

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[18] See also *Acosta*, 221 F.3d at 122 ("The AEDPA statute of limitations is not jurisdictional, and nothing in AEDPA or in the 2254 Habeas Rules indicates that the burden of pleading the statute of limitations has been shifted from the respondent to the petitioner. The AEDPA statute of limitations is therefore an affirmative defense * * *." (citation omitted)); *Jackson* v. *Sec'y for Dep't of Corr.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (per curiam); *Scott,* 286 F.3d at 927; *Kreutzer* v. *Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000); *Davis* v. *Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *Miller* v. *Marr*, 141 F.3d 976, 978 (10th Cir. 1998).

[19] *Robinson*, 313 F.3d at 137 ("[A]ffirmative defenses under AEDPA should be treated the same as affirmative defenses in other contexts, and, if not pleaded in the answer, they must be raised at the earliest practicable moment thereafter" to avoid waiver); see also *Morrison* v. *Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005)

Under the Civil Rules, therefore, the AEDPA limitations defense is waived if not timely raised. *Nardi*, 354 F.3d at 1141 ("[T]he [S]tate waives the statute of limitations by failing to raise the defense in its answer."); *Scott*, 286 F.3d at 928 ("[R]espondent's failure to raise the statute of limitations defense as required by * * * the rules of pleading * * * amounted to a waiver of that defense.").[20] Indeed, this Court has recognized in several habeas cases that affirmative defenses must be raised timely or else they are waived. *Gray* v. *Netherland*, 518 U.S. 152, 165-66 (1996) ("[P]rocedural default is an affirmative defense" that the State is "obligated to raise * * * or lose the right to assert the defense thereafter."); *Schiro* v. *Farley*, 510 U.S. 222, 228-29 (1994) ("The *Teague* [v. *Lane*, 489 U.S. 288 (1989),] bar to the retroactive application of new rules is not * * * jurisdictional" and "a State can

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(applying Civil Rules 8(c) and 12(b) to AEDPA limitations defense); *Hill*, 277 F.3d at 705 (applying Civil Rule 8(c) to AEDPA limitations defense); *Acosta*, 221 F.3d at 121-22 (same); *Libby* v. *Magnusson*, 177 F.3d 43, 49 (1st Cir. 1999) (Civil Rule 8(c) "functions much the same way in habeas corpus jurisprudence"). See also *Wilson* v. *Beard*, 426 F.3d 653, 662 & n.6 (3d Cir. 2005) (holding that Civil Rule 6(a) governs computation of AEDPA period of limitation and collecting cases holding the same).

[20] See also *Bendolph*, 409 F.3d at 164 (reaffirming holding of *Robinson*, 313 F.3d at 134, 137, that "a limitations defense may be waived by a State defendant in a habeas proceeding" if it is not "pleaded in the answer * * * [or] raised at the earliest practicable moment thereafter"); *Crews* v. *Horn*, 360 F.3d 146, 150 n.2 (3d Cir. 2004) (State waived limitations defense by not pleading it in answer or at "earliest practicable moment"); *Stewart* v. *Hendricks*, 71 Fed. Appx. 904, 906 (3d Cir. 2003) (unpublished) (State waived limitations defense when it "never even mentioned the limitations defense in any pleading"); *Davis* v. *LeMaster*, 216 F.3d 1086 (table), 2000 WL 702408 at *1 n.2 (10th Cir. May 26, 2000) (unpublished) (limitations period was not jurisdictional and was waived by State's failure to raise it); *United States ex. rel. Galvan* v. *Gilmore*, 997 F. Supp. 1019, 1026 (N.D. Ill. 1998) (same).

waive the *Teague* bar by not raising it.").[21] Furthermore, the near-universal recognition that AEDPA's limitations period can be equitably tolled supports the conclusion that it can also be waived.[22]

Once the limitations defense has been waived, courts are not obligated to impose it *sua sponte* as the State and Eleventh Circuit assert. *Cf.* Pet. App. 5a; Opp. 7. That position is contrary to *Trest* v. *Cain*, 522 U.S. 87 (1997), which held that an appeals court was "not required" to consider procedural default *sua sponte* in habeas cases because it is a non-jurisdictional affirmative defense that the State normally is "obligated to raise * * * [or] lose the right to assert * * *." *Id.* at 89 (internal quotation marks omitted); see also *Collins* v. *Youngblood*, 497 U.S. 37, 40-41 (1990) (declining to decide non-retroactivity issue *sua sponte* when State failed to raise that defense in a habeas case). Likewise, because limitations is a non-jurisdictional affirmative defense, the State must raise it or waive it.

When a State fails to raise AEDPA's limitations defense in compliance with the Civil Rules, a court may not cure the State's waiver by dismissing the petition *sua sponte* as untimely. *Nardi*, 354 F.3d at 1141 (holding that a "district court lacks the authority to *sua sponte* dismiss a habeas petition as

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[21] *Cf. Rumsfeld* v. *Padilla*, 124 S. Ct. 2711, 2728 (2004) (Kennedy, J., concurring) (objection to location of filing habeas petition can be waived by government); *McCleskey* v. *Zant*, 499 U.S. 467, 494 (1991) ("[T]he government bears the burden of pleading abuse of the writ."); *Granberry* v. *Greer*, 481 U.S. 129, 135-36 (1987) (rejecting argument that non-exhaustion defense is unwaivable).

[22] *Robinson*, 313 F.3d at 134 ("[B]ecause the AEDPA limitations period is subject to equitable modifications such as tolling, it is also subject to other non-jurisdictional, equitable considerations, such as waiver."); see 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice & Procedure* § 5.2a, at 235 & n.19 (4th ed. 2001) (collecting cases applying equitable tolling).

time-barred after the [S]tate files an answer which fails to raise the statute of limitations defense."); *Scott*, 286 F.3d at 930 (post-answer *sua sponte* dismissal "was an impermissible curing of the [State's] waiver.").[23] This Court frequently criticizes such *sua sponte* rulings in the habeas context, observing that adversarial briefing and argument is the fairest and most efficient way to resolve disputes, *Trest*, 522 U.S. at 92, and that *sua sponte* rulings upset settled expectations. *Bell* v. *Thompson*, 125 S. Ct. 2825, 2831, 2836-37 (2005) (holding that appeals court abused its discretion by *sua sponte* amending an earlier decision denying habeas corpus relief when there was no "miscarriage of justice" and parties expected that litigation had ended).[24]

Here, although the State never raised a limitations defense in the district court at any time, the court skirted the adversary process and cured the State's waiver by dismissing Day's petition as untimely *sua sponte*. Moreover, it did so almost a year after the petition was filed, upsetting both parties' expectations that the considerable time and expense spent briefing the merits of Day's petition would yield a decision on the merits. *Pino* v. *Ryan*, 49 F.3d 51, 53 (2d Cir. 1995). Under the principles discussed above, this *sua sponte* dismissal was error and should be reversed.

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[23] See also *Stewart*, 71 Fed. Appx. at 906 (waivability of the limitations defense "effectively forecloses" the argument that "a district court may raise the AEDPA's limitations provision *sua sponte*" when State never raised it); Part I.B., *supra*.

[24] See also *Castro* v. *United States*, 540 U.S. 375, 383 (2003) (district court may not *sua sponte* recharacterize petitioner's motion as a § 2255 petition without giving notice and opportunity to amend); *Calderon* v. *Thompson*, 523 U.S. 538, 558 (1998) (it is abuse of discretion for court in habeas case to recall its mandate *sua sponte* absent a "miscarriage of justice").

II. NEITHER AEDPA NOR THE HABEAS RULES AUTHORIZE *SUA SPONTE* DISMISSAL BASED ON LIMITATIONS AFTER AN ANSWER HAS BEEN FILED.

The court of appeals recognized that, "[i]n an ordinary civil case, a failure to plead the bar of the statute of limitations constitutes a waiver of the defense." Pet. App. 4a (internal quotation marks omitted). Yet it mistakenly concluded that "a habeas case that is governed by AEDPA is not controlled by this rule." *Ibid.* It based this conclusion on a selective reading of Habeas Rule 4 and a perceived "obligation" to enforce AEDPA's statute of limitations to promote policies of "comity, finality, and federalism." *Id.* at 5a.

The court of appeals' analysis is flawed because it does not ask the proper question: are the Civil Rules on waiver and *sua sponte* dismissal "not inconsistent" with the habeas statutes and rules? As discussed below, neither AEDPA nor the Habeas Rules address – much less authorize – post-answer *sua sponte* dismissal based on a waived limitations defense. Accordingly, the Civil Rules discussed above apply.

A. The Civil Pleading Rules Apply In Habeas Cases If They Are Not Inconsistent With AEDPA Or The Habeas Rules.

As this Court has noted, the Civil Rules are "applicable as a general matter to habeas cases." *Slack*, 529 U.S. at 489. The basis for this principle is Civil Rule 81(a)(2), which provides that the Civil Rules "are applicable to proceedings for * * * habeas corpus * * * to the extent that the practice in such proceedings is not set forth in statutes of the United States * * * or the [Habeas] Rules * * * and has heretofore conformed to the practice in civil actions." Of course, before the Civil Rules, some areas of habeas practice (*e.g.*, discovery) differed substantially from the procedures governing ordinary civil actions. See *Harris* v. *Nelson*, 394 U.S. 286, 294 (1969). But in other areas, habeas practice conformed to that

of civil actions. See, *e.g.*, *Browder* v. *Director, Dep't of Corr.*, 434 U.S. 257, 270 (1978).

In these latter areas, the Civil Rules apply to matters of procedure not directly addressed by a habeas statute or rule. *Ibid*. (holding that Civil Rules applied where "[n]o other statute of the United States is addressed to" the issue). This Court's subsequent cases confirm the general principle that "[t]he Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the [statutes or] Habeas Corpus Rules." *Woodford* v. *Garceau*, 538 U.S. 202, 208 (2003); see *ibid.* ("Nothing in the Habeas Corpus Rules contradicts [Civil] Rule 3. The logical conclusion, therefore, is that a habeas suit begins with the filing of an application for habeas corpus relief – the equivalent of a complaint in an ordinary civil case.").[25]

The Civil Rules at issue here establish basic pleading practices and reflect the fundamental concept that once a moving party asserts a right to relief, the burden shifts to the opposing party to show why relief should not be granted (either on the merits or by interposing a defense). These concepts are also basic to habeas corpus practice, both historic and modern.

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[25] See also Habeas Rule 11; *Gonzalez* v. *Crosby*, 125 S. Ct. 2641, 2646-48 (2005) (holding that "Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only 'to the extent that [it is] not inconsistent with' applicable federal statutory provisions and rules," and concluding that while some uses of rule would circumvent statutory requirements, others were not inconsistent with the text of any statute or rule); *Mayle* v. *Felix*, 125 S. Ct. 2562, 2574-75 (2005) (applying Civil Rule 15(c)(2) in habeas case and adopting interpretation of rule "consistent with [its] general application * * * in civil cases"); *Kiser* v. *Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) ("[W]here the [Habeas Rules] are silent on an issue, Rule 11 compels us to follow the Federal Rules of Civil Procedure.").

Prior to the Civil Rules, "pleadings" in habeas cases functioned as those in ordinary civil actions. See 1 Thomas C. Spelling, *A Treatise on Extraordinary Relief in Equity and at Law* 1081 (1893) ("While strictly speaking, owing to the summary character of the proceeding, there are no pleadings in habeas corpus, yet for all practical purposes the petition * * * is treated as a complaint, and the return as an answer in an ordinary civil action."); *id*. at 1084 ("With reference to the degree of certainty required in returns [answers], it may be stated simply that the ordinary rules are applied as in civil actions generally."). Likewise, if a habeas petitioner properly pleaded a right to relief, the respondent had the burden to plead the reasons why the writ should not issue. *Ibid.* ("Strict correctness [in the return] is not required; but the facts necessary to warrant the detention must be alleged."). The current habeas statute retains this feature. See 28 U.S.C. § 2243 ("A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the *respondent to show cause* why the writ should not be granted * * *. * * * The person to whom the writ or order is directed shall make a return certifying the true cause of the detention." (emphasis added)).

Thus, pleading practices in general and the burden of disproving the claimant's entitlement to relief in particular have been substantially the same in habeas cases as in other civil actions. Accordingly, the civil pleading rules apply to habeas cases to the extent they are not inconsistent with any habeas statutes or rules.

B. The Civil Pleading Rules Are Not Inconsistent With AEDPA.

Congress chose to call its one-year deadline for filing habeas petitions a "period of limitation." 28 U.S.C. § 2244(d)(1). Nothing in AEDPA's text or legislative history alters the traditional understanding that a period of limitation is a non-jurisdictional, waivable affirmative defense.

1. "[W]here Congress uses terms that have accumulated settled meaning under * * * the common law, a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of these terms." *Neder* v. *United States*, 527 U.S. 1, 21 (1999) (internal quotation marks omitted); see also *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 383 (2004) (courts should not give "familiar statutory language a meaning foreign to every other context in which it is used."). The term "period" or "statute" of limitations, while foreign to habeas law prior to the passage of AEDPA, has a well-established common-law meaning.

Statutes of limitations are "pervasive" in the civil context; legislatures have applied them to nearly all civil causes of action to encourage the "reasonably diligent presentation" of claims. *United States* v. *Kubrick*, 444 U.S. 111, 117, 123 (1979). As discussed in Part I above, these civil limitations periods are uniformly interpreted as non-jurisdictional and thus waivable affirmative defenses that courts may not impose *sua sponte* after they have been waived.

Likewise, limitations periods in federal criminal law are non-jurisdictional affirmative defenses "that will be considered waived if not raised in the district court" by the defendant. *United States* v. *Karlin*, 785 F.2d 90, 92-93 (3d Cir. 1986); see also *United States* v. *Arky*, 938 F.2d 579, 581-82 (5th Cir. 1991) (per curiam). Courts have reached this conclusion even through many criminal statutes of limitations contain mandatory language that is absent from § 2244(d)(1), such as: "[N]o person shall be prosecuted * * * unless the indictment is found * * * within five years next after such offense shall have been committed." 18 U.S.C. § 3282(a). Moreover, this conclusion raises an issue of fairness: if a criminal defendant can waive a statute of limitations by failing to raise it – thus allowing the State to proceed with an untimely prosecution – the State should be held to the same standard regarding timely assertion of its limitations defense in habeas cases.

2. There is no indication in § 2244(d)(1) that Congress intended to alter this general understanding of limitations periods as affirmative defenses that courts may not impose *sua sponte* after they have been waived. To the contrary, under the analytical framework of *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the text of the statute confirms this interpretation of "period of limitation."

Zipes analyzed the text, legislative history, and statutory purpose of the limitations period for filing discrimination charges under Title VII of the Civil Rights Act of 1964 and concluded that it was a waivable affirmative defense, not a jurisdictional bar. 455 U.S. at 393. The Court first examined the structure of Title VII, noting that the provision granting district courts jurisdiction "contain[ed] no reference to the timely-filing requirement" and, in fact, "appear[ed] as an entirely separate provision." *Id.* at 393-94. In addition, the timely filing requirement did not "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 394.

The same can be said of AEDPA's period of limitation. The provision granting jurisdiction to the district courts (28 U.S.C. § 2241) appears in an entirely separate section of the statute and does not mention § 2244(d)(1)'s period of limitation. Nor does the text of § 2244(d)(1) speak in jurisdictional terms or "purport to limit the jurisdiction of the district courts in any way." *Miller* v. *N.J. State Dep't of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998); see also *Dunlap* v. *United States*, 250 F.3d 1001, 1005 (6th Cir. 2001) (discussing similarly-worded limitation period of 28 U.S.C. § 2255). Thus, as with the statute in *Zipes*, the structure of AEDPA indicates that the one-year time limit operates as an ordinary statute of limitations, not a jurisdictional bar.

Zipes also considered references in the legislative history of Title VII to a "period of limitations" and a "time limitation" to be persuasive evidence that the statute's timely filing

requirement was a waivable affirmative defense. 455 U.S. at 394. The same is true of AEDPA's legislative history (see *Dunlap*, 250 F.3d at 1005-06; *Miller*, 145 F.3d at 618), and there is a far more significant indication of Congress's intent in § 2244(d)(1): the text itself actually contains the term "period of limitation."

Finally, the Court in *Zipes* looked at the legislative purpose of the Title VII filing requirement: "preventing the pressing of 'stale' claims, the end served by a statute of limitations." 455 U.S. at 394. The legislative history of AEDPA indicates that its various filing requirements serve a similar purpose: "to curb the *abuse* of the statutory writ of habeas corpus, and to address the acute problems of *unnecessary* delay and abuse in capital cases." H.R. Conf. Rep. No. 104-518, at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 944 (emphasis added). Their object "is not to produce default * * * [but] to stimulate the orderly and expeditious consideration on the merits of all federal issues * * *." 135 Cong. Rec. S13484 (daily ed. Oct. 16, 1989) (Committee report and proposal from the Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Aug 23, 1989). Construing § 2244(d)(1) as an ordinary statute of limitations – in other words, as a non-jurisdictional affirmative defense that may be waived or tolled – serves this purpose. *Dunlap*, 250 F.3d at 1006; *Miller*, 145 F.3d at 618.

Taking these factors together, *Zipes* held that the filing period in Title VII was "not a jurisdictional prerequisite * * * but a requirement subject to waiver." 455 U.S. at 398. Because § 2244(d)(1) contains virtually identical signals and even stronger textual support, the AEDPA limitations period is likewise a non-jurisdictional, waivable affirmative defense.[26] Accordingly, it is not inconsistent with the statute to

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[26] *Miller*, 145 F.3d at 618; see also *Dunlap*, 250 F.3d at 1005-07 & n.1; *Harris* v. *Hutchinson*, 209 F.3d 325, 328-29 (4th Cir. 2000); *Moore* v. *United States*, 173 F.3d 1131, 1134 (8th Cir. 1999); *Davis* v. *Johnson*, 158 F.3d at 811.

apply the Civil Rules to determine when waiver occurs and to bar *sua sponte* imposition of a waived limitations defense.

3. As this Court has already recognized, a generally-applicable Civil Rule that provides an exception to AEDPA's one-year limitations period is "not inconsistent" with the statute. In *Mayle* v. *Felix*, the Court acknowledged that Civil "Rule 15(c)(2) relaxes * * * the [AEDPA] statute of limitations" by allowing claims in an amended petition to relate back to claims in the original petition if they share a common core of operative facts. 125 S. Ct. 2562, 2572, 2574-75 (2005). And *Gonzalez* v. *Crosby* held that a Rule 60(b) motion to reopen a limitations ruling – which was filed more than a year after the petitioner's habeas proceedings concluded and more than four years after the limitations period expired – "create[d] no inconsistency with the [text of the] habeas statute or rules." 125 S. Ct. 2641, 2645, 2648 (2005). Under these decisions, applying Civil Rules 8(c) and 12(b) to conclude that the State waived the limitations defense in this case is not inconsistent with the statute creating that defense.

4. Congress could have altered the common-law understanding that AEDPA's period of limitation is waivable by default and cannot be imposed by courts *sua sponte* after it has been waived. When Congress intends to alter these variables with respect to a defense, however, it does so explicitly.

For example, AEDPA restricted waiver of the habeas defense of exhaustion, providing that the "State shall not be deemed to have waived the exhaustion requirement * * * unless the State * * * expressly waives the requirement." 28 U.S.C. § 2254(b)(3). This prohibition against implied waiver of the exhaustion defense, coupled with the absence of a similar provision for the limitations defense, indicates that Congress did not intend to protect States against implied waiver of the limitations defense. *Nardi*, 354 F.3d at 1141. As this Court has long recognized, "[w]here Congress includes particular language in one section of a statute but

omits it in another * * *, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).[27]

Furthermore, this prohibition against implied waiver of the exhaustion defense is an acknowledgment by Congress that affirmative defenses in habeas cases ordinarily are waived by failure to raise them. See *Banks* v. *Dretke*, 540 U.S. 668, 705 (2004) (noting that "under pre-AEDPA law, exhaustion and procedural default defenses could be waived based on the State's litigation conduct"). Otherwise, the language of § 2254(b)(3) requiring express waiver of the exhaustion defense would serve no purpose. See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("[I]t is our duty 'to give effect, if possible, to every clause and word of a statute.' We are thus 'reluctant to treat statutory terms as surplusage' in any setting.") (citations omitted). Congress's failure to require express waiver of other affirmative defenses – such as limitations – indicates that it intended ordinary waiver principles to apply.

In other statutes, Congress has chosen to make timely filing requirements expressly jurisdictional and thus altogether unwaivable. See 16 U.S.C. § 825*l*(b); 26 U.S.C. § 6404(h)(1); 33 U.S.C. § 921(c). Had Congress intended to create an unwaivable time limit for filing habeas petitions under AEDPA, it could have modeled § 2244(d)(1) after one of those statutes, making the court's jurisdiction over the petition contingent on timely filing. See *Brown* v. *Director, Office of Workers Compensation Programs* 864 F.2d 120, 123 (11th Cir. 1989) ("[W]e cannot fairly assume that * * * Con-

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[27] See also 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.25, at 327 (6th ed. rev. 2000) ("There is generally an inference that omissions are intentional. This rule is based on logic and common sense. It expresses the concept that when people say one thing they do not mean something else.").

gress intended the 60-day filing period [of 33 U.S.C. § 921] to be in the nature of a statute of limitations when it uses the word 'jurisdiction' in the statute.").[28] The term "jurisdiction" does not appear in § 2244(d)(1), however.

Finally, if Congress had wanted to authorize courts to dismiss untimely habeas petitions *sua sponte* at any stage of the case, regardless of whether the limitations defense had been waived, it could have done so expressly as it did in the Prison Litigation Reform Act ("PLRA"). The PLRA, which governs *in forma pauperis* cases, provides that "the court shall dismiss the case *at any time* if the court determines that * * * the action or appeal * * * fails to state a claim on which relief may be granted * * *." 28 U.S.C. § 1915(e)(2) (emphasis added).[29] Courts have interpreted this provision to allow *sua sponte* dismissal at any time for a variety of reasons, including limitations. See *Gartrell* v. *Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993) (per curiam) (holding that "[a]lthough the defense of limitations is an affirmative defense, which usually must be raised by the defendants in the district court, * * * the district court may raise the defense *sua sponte* in an action proceeding under 28 U.S.C. § 1915.").

In sum, Congress could have used numerous tools to alter ordinary waiver principles or authorize *sua sponte* dismissals expressly, as it has done in several other statutes. Yet Congress did not do so, and this Court should not assume that it did so *sub silentio*. The text of § 2244(d)(1) should thus be interpreted consistently with the traditional understanding of "period of limitation."

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[28] See also *Ky. Util. Co.* v. *FERC*, 789 F.2d 1210, 1214-15 (6th Cir. 1986) (16 U.S.C. § 825*l*); *Gati* v. *Comm'r*, 113 T.C. 132, 134 (1999) (26 U.S.C. § 6404).

[29] The 1996 PLRA amendments to § 1915 re-designated former subsection (d) as subsection (e). Pre-1996 case law thus refers to § 1915(d), although the statute has retained the identical wording.

C. The Civil Pleading Rules Are Not Inconsistent With The Habeas Rules.

The Habeas Rules are not inconsistent with this traditional understanding of limitations. Like the Civil Rules, the Habeas Rules prohibit post-answer *sua sponte* dismissals by implication.

The court of appeals reached a contrary conclusion after quoting one sentence from Habeas Rule 4, which governs a court's "[p]reliminary [r]eview" of a habeas petition. Pet. App. 5a. To determine the proper scope of Rule 4, however, the sentence chosen by the court of appeals must be read with the one after it:

> "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. ***If the petition is not dismissed***, the judge must order the respondent to file an answer * * *."

Habeas Rule 4 (emphasis added).[30]

The rule's use of the phrase "[i]f the petition is not dismissed" has two consequences. First, it indicates that considering a dismissal and ordering an answer are sequential steps. See *Granberry* v. *Greer*, 481 U.S. 129, 135 n.7 (1987). Second, the phrase implies an either/or situation: either the district court orders a summary dismissal or it orders an answer, but it does not do both. Thus, the plain language of Habeas Rule 4 authorizes only pre-answer summary dismissals. Indeed, even the State concedes that the rule "literally speak[s] to a pre-answer dismissal." Opp. 15.

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[30] This quote is from the current version of Habeas Rule 4 as amended effective December 1, 2004. The Advisory Committee notes state that "no substantive change is intended" regarding the quoted portion of the rule.

Because Habeas Rule 4 authorizes only pre-answer dismissals, standard interpretive canons establish that post-answer summary dismissals are prohibited by negative implication. *Christensen* v. *Harris County*, 529 U.S. 576, 583 (2000) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode."); *cf. Leatherman* v. *Tarrant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius*."). Almost every court that has faced the question has held that Habeas Rule 4 does not authorize post-answer dismissals. See *Bendolph*, 409 F.3d at 157 (case did not "fall[] within the summary dismissal period of [Habeas] Rule 4" after State "filed answer[] that did not raise the AEDPA statute of limitations as a defense"); *Nardi*, 354 F.3d at 1141 ("Rule 4 authorizes a summary dismissal *only prior to a responsive pleading by the state* * * *."); *Scott*, 286 F.3d at 930 (6th Cir. 2002) (Rule 4 power to dismiss petition *sua sponte* "expires when the judge orders a respondent to file an answer"); see also Pet. 11-12 & n.10 (explaining that cases on which Eleventh Circuit relied hold only that Rule 4 allows dismissal *prior to* answer by State).

The above holdings are not only faithful to the rule's plain meaning and standard interpretative canons,[31] they are also supported by the Advisory Committee's notes to Habeas Rule 4. The notes state that the purpose of pre-answer *sua sponte* dismissal is to "screen out frivolous petitions and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Post-answer *sua sponte*

[31] They are also faithful to the text of 28 U.S.C. § 2243, which provides that a judge shall "issue an order directing the respondent to show cause why the [application for a] writ should not be granted, *unless* it appears from the application that the applicant * * * is not entitled thereto. * * * The person to whom the * * * order is directed shall make a return [*i.e.*, an answer] certifying the true cause of the detention." (emphasis added).

dismissals would not serve that purpose, however, because the burden of answering has already been incurred.

Nor is Habeas Rule 4's distinction between pre- and post-answer dismissals arbitrary. Instead, it conforms to the time-honored adversary principle of the Civil Rules that affirmative defenses not asserted in an answer are waived. If a court could cure such waivers through *sua sponte* post-answer dismissals, that principle would be meaningless. See Part I.B., *supra*.

Limiting Habeas Rule 4 to pre-answer dismissals is also consistent with new Habeas Rule 5(b), which provides that the answer "*must state* whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations." (Emphasis added). Functionally, this language is the same as the mandatory language in Civil Rules 8 and 12, which gives rise to the waiver principle of the Civil Rules. See Part I.A., *supra*. Although the revisions to Habeas Rule 5(b) do not apply to this case,[32] the Advisory Committee "intend[ed] no substantive change with the additional new language." Instead, it concluded that the explicit requirement to plead limitations "conforms to current case law and statutory provisions."

Finally, there is no practical need to expand the limited *sua sponte* dismissal power of Habeas Rule 4 because the Civil Rules already contain procedures for the tardy assertion of defenses. See Fed. R. Civ. P. 15(a) (providing for amend-

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[32] The rule was amended on December 1, 2004, well after the State filed its answer and the magistrate issued his order. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 275 n.29 (1994) ("A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime * * *."); *Richardson Elecs., Ltd.* v. *Panache Broad. of Pa., Inc.,* 202 F.3d 957, 958 (7th Cir. 2000) ("Generally, a new procedural rule applies to the *uncompleted* portions of suits pending when the rule became effective * * *.") (emphasis added).

ments to pleadings). The Civil Rules can thus accommodate situations in which the State did not plead limitations but belated amendment is proper, as when the State lacks the information needed to knowledgeably analyze a limitations issue before it must answer. See *Bendolph*, 409 F.3d at 160-61, 167. Here, the State made no attempt to use such procedures. In fact, the State affirmatively conceded the timeliness of Day's petition. Creating a *sua sponte* dismissal power outside the Habeas and Civil Rules in order to rescue the State from its waiver would simply short-circuit the drafters' contemplation and resolution of this very contingency.

III. POLICY CONCERNS DO NOT AUTHORIZE *SUA SPONTE* DISMISSAL BASED ON A WAIVED LIMITATIONS DEFENSE.

For these reasons, AEDPA and the Habeas Rules are not inconsistent with the ordinary rules applicable to civil litigation, which recognize that (1) limitations is a waivable affirmative defense and (2) courts may not impose waived defenses *sua sponte*. Although the court of appeals acknowledged these rules, it held that they were trumped by an "obligation to enforce the federal statute of limitations * * * to promote [AEDPA's policies of] comity, finality, and federalism." Pet. App. 5a. This conclusion is wrong for three reasons.

A. AEDPA's Purposes Do Not Displace Generally Applicable Civil Rules.

Although certain provisions of AEDPA reflect concerns of comity, federalism, and finality, Congress did not enact "comity, federalism, and finality"; it enacted AEDPA. The purposes underlying AEDPA cannot displace otherwise applicable Civil Rules.

1. Civil Rule 81(a)(2) applies the Civil Rules to habeas proceedings "to the extent that the practice in such proceedings is not set forth in statutes of the United States * * * or

the [Habeas] Rules * * * and has heretofore conformed to the practice in civil actions." As Part II explains, the civil pleading rules at issue here meet each of these conditions: they match the historic requirement that a habeas respondent plead the reasons why the petitioner is not entitled to relief, and they are not inconsistent with AEDPA or the Habeas Rules, which do not authorize the practice of post-answer *sua sponte* dismissal based on an unpleaded limitations defense. Rule 81(a)(2) leaves no room for non-textual policy concerns to alter this conclusion.

This Court's recent decisions confirm that general policy concerns outside the text of relevant statutes and rules cannot alone limit the application of general Civil Rules. In *Gonzalez*, for example, the Court focused on "whether the *text* of [the Civil Rule] itself, or of some other *provision of law*, limits its application in a manner relevant to the case * * *." 125 S. Ct. at 2646 (emphasis added).[33] Because no statutory requirement or habeas rule limits the civil pleading rules that the district court violated by acting *sua sponte*, those rules apply here.

2. Moreover, relying on unwritten AEDPA doctrines to authorize *sua sponte* dismissal at any time would improperly abolish the pre-answer limit that Habeas Rule 4 placed on the summary dismissal power. Because Habeas Rule 4 "deals specifically with" summary dismissals, "this Rule" – not unwritten " 'equitable' reasons beyond those embodied" in the

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[33] *Cf.* 125 S. Ct. at 2647-48 (holding that some uses of rule would "circumvent" or "escape" a statutory requirement); *Mayle*, 125 S. Ct. at 2573-74 (considering degree to which application of civil rule would functionally disable habeas statute); *Pitchess* v. *Davis*, 421 U.S. 482, 489 (1975) (per curiam) (holding that civil rule could not be used to raise unexhausted claims given statutory exhaustion requirement); *Harris* v. *Nelson*, 394 U.S. 286, 296 (1969) (holding that civil discovery rules did not apply because statute specifically addressed habeas discovery).

Rule – "should * * * determine[] whether or not the petition's dismissal was appropriate." *Lonchar* v. *Thomas*, 517 U.S. 314, 316 (1996); see *id.* at 322 (holding that court could not "properly dismiss this first habeas petition for special ad hoc 'equitable' reasons not encompassed within the framework" of the Rule).

3. Using policies implicit in AEDPA to displace the Civil Rules regarding waiver and *sua sponte* imposition of defenses also violates the "cardinal principle of statutory construction that repeals by implication are not favored." *United States* v. *United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976). When Congress wishes to limit or eliminate waiver of a defense or to authorize *sua sponte* dismissal at any time, it says so expressly and unequivocally. See Part II.B, *supra*. Moreover, when Congress perceives a conflict between a habeas statute and a generally applicable federal rule, it "expressly circumscribe[s]" the rule. *Gonzalez*, 125 S. Ct. at 2646 (discussing Fed. R. App. P. 22). Under these circumstances, "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *United States* v. *Wells*, 519 U.S. 482, 496 (1997).

"In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974). Here, AEDPA and the Habeas Rules do not even address waiver or post-answer imposition of a limitations defense; they certainly are not irreconcilable with the Civil Rules on these subjects. See Parts II.B.-C., *supra*. Accordingly, those rules apply to habeas cases notwithstanding AEDPA's implicit policies.

4. Finally, allowing AEDPA's implicit policies to distort the meaning of a generally applicable Civil Rule in a habeas case would undermine the uniformity of the Federal Rules. The same language enacted with the same intent would mean

different things when applied to different kinds of cases. To interpret the Federal Rules in such a way "would be to invent [rules] rather than interpret [them]." *Clark* v. *Martinez*, 125 S. Ct. 716, 722-23 (2005). In addition, because litigants would not know ahead of time how the Federal Rules would be applied in different cases, procedural certainty would be threatened. Such uncertainty impairs not only the uniformity of the Federal Rules but also the dominant objective of the Rules Enabling Act: the creation of a uniform and "simplified practice [that would] strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances."[34]

Because procedural law should be uniform and predictable, this Court should not interpret a Federal Rule to mean different things under different statutes unless such an interpretation is required by a substantive legal rule.

* * *

For these reasons, the policies of comity, federalism, and finality mentioned by the Eleventh Circuit do not repeal the civil pleading rules by implication. This Court need not delve any deeper into policy to hold that the district court erred by dismissing Day's petition *sua sponte* based on a limitations defense that the State not only failed to plead but expressly conceded. Yet a full examination of relevant policy concerns provides further support for that holding. Concerns such as judicial neutrality, the adversary character of our legal system, procedural efficiency and certainty, and the importance

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[34] Hughes, C.J., *Address before the American Law Institute* (May 9, 1935), *reprinted in* 21 A.B.A.J. 340, 341 (1935); see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1023-24 & 1024 n.36 (1982); Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules*, 15 Tenn. L. Rev. 551, 558-62 (1939).

of the habeas remedy weigh heavily against the district court's decision to aid the State at Day's expense by imposing the State's waived limitations defense *sua sponte*. In addition, holding the State executive branch to its waiver would not offend comity, federalism, or finality.

B. Policy Concerns Counsel Against Post-Answer *Sua Sponte* Dismissal.

The State argues that confining the district court's summary dismissal power to the pre-answer time frame of Habeas Rule 4 elevates form over substance. Opp. 5. To the contrary, several important policies counsel against dismissing a case *sua sponte* based on limitations after a litigant foregoes the opportunity to raise that defense in its answer.

1. Perhaps most important is the principle that the Due Process Clause and Article III require a "neutral and detached judge." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 533 (2004) (quoting *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993)); see also *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986) (Article III guarantees "an independent and impartial adjudication by the federal judiciary"). Judicial neutrality and fairness are compromised when a judge "act[s] as surrogate counsel for one side but not the other." *Bendolph*, 409 F.3d at 172 (Nygaard, J., dissenting). Thus, this Court has held that having judges "advise" *pro se* litigants about how to avoid AEDPA's limitations defense "would undermine district judges' role as impartial decisionmakers." *Pliler* v. *Ford*, 542 U.S. 225, 231 (2004). Impartiality is equally undermined when a judge investigates whether a State litigant has a viable limitations defense that it failed to raise and, if so, dismisses the petition *sua sponte* based on that waived defense.[35] To maintain "both the appearance and

[35] See *Falconer* v. *Lane*, 905 F.2d 1129, 1135 (7th Cir. 1990) ("[W]aiver is not an obstacle reserved for habeas petitioners alone."); *Davis* v. *Johnson*, 8 F. Supp. 2d 897, 900 (S.D. Tex.

fact of judicial neutrality," *Pliler*'s recognition that judges "may not act as *de facto* counsel in habeas proceedings" should apply with particular force to State litigants already represented by counsel. *Bendolph*, 409 F.3d at 176 (Nygaard, J., dissenting).

2. A judge who imposes a waived limitations defense *sua sponte* also offends the related principle that, "[i]n our adversary system, it is enough for judges to judge." *Dennis* v. *United States*, 384 U.S. 855, 875 (1966). The "adversary system is designed around the premise that the *parties* know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro* v. *United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment) (emphasis added). Thus, "calculating [the AEDPA] statute[] of limitations [is a] task[] normally and properly performed by trained counsel." *Pliler*, 542 U.S. at 231; see *id.* at 232 (noting that these calculations depend upon information more accessible to State than court or petitioner). If counsel fails in his responsibility to calculate the limitations period and to advance an available limitations defense, the fundamental adversary "rule that points [of law] not argued will not be considered" applies. *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring); see *Bendolph*, 409 F.3d at 172 (Nygaard, J., dissenting) ("In an adversar[y] system, it is not for the courts to bring to light the best arguments for either side; that responsibility is left to the parties themselves.").

1998) ("Timing rules work both ways: if the [S]tate wants to kill a man because his filings are not on time, it should raise that issue promptly."); 2 Hertz & Liebman, *supra*, § 22.1, at 933 & n.45, 935 & n.47 (collecting cases that rely on the "equitable imperative to treat litigants on both sides of a lawsuit the same" to conclude that "waiver doctrines [should apply] as strictly against the States * * * as against habeas corpus petitioners").

This adversary doctrine of waiver acknowledges that a party – not the court – is in the best position to know when its own interests are at stake. There are many reasons why a State litigant may choose not to interpose an available limitations defense: because a merits issue offers an easier ground for decision, because it wishes to seize an opportunity for a favorable ruling on an important merits issue, because it wishes to avoid the possibility of making unfavorable law on a limitations issue, or because it concludes in the interest of justice that the petitioner is likely entitled to relief. A State may also conclude that limitations concerns are absent in a particular case because it received adequate notice of the petitioner's claims or because the evidence has not been impaired by the passage of time. See p. 12, *supra*. Given the variety of considerations that must be weighed to decide whether it is in a State litigant's best interest to assert a limitations defense, that decision "can properly and effectively be made *only* by an advocate." *Dennis*, 384 U.S. at 875 (emphasis added). "Accordingly, when * * * the [S]tate waives a [defense] * * *, the district court should assume that the waiver is justified." *Esslinger* v. *Davis*, 44 F.3d 1515, 1528 (11th Cir. 1995).

3. Post-answer dismissal based on a waived limitations defense also fails to advance – and in fact undermines – values of procedural efficiency and judicial economy. As explained in Part I.A. above, a primary purpose of the limitations defense is to relieve the court of the burden of trying stale claims by allowing it to dispose of such claims promptly. Thus, requiring the State to raise an affirmative defense of limitations early in the litigation conserves judicial resources. If the State fails to raise its defense in a timely manner, however, "the parties and the court begin to expend time and effort on the merits of the petition." *Bendolph*, 409 F.3d at 173 (Nygaard, J., dissenting). Here, the magistrate judge issued his show-cause order regarding limitations nearly a year after Day's petition was filed and eight months

after the parties completed full briefing on the merits of the petition. "At this point, judicial efficiency and economy [were] already lost." *Ibid*.

Moreover, even if curing a State's waiver of limitations through *sua sponte* dismissal could save resources in a particular case, that practice would harm the efficiency of the judicial system overall. Rescuing the State from its waiver dramatically undermines its incentive to comply with the resource-conserving procedures that require parties to raise defenses early. See Part I.A., *supra*. It also permits the State to "sandbag" the petitioner and consume the court's resources by "seek[ing] a favorable ruling on the merits in the district court while holding the * * * [limitations] defense in reserve for use on appeal if necessary." *Granberry*, 481 U.S. at 132.

In addition, making it a court's business to ferret out a party's waived defenses would waste more judicial resources on an issue collateral to the merits with little resulting benefit. This Court is understandably reluctant to have district judges undertake "the potentially burdensome, time-consuming, and fact-intensive task of making a case-specific investigation and calculation of whether the AEDPA limitations period has already run." *Pliler*, 542 U.S. at 232. Furthermore, because "district judges often will not be able to make these calculations based solely on the face of habeas petitions," it is quite possible that they will "err in their calculation" (*ibid*.) and expend everyone's resources pointlessly.

4. Values of certainty and equality in the application of procedural rules would also suffer if courts were given unfettered discretion to dismiss a petition *sua sponte* based on a waived limitations defense. None of the courts below recognized any limits on their ability to impose the defense *sua sponte* or conducted any analysis of whether that step was appropriate in this case. The Eleventh Circuit and the State attempt to avoid this problem by arguing that courts have "an *obligation* to enforce the [AEDPA] statute of limitations."

Pet. App. 5a (emphasis added); see Opp. 7. Yet this Court has rejected that argument with respect to another non-jurisdictional habeas defense (procedural default), holding that a court "is not 'required' to raise the issue * * * *sua sponte*." *Trest*, 522 U.S. at 89.

Thus, the holdings below simply allow courts to cure a State's waiver at their whim. That approach not only introduces uncertainty about whether generally-applicable waiver rules will be enforced in a given case, it is also "likely to create vast disparities concerning the treatment of government waiver between judges and from one case to the next" that produce different outcomes for similarly situated petitioners. *Bendolph*, 409 F.3d at 175 n.27 (Nygaard, J., dissenting). "[T]he harm caused by the failure to treat similarly situated [petitioners] alike cannot be exaggerated: such inequitable treatment hardly comports with the ideal of administration of justice with an even hand." *Teague*, 489 U.S. at 315 (plurality opinion of O'Connor, J.) (internal quotation marks omitted); see also *Lonchar*, 517 U.S. at 323-24 (noting importance of laying down specific standards for habeas procedure to "reduce uncertainty" and "minimize disparate treatment of similar cases").

5. Finally, dismissing a petition *sua sponte* based on a waived defense is contrary to this Court's admonition that habeas corpus is "not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes." *Hensley* v. *Mun. Ct.*, 411 U.S. 345, 349 (1973) (internal quotations marks and citation omitted). Dismissing Day's *first* federal habeas petition on this basis was especially improper, "for that dismissal denies [him] the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar*, 517 U.S. at 324. This Court should not grant State litigants in habeas cases a special exemption from the ordinary rules governing waiver and *sua sponte* dismissal.

C. Waiver Of A Limitations Defense Does Not Offend Comity, Federalism, Or Finality.

Disregarding the policies discussed above, the Eleventh and Third Circuits have held that a post-answer *sua sponte* dismissal based on limitations is proper because it furthers the interests of comity, federalism, and finality underlying AEDPA. Pet. App. 5a-6a; *Bendolph*, 409 F.3d at 162, 165. The State argues that comity, in particular, gives courts discretion to impose waived defenses. Opp. 8-9. A closer examination of these interests, however, reveals that none is offended by holding a State litigant to its waiver.

1. AEDPA's limitations defense "do[es] not implicate the interests of comity and federalism." *Bendolph*, 409 F.3d at 173 (Nygaard, J., dissenting). In the habeas context, comity and federalism "dictate[] that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the *state courts* should have the first opportunity to review this claim and provide any necessary relief." *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 844 (1999) (emphasis added). This rationale supported the creation of common-law exhaustion and procedural default defenses, which ensure that state courts are given this opportunity and that their procedural requirements for review are respected.[36] Because the proper relationship between federal and state courts is not solely the concern of the parties, this Court has held that it may be appropriate for a federal appellate court to dismiss in

[36] *Coleman* v. *Thompson*, 501 U.S. 722, 730-32 (1991); see also *Rose* v. *Lundy*, 455 U.S. 509, 515 (1982) (explaining that Court developed common-law exhaustion requirement to avoid "unnecessary conflict" in relations "between the judicial tribunals of the Union and of the States" (quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886)).

favor of state court review even when an exhaustion defense is raised belatedly on appeal.[37]

Policies such as comity and federalism did not give rise to a common-law defense of limitations in habeas corpus cases, however. Limitations was never part of habeas corpus practice until Congress enacted a one-year statute of limitations in AEDPA. *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993). Because this new limitations period is exclusively a creature of Congress, it should be interpreted according to Congress's intent – not the common-law policies that are the framework for some other habeas defenses.

Moreover, unlike the exhaustion and procedural default defenses, AEDPA's statutory limitations defense is not a mechanism for deference to state courts and their procedures. Instead, it cuts off federal review altogether based on a timing rule that state courts never consider. The State's only involvement with the federal limitations defense is as a party: its executive branch represents the official with custody of the petitioner. If the State as litigant does not "indicate that a federal constitutional claim is barred," however, "a federal court implies no disrespect for the State by entertaining the claim." *Ulster County Ct.* v. *Allen*, 442 U.S. 140, 154 (1979).

In fact, as discussed in Part III.B.2. above, a State litigant is in a far better position than a court to decide whether asserting a limitations defense is in its best interest. Given the many reasons why a State might choose not to invoke a limitations defense, it would undermine interests of comity and federalism for a court to subvert the State's choice by imposing that defense *sua sponte*.

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[37] *Granberry*, 481 U.S. at 134 ("The court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim.").

In the district court, the State affirmatively conceded that Day's petition was timely and then said nothing when the magistrate judge issued his *sua sponte* show-cause order regarding limitations. It never advocated a dismissal based on limitations at any time. Thus, comity and federalism do not support the district court's order dismissing Day's petition.

2. With respect to finality, this Court has held that "Congress enacted AEDPA to reduce delays in the execution of state * * * sentences, particularly in capital cases." *Woodford*, 538 U.S. at 206. In particular, AEDPA's limitations period "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; see also *Rhines* v. *Weber*, 125 S. Ct. 1528, 1534 (2005).

Existing procedures are sufficient to accommodate this goal of not delaying finality. *Scott*, 286 F.3d at 930 n.10. Before an answer is filed, Habeas Rule 4 allows courts to dismiss untimely petitions summarily. If the court orders the State to answer an untimely petition, the State can obtain a prompt dismissal through the adversary process by raising the limitations defense in its answer.

There is no reason to go further by creating an ad hoc exception to the Civil Rules concerning waiver and post-answer *sua sponte* dismissal. Giving a trial or appellate court discretion to dismiss a petition *sua sponte* based on limitations at later stages of the litigation – here, nearly a year after the petition was filed – would not reduce delay. In addition, the lingering uncertainty of possible *sua sponte* action leaves both parties in limbo; it certainly does not provide the State with the "real finality" necessary to execute its moral judgment and allow the victims of crime to move forward. *Calderon* v. *Thompson*, 523 U.S. 538, 556 (1998).

Moreover, the State's interest in finality is not absolute in the habeas context.[38] AEDPA's limitations period itself contains exceptions for tolling, retroactivity, and equitable impediments to filing. 28 U.S.C. § 2244(d). In addition, this Court's recent decisions in *Gonzalez* and *Mayle* confirm that finality is not offended when a generally-applicable Civil Rule provides an exception to the limitations period. See Part II.B.3., *supra*. As in *Gonzalez*, "the virtues of finality" carry "little weight" here because the whole purpose of Civil Rules 8(c) and 12(b) is to require that limitations and other defenses be raised promptly on pain of waiver – *i.e.*, to make an exception to finality in order to promote judicial efficiency. 125 S. Ct. at 2646; see Part I.A., *supra*. The policy balance struck by these rules should be respected.

Finally, as with AEDPA, an interest in finality also motivated the enactment of limitations periods in civil cases generally. See *McCuskey* v. *Cent. Trailer Servs., Ltd*., 37 F.3d 1329, 1333 (8th Cir. 1994). Indeed, the policy reasons for having a limitations period are stronger in ordinary civil cases than in non-capital habeas cases like this one.[39] Yet courts in these civil cases readily find a limitations defense

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[38] *McCleskey*, 499 U.S. at 492-93; see also *Bendolph*, 409 F.3d at 174 (Nygaard, J., dissenting) (noting that "conventional notions of finality have diminished significance in the context of habeas").

[39] Several of the policies underlying a typical statute of limitations – such as preventing the assertion of stale claims, ensuring notice of adverse claims and protecting settled expectations against an impaired fact-finding process (see Part I.A., *supra*) – have diminished significance in non-capital habeas cases. See 28 U.S.C. §§ 2254(b) (requiring prior exhaustion of claims in state court), 2254(e) (presuming that state court factual determinations are correct); *Rose*, 455 U.S. at 520 (noting that non-capital "prisoner's principal interest, of course, is in obtaining speedy relief on his claims"). AEDPA includes a separate limitations period for capital prisoners that is not at issue here. See 28 U.S.C. § 2263.

waived and refuse to impose it *sua sponte*. See Part I.A.-B., *supra*. The result should be no different here.

IV. THE STATE EXPRESSLY AND CORRECTLY CONCEDED THE PETITION WAS TIMELY.

A. The District Court Erred By Failing To Give Binding Effect To The State's Express Waiver.

The State also waived the limitations defense for a second, independent reason: it expressly conceded in its answer that Day's petition was timely. J.A. 24 ("Respondent agrees the petition is timely; filed after 352 days of untolled time."). The district court erred by ignoring this concession and addressing the timeliness of Day's petition *sua sponte*.

The State's pleading that "the petition is timely" was an express waiver of its limitations defense that should have been given binding effect. In a similar case involving the exhaustion defense, the Eighth Circuit held "that when * * * the [S]tate unequivocally concedes in pleadings that a petitioner's claims * * * have been exhausted, that concession constitutes an express waiver." *Purnell* v. *Mo. Dep't of Corr.*, 753 F.2d 703, 708 (8th Cir. 1985); see also *Esslinger*, 44 F.3d at 1520, 1525 (answer representing that petitioner "has not procedurally defaulted on any of his claims" constituted waiver); *cf. Green* v. *United States*, 260 F.3d 78, 84-85 (2d Cir. 2001) (holding that government expressly waived limitations defense by making statements in brief inconsistent with defense).

The State attempts to blunt the force of this waiver by arguing that it was based on a calculation "mistake." Opp. 2. Yet "the consequences of a pleading may not be avoided merely by stating in conclusory fashion * * * that the concession was 'clearly inadvertent' or by claiming * * * that 'a big mistake' had been made." *Purnell*, 753 F.2d at 708 (citing Fed. R. Civ. P. 11). Instead, "when * * * the [S]tate waives a [defense] * * *, the district court should assume that the

waiver is justified." *Esslinger*, 44 F.3d at 1528. Accordingly, the district court erred in addressing the timeliness of Day's petition after the State had conceded that it was timely. See *id.* at 1527 n.44 (holding that "district court abused its discretion in not honoring the Attorney General's waiver" of procedural default defense); *Purnell*, 753 F.2d at 710 (remanding "with instructions that the district court accept the state's waiver of exhaustion and consider the habeas corpus petition on its merits").

B. The State's Express Concession Of Timeliness Was Correct.

The court of appeals attempted to avoid this conclusion by labeling the State's concession of timeliness "patently erroneous." Pet. App. 4a. In fact, however, Day's petition was timely. For this additional reason, the State's express waiver should have been given binding effect.

The timeliness of Day's federal petition turns on whether the tolling period for his Florida post-conviction application included the 90 days during which he was eligible to file a certiorari petition with this Court (the "post-conviction certiorari period"). Pet. App. 16a (timeline). In 28 U.S.C. § 2244(d)(2), Congress provided that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is *pending* shall not be counted toward any period of limitation under this subsection." (Emphasis added). The plain meaning of "pending," together with AEDPA's statutory structure, indicates that the federal limitations period continued to be tolled during the post-conviction certiorari period. See *Abela* v. *Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), cert. denied sub nom. *Caruso* v. *Abela*, 541 U.S. 1070 (2004).

1. Section 2244(d)(2) tolls limitations during the post-conviction certiorari period based on the plain meaning of "pending."

In *Carey* v. *Saffold*, 536 U.S. 214, 219 (2002), this Court held that a state post-conviction application remains "pending" for § 2244(d)(2) tolling purposes beyond the time period when the application is actually "under court consideration." The Court looked to plain meaning, observing that "[t]he dictionary defines 'pending' (when used as an adjective) as 'in continuance' or 'not yet decided.' * * * It similarly defines the term (when used as a preposition) as 'through the period of continuance * * * of,' 'until the * * * completion of.' " *Id.* at 219-20 (quoting Webster's Third New International Dictionary 1669 (1993)). Accordingly, the Court held that tolling under § 2244(d)(2) continues "until the completion of" the "collateral review process" – that is, until the petitioner's state post-conviction "application has achieved final resolution." *Id*. at 214.[40] In the AEDPA context, then, an application for state post-conviction relief remains "pending" until it becomes "final." *Abela*, 348 F.3d at 172 (holding these words are "but two sides of the same coin").

This Court recently defined the term "final" for limitations purposes in *Clay* v. *United States*, 537 U.S. 522 (2003). *Clay* considered when a federal conviction becomes "final" on direct review, which is when the one-year limitations period for § 2255 motions by federal prisoners begins to run. It held that in "post-conviction relief, a context in which finality has a long-recognized, clear meaning[,] [f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, *or when the time for filing a certiorari petition expires*" without a petition being filed. *Id.* at 527 (emphasis added).

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[40] Although *Carey* refers to completion of the "State's post-conviction procedures," 536 U.S. at 220, no federal certiorari petition on the application for state collateral review was at issue.

Because a state court's ruling on a state post-conviction application is subject to alteration by this Court until the time for seeking certiorari review expires, that ruling similarly is not "final" until the post-conviction certiorari period expires. The application thus remains "pending" during that period – and the limitations period continues to be tolled under § 2244(d)(2) – regardless of whether certiorari is sought. *Abela*, 348 F.3d at 172-73.

Here, Day used 353 days of the one-year limitations period before filing his state post-conviction application, but the tolling period for that application did not end until after he filed his federal petition. Pet. App. 16a; see p. 4-5, *supra*. Accordingly, his federal petition was timely.

2. AEDPA's structure confirms that the post-conviction certiorari period tolls limitations.

The conclusion that § 2244(d)(2) tolls limitations during the post-conviction certiorari period is confirmed by comparing it with 28 U.S.C. § 2263, the limitations and tolling provision for capital prisoners in opt-in states. Section 2263 reflects the language Congress used when it intended to *exclude* from tolling the post-conviction certiorari period.[41]

Under § 2263(a), the limitations period begins on the date of "final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." This period is then tolled by § 2263(b)(1) "from the date that a petition for certiorari *is filed* in the Supreme Court until the date of final disposition of the petition * * *." (Emphasis added). By its plain terms, § 2263(b)(1)

[41] Section 2263 was intended to limit the ability of capital claimants to delay executions by filing eleventh-hour certiorari petitions. See 135 Cong. Rec. 24,684 (1989) (statement of Sen. Biden).

requires that a capital opt-in prisoner actually file a certiorari petition to get the benefit of any tolling after the last state court decision. No such requirement appears in § 2244(d)(2).

Subsection 2263(b)(2) also tolls the limitations period "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final *State court* disposition of such petition." (Emphasis added). In contrast, § 2244(d)(2) does not limit tolling to the time that a post-conviction application is pending in the state court system.

Thus, in § 2263, Congress intentionally excluded the certiorari period from two parts of the tolling scheme. Congress's decision not to use either method of exclusion in § 2244 confirms that the 90-day period for seeking certiorari from this federal court does toll limitations regardless of whether a petition is filed. *Russello*, 464 U.S. at 23 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Some courts have reached the opposite conclusion by comparing § 2244(d)(2) with § 2244(d)(1)(A).[42] The latter section provides that limitations begins to run after the latest of, among other things, the day a judgment "bec[omes] final by the conclusion of direct review or the expiration of the time for seeking such review." According to these courts, "pending" should not include the post-conviction certiorari period because § 2244(d)(2) does not expressly mention the expiration of the time for seeking certiorari.

To apply the *Russello* presumption to those two provisions, however, there must be some basis to assume Congress

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[42] See, *e.g.*, *Coates* v. *Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000) (per curiam); *Stokes* v. *Dist. Attorney of Philadelphia County*, 247 F.3d 539, 541 (3d Cir. 2001) (collecting cases).

varied the statutory wording to contrast each provision with the other. That notion is unreasonable because it compares apples to oranges: § 2244(d)(1)(A) establishes a date for starting the limitations period (a "trigger" provision), while § 2244(d)(2) establishes the interval during which that period is tolled. The language of these provisions is necessarily different because they refer to different temporal phenomena: § 2244(d)(1) uses "final" to identify a *discrete* point in time (to trigger the limitations period); § 2244(d)(2) uses "pending" to identify a time *interval* (to toll that period). Thus, specifying the "expiration of the time for seeking such review" as a point when the judgment becomes "final" does not negate the conclusion that the case remains "pending" during the time interval for seeking such review.

In sum, applying the *Russello* presumption to interpret § 2244(d)(2) in light of § 2244(d)(1)(A) is inappropriate because the differences between these provisions result from a need to identify different temporal phenomena, not from a need to distinguish between direct and post-conviction treatment of certiorari periods. Moreover, AEDPA's legislative history shows that the wording of § 2244(d)(1)(A) resulted not from an intent to make such a distinction, but from a desire to separate the limitations trigger from the exhaustion requirement. See *Kapral* v. *United States*, 166 F.3d 565, 581 (3d Cir. 1999) (Alito, J., concurring) (explaining that § 2244(d)(1)(A)'s text is merely a "product of the vagaries of the legislative process" and distinguishing trigger provisions of § 2244(d)(1)(A) from those in § 2255 ¶ 6(1)).[43]

Accordingly, the apples to apples comparison is between the two tolling provisions discussed above: § 2263(b) and

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[43] In *Clay*, this Court expressly declined to use the *Russello* canon to interpret § 2255 ¶ 6(1) in light of § 2244(d)(1)(A) for some of the same textual and legislative reasons identified above. See *Clay*, 537 U.S. at 530 (inferring instead a textual basis for the varied phrasing of § 2244(d)(1)(A) and § 2255 ¶ 6(1)).

§ 2244(d)(2).[44] Because that comparison confirms that § 2244(d)(2) tolls limitations during the post-conviction certiorari period, Day's petition was timely and the district court erred by failing to honor the State's express concession of timeliness.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted.

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[44] See *White* v. *Klitzkie*, 281 F.3d 920, 927 (9th Cir. 2002) (Berzon, J., dissenting); 1 Hertz & Liebman, *supra*, § 5.2b at 252-53 n.50.

ADDENDUM

United States Code

28 U.S.C. § 2244(d): (excerpts)

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

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

* * * * *

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

28 U.S.C. § 2263: (excerpts)

Filing of habeas corpus application; time requirements; tolling rules

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of

last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition;
* * *

Federal Rules of Civil Procedure ("Civil Rules")

Civil Rule 8(c):

Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Civil Rule 12(b):

How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is

waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Civil Rule 12(h):

Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Civil Rule 81(a)(2):

These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent

that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

Rules Governing Section 2254 Cases ("Habeas Rules")

Habeas Rule 4 (as amended December 1, 2004):

Preliminary Review; Serving the Petition and Order

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

Former Habeas Rule 4:

Preliminary Consideration by Judge

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appro-

priate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

Habeas Rule 5 (as Amended December 1, 2004):

The Answer and the Reply

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

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

(c) *Contents: Transcripts*. The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript cannot be obtained,the respondent may submit a narrative summary of the evidence.

(d) *Contents: Briefs on Appeal and Opinions*. The respondent must also file with the answer a copy of:

(1) any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding;

(2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and

(3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence.

(e) *Reply*. The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

Former Habeas Rule 5:

Answer; Contents

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

Habeas Rule 11:

Applicability of the Federal Rules of Civil Procedure

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