No. 10-9995

In the Supreme Court of the United States

PATRICK WOOD, PETITIONER

v.

KEVIN MILYARD, WARDEN, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MELISSA ARBUS SHERRY
Assistant to the Solicitor General
JOSHUA S. JOHNSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether an appellate court has the authority to raise *sua sponte* a 28 U.S.C. 2244(d) statute of limitations defense.

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

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INTEREST OF THE UNITED STATES

This case presents the questions whether a court of appeals has the authority to raise *sua sponte* a 28 U.S.C. 2244(d) statute of limitations defense and, if so, whether the State's statements here constituted a deliberate waiver of that defense. Although this case involves a claim by a state prisoner under 28 U.S.C. 2254, the one-year time limit for a state prisoner to file a habeas petition is the same as the period within which a federal prisoner must file a motion for postconviction relief. See 28 U.S.C. 2244(d)(1); 28 U.S.C. 2255(f) (Supp. IV 2010). Because the Court's decision here will likely affect cases presenting similar questions under Section 2255, the United States has a substantial interest in the resolution of this case.

STATEMENT

1. In 1986, petitioner shot and killed the assistant manager of a pizza delivery store during a robbery. He was charged in Colorado state court with first-degree murder after deliberation, first-degree felony murder, aggravated robbery, and two counts of felony menacing, and his first trial ended in a mistrial. Petitioner thereafter agreed to a bench trial, and the court found him guilty of second-degree murder, as well as felony murder, robbery, and menacing. The court merged the robbery and murder counts and sentenced petitioner to a lifetime term of imprisonment, plus two four-year terms of imprisonment for the menacing counts, all running concurrently. The Colorado Court of Appeals affirmed and, on October 23, 1989, the Colorado Supreme Court denied certiorari. J.A. 114a, 136a-137a.

2. In 1994, petitioner filed a pro se petition for federal habeas relief. The district court dismissed the petition because petitioner had failed to exhaust his state court remedies. J.A. 114a-115a, 137a.

In June 1995, petitioner filed a pro se motion for postconviction relief in state court and sought appointment of postconviction counsel. In October 1995, petitioner filed a motion seeking a ruling and, on December 1, 1995, the state court responded by appointing postconviction counsel. During the ensuing eight years, petitioner and the court took no further action with respect to that motion. In April 2004, petitioner wrote a letter to the court, but the substance of that letter is not in the record. J.A. 10a-11a, 115a, 137a-138a.

On August 30, 2004, petitioner filed a second pro se motion for postconviction relief in state court. J.A. 11a, 115a, 138a. On the first page of his new motion, petitioner "prominently stated that '[n]o other postcon-

viction proceedings [had been] filed.'" J.A. 138a (brackets in original; citation omitted). The state postconviction court denied the new motion and the Colorado Court of Appeals affirmed. *Ibid.* On February 5, 2007, the Colorado Supreme Court denied certiorari. *Ibid.*

3. Exactly one year later, on February 5, 2008, petitioner filed a petition for federal habeas relief under 28 U.S.C. 2254. J.A. 13a-28a. In response to a question on the preprinted habeas form asking petitioner to list each postconviction proceeding he had previously initiated, petitioner identified only his August 2004 state postconviction motion. J.A. 17a-19a.

Before requiring the State to file an answer, the magistrate judge ordered petitioner to show cause why his petition should not be dismissed as barred by 28 U.S.C. 2244(d)'s one-year statute of limitations. J.A. 29a-33a; see Rule 4 of the Rules Governing Section 2254 Cases (Section 2254 Rules). The order explained that, because petitioner's conviction became final before the one-year limitations period was enacted into law as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 101, 110 Stat. 1217 (28 U.S.C. 2244(d)), petitioner would have had to file his petition by April 24, 1997, unless he qualified for statutory or equitable tolling. J.A. 32a; see *Carey* v. *Saffold*, 536 U.S. 214, 217 (2002); 28 U.S.C. 2244(d)(2) (providing for statutory tolling while a "properly filed" state postconviction motion is pending). The order further noted that petitioner's August 2004 postconviction motion would not toll the limitations period because it was filed "over seven years after" the time limit had expired. J.A. 32a. In response, petitioner failed to mention his 1995 state postconviction motion, J.A. 34a-40a,

and the district court accordingly dismissed the petition as time barred, J.A. 41a-46a.

Petitioner moved for reconsideration and again failed to mention his 1995 postconviction motion. J.A. 47a-60a. The district court granted petitioner's motion, J.A. 61a-63a, and ordered the State "to file a Pre-Answer Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and/or exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A)," J.A. 64a-65a.

In its pre-answer response, the State argued that the petition was subject to dismissal because some of petitioner's claims had not been exhausted in state court. Pre-Answer Response 4-13. As to the limitations defense, the State explained that petitioner "had until April 24, 1997, plus any tolling periods, to timely file his habeas petition," and that if petitioner had only filed the 2004 motion for state postconviction relief, his petition "clear[ly]" would be untimely. J.A. 70a. The State, however, informed the district court for the first time that petitioner had also filed a 1995 postconviction motion. J.A. 68a. Noting that it was "unclear how the 1995 postconviction motion, which apparently was never ruled upon" should affect the timeliness of the federal habeas petition, the State suggested that it was "certainly arguable that the 1995 postconviction motion was abandoned before 1997 and thus did not toll" the statute of limitations period at all. J.A. 70a. The State concluded by stating that it "will not challenge, but [is] not conceding, the timeliness of [petitioner's] habeas petition in [its] pre-answer response." *Ibid.*

The district court agreed that several of petitioner's claims had not been properly exhausted and permitted petitioner to voluntarily dismiss those claims. J.A. 74a-

82a. The court then ordered the State to file an answer under Rule 5 of the Section 2254 Rules. J.A. 83a. In its answer, the State discussed the Section 2244(d) statute of limitations defense and stated that, "[a]s noted in the pre-answer response, the [State is] not challenging, but do[es] not concede, the timeliness of the petition. The [State] hereby incorporate[s] the arguments raised in the pre-answer response into this answer." J.A. 87a.

On July 6, 2009, the district court dismissed the two remaining claims on their merits, J.A. 96a-111a, and later denied a certificate of appealability, Order Denying Certificate of Appealability.

4. On January 4, 2010, the court of appeals granted a certificate of appealability on both exhausted claims and appointed counsel. J.A. 112a-130a. In its order, the court examined the state and federal court records and concluded that petitioner's habeas petition might not have been timely filed. J.A. 120a-123a. Because the court considered it to be "an important preliminary matter" given Section 2244(d)'s "purpose of bringing finality to state court criminal judgments," the court directed the parties to brief the timeliness of petitioner's habeas petition. J.A. 122a-123a.

On appeal, petitioner argued that his federal habeas petition was timely because the 1995 postconviction motion tolled the one-year limitations period under 28 U.S.C. 2244(d)(2). See Pet. C.A. Supp. Br. 18-23; Pet. C.A. Supp. Reply Br. 1-8. Petitioner did not argue that the State waived any statute of limitations defense or that the appellate court was otherwise without authority to raise that issue *sua sponte*, and he did not cite this Court's decision in *Day* v. *McDonough*, 547 U.S. 198 (2006). In its supplemental brief, the State argued that petitioner's habeas petition was untimely because the

eight years of inaction constituted abandonment of the 1995 postconviction motion. Resp. C.A. Supp. Br. 17-23.

5. In an unpublished opinion, the court of appeals affirmed the district court on alternative grounds. J.A. 135a-144a. The court explained that "[a]lthough the district court's ultimate disposition of this case rested on grounds other than timeliness," it had "discretion to affirm on any ground adequately supported by the record." J.A. 139a n.2 (quoting *Davis* v. *Roberts*, 425 F.3d 830, 834 (10th Cir. 2005)). The court recognized that, in *Day*, this Court had advised federal courts that they could not "'override a State's deliberate waiver of a limitations defense' and sua sponte dismiss a habeas petition." *Ibid.* (quoting 547 U.S. at 202). Looking to the State's district court filings, the court of appeals noted that the State "provided a cryptic response to the timeliness question," but concluded that it did not amount to "a deliberate waiver" when read in context. *Ibid.* The court further determined that consideration of the timeliness defense was "particularly apt in this case, given that the issue was raised in the district court and addressed by [petitioner], the parties have briefed the issue on appeal, and the interests of justice would be served in reaching [it] given the extensive time period involved." *Ibid.* The court therefore decided to exercise its authority to consider whether the habeas petition was timely filed and concluded that it was not. J.A. 139a-144a.[1]

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[1] In his petition for panel rehearing, petitioner argued for the first time that the State had deliberately waived the limitations defense and that the court of appeals erred in considering it. See Pet. for Panel Reh'g 3-9. Petitioner did not contend that the court of appeals otherwise lacked authority to consider the limitations defense on its own motion.

SUMMARY OF ARGUMENT

I. A federal appellate court has the authority to give effect to the one-year statute of limitations period Congress has established for federal court review of state court convictions, even if the State has failed to preserve that defense. The court of appeals can enforce, on its own motion, several other habeas defenses that implicate the same institutional interests as AEDPA's time bar. And the limitations defense itself can be vindicated by the district court *sua sponte*. The State's failure to assert (and the district court's failure to enforce) the one-year limitations period does not deprive an appellate court of its inherent authority to give effect *sua sponte* to Congress's determination that federal courts should not hear untimely petitions.

Nothing in the statutes or rules concerning habeas procedure, the rules governing civil proceedings generally, or this Court's case law divests an appellate court of its independent authority to abide by the limitations on habeas review. Any suggestions to the contrary are squarely foreclosed by this Court's decision in *Day* v. *McDonough*, 547 U.S. 198 (2006), and the long line of cases on which *Day* relied. The limitations defense is "on a par" (*id.* at 209) with other procedural bars to habeas relief (*e.g.*, exhaustion, nonretroactivity, procedural default) that appellate courts can enforce *sua sponte*, and neither law nor logic supports a different rule for untimely petitions.

II. The court of appeals did not abuse its discretion by reaching the timeliness issue in this case. That petitioner suffered no prejudice and had ample opportunity to respond (in the district court and on appeal) is beyond dispute. And, given the extensive time period involved,

the interests of justice were best served by dismissing the petition as untimely.

The court of appeals would have abused its discretion had it overridden a clear and unambiguous decision by the State to waive a known meritorious limitations defense. See *Day*, 547 U.S. at 202, 210 n.11. But the State's "cryptic" (J.A. 140a n.2) comments in the district court, when viewed in context, fall short of a clear and unambiguous waiver. And, importantly, the State clarified any ambiguity on appeal when it forcefully argued that the petition was untimely. In light of the substantial institutional interests in finality and judicial efficiency that AEDPA's limitations bar protects, the court of appeals cannot be said to have "override[n]" (*Day*, 547 U.S. at 202) any deliberate waiver by the State.

ARGUMENT

I. A COURT OF APPEALS HAS THE AUTHORITY TO DISMISS AN UNTIMELY HABEAS PETITION *SUA SPONTE*

In order "to advance the finality of criminal convictions," Congress "adopted a tight time line, a one-year limitations period" for federal habeas cases. *Mayle* v. *Felix*, 545 U.S. 644, 662 (2005); see 28 U.S.C. 2244(d)(1); 28 U.S.C. 2255(f) (Supp. IV 2010). AEDPA's limitations period "quite plainly serves the well-recognized interest in the finality of state court judgments"; it "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." *Rhines* v. *Weber*, 544 U.S. 269, 276 (2005) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 179 (2001)). To further that policy, and in accord with relevant precedent, this Court held in *Day* v. *McDonough*, 547 U.S. 198 (2006), that a federal district court may dismiss an untimely habeas

petition *sua sponte*, even when the State fails to raise a statute of limitations defense in its answer. Under that same policy, and consistent with that same case law, an appellate court likewise has the discretionary authority to dismiss untimely habeas petitions on its own motion.

A. A Federal Appellate Court Has The Authority To Enforce *Sua Sponte* AEDPA's Statute Of Limitations Under This Court's Precedents And Sound Habeas Policy

AEDPA's statute of limitations is not jurisdictional. See *Holland* v. *Florida*, 130 S. Ct. 2549, 2560 (2010); *Day*, 547 U.S. at 205. It is a nonjurisdictional defense subject to forfeiture and waiver, *Holland*, 130 S. Ct. at 2560, and the State does not dispute that it forfeited that defense by failing to challenge the habeas petition as untimely in the district court, Resp. Br. 17, 46. Additionally, a federal appellate court is not obliged to excuse a State's forfeiture or to raise the timeliness issue on its own motion. Cf. *Gonzalez* v. *Thaler*, No. 10-895 (Jan. 10, 2012), slip op. 5 ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented."). The first question presented, as reformulated by this Court, asks whether a federal appellate court *may* raise a Section 2244(d) statute of limitations defense, despite the State's forfeiture. The answer is yes.[2]

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[2] Petitioner at times conflates the two questions presented by limiting the first question to circumstances where there purportedly has been a deliberate waiver. See Pet. Br. 23, 33. For purposes of answering the first question, the Court need only decide whether a court of appeals is categorically precluded from enforcing AEDPA's statute of limitations defense on its own motion. If the Court rejects that position, it may then address the deliberate-waiver question. See Part II, *infra*.

1. In *Day*, this Court held that "district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." 547 U.S. at 209. Based on an apparent computation error, the State in that case had incorrectly conceded in its answer that the petition was timely filed. *Id.* at 203. Despite that concession, the district court dismissed the petition as time barred and the court of appeals affirmed. *Id.* at 204. The question presented to this Court was "whether a federal court lacks authority, on its own initiative, to dismiss a habeas petition as untimely, once the State has answered the petition without contesting its timeliness." *Id.* at 202. The Court held that a federal district court may dismiss a habeas petition as untimely in those circumstances, so long as the parties are afforded "fair notice and an opportunity to present their positions," the habeas petitioner "is not significantly prejudiced," and "the interests of justice" are better served "by dismissing the petition as time barred." *Id.* at 210 (citation omitted).

2. Contrary to petitioner's contention, this Court's decision in *Day* is not a "limited exception" to a "well-settled principle that a litigant who fails to plead an affirmative defense waives any right to assert it." Pet. Br. 18; see *id.* at 29-30, 32 (referring to *Day* as an "exception"); *Barnett* v. *Roper*, 541 F.3d 804, 807 (8th Cir. 2008) (declining to "extend" *Day's* "exception"), cert. denied, 130 S. Ct. 63 (2009). This Court has long recognized the distinctive role the judiciary plays in enforcing limitations on habeas relief in order to promote finality and reduce federal-state friction—even where doctrines of forfeiture might otherwise preclude enforcement in civil litigation. *Day* is simply the latest application of that general principle.

In *Granberry* v. *Greer*, 481 U.S. 129 (1987), this Court held that federal courts of appeals "have discretion to consider the issue of exhaustion despite the State's failure to interpose the defense at the district-court level." *Day*, 547 U.S. at 206 (citing 481 U.S. at 133); see *id.* at 217 (Scalia, J., dissenting) (noting that "the *Granberry* regime allows the forfeited procedural defense to be raised for the first time on appeal, either by the State or by the appellate court *sua sponte*"). In that case, the Court rejected two "extreme" positions: that a court of appeals is either precluded from, or required to, "dismiss [a habeas petition] for nonexhaustion notwithstanding the State's failure to raise it." *Granberry*, 481 U.S. at 133. Instead, the Court adopted an "intermediate approach," whereby appellate courts should "exercise discretion in each case to decide whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith." *Id.* at 131, 133.

Consistent with its decision in *Granberry*, the Court subsequently held that a reviewing court may apply the nonretroactivity rule announced in *Teague* v. *Lane*, 489 U.S. 288, 310 (1989) (plurality opinion), even if the State fails to raise it. See *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994) (holding that "a federal court may, but *need not*, decline to apply *Teague* if the State does not argue it") (emphasis added); *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (declining to address nonretroactivity defense that the State failed to raise in the lower courts, but noting that the Court "undoubtedly" had "the discretion to reach" the issue); see also *Day*, 547 U.S. at 206 (discussing *Caspari* and *Schiro*).

And while this Court has never decided the issue, see *Trest* v. *Cain*, 522 U.S. 87, 90 (1997), the overwhelming

majority of courts of appeals have concluded that they have discretion to consider whether a habeas petitioner's claims are procedurally defaulted despite the State's failure to properly assert that defense.[3] See *Ortiz* v. *Dubois*, 19 F.3d 708, 714-715 (1st Cir. 1994), cert. denied, 513 U.S. 1085 (1995); *Washington* v. *James*, 996 F.2d 1442, 1447-1448 (2d Cir. 1993), cert. denied, 510 U.S. 1078 (1994); *Szuchon* v. *Lehman*, 273 F.3d 299, 321 & n.13 (3d Cir. 2001); *Yeatts* v. *Angelone*, 166 F.3d 255, 260-262 (4th Cir.), cert. denied, 526 U.S. 1095 (1999); *Smith* v. *Johnson*, 216 F.3d 521, 523-524 (5th Cir. 2000) (per curiam); *Lorraine* v. *Coyle*, 291 F.3d 416, 426 (6th Cir.), modified on denial of reh'g, 307 F.3d 459 (2002), cert. denied, 538 U.S. 947 (2003); *Perruquet* v. *Briley*, 390 F.3d 505, 515-519 (7th Cir. 2004); *King* v. *Kemna*, 266 F.3d 816, 821-822 (8th Cir. 2001) (en banc), cert. denied, 535 U.S. 934 (2002); *Windham* v. *Merkle*, 163 F.3d 1092, 1100-1101 (9th Cir. 1998); *Manlove* v. *Tansy*, 981 F.2d 473, 476 n.4 (10th Cir. 1992). But cf. *Smith* v. *Secretary, Dep't of Corr.*, 572 F.3d 1327, 1339-1342 (11th Cir. 2009) (suggesting that under AEDPA different waiver rule applies to procedural default based on nonexhaustion); *United States* v. *Barron*, 172 F.3d 1153, 1156-1157 (9th Cir. 1999) (en banc) (declining to consider forfeited procedural-default defense in Section 2255 case based on absence of "extraordinary circumstances"). As the Fourth Circuit explained, "in the presence of overriding interests of comity and judicial efficiency that transcend the interests of the parties," a federal appellate court "may, in its discretion, deny federal habeas

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[3] In *Trest*, the Court held only that courts of appeals are not obliged to raise a procedural bar *sua sponte*, but declined to decide whether they had discretion to do so. 522 U.S. at 89-90.

relief on the basis of issues that were not preserved or presented properly by a state." *Yeatts*, 166 F.3d at 261.[4]

This Court in *Day* relied on *Granberry*, *Caspari*, *Schiro*, and the procedural-default case law to hold that "district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." 547 U.S. at 209. The Court explained that "it would make scant sense to distinguish in this regard AEDPA's time bar from [these] other threshold constraints on federal habeas petitioners." *Ibid.*; see *id.* at 205-206. Indeed, as this Court observed, the current version of Rule 5(b) of the Section 2254 Rules places the statute of limitations defense "on a par" with "failure to exhaust state remedies," "procedural bar," and "nonretroactivity." *Id.* at 209 (quoting Rule 5(b) of the Section 2254 Rules). And because the limitations defense "advances the same concerns as those advanced by the doctrines of exhaustion and procedural default," as well as nonretroactivity, the Court agreed that they "must be treated the same." *Id.* at 209 (quoting *Long* v. *Wilson*, 393 F.3d 390, 404 (3d Cir. 2004)).

Granberry, *Caspari*, and *Schiro* did not concern the authority of federal *district* courts, and the procedural-

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[4] The courts of appeals have also held that, in appropriate circumstances, they may conduct harmless error review in a habeas proceeding, even if the State failed to properly argue harmlessness. See *Miller* v. *Stovall*, 608 F.3d 913, 927 (6th Cir. 2010), vacated on other grounds, 132 S. Ct. 573 (2011); *Jones* v. *Cain*, 600 F.3d 527, 540-541 & n.12 (5th Cir. 2010); *Sanders* v. *Cotton*, 398 F.3d 572, 582 (7th Cir. 2005); *Horsley* v. *Alabama*, 45 F.3d 1486, 1492 n.10 (11th Cir.), cert. denied, 516 U.S. 960 (1995); *Lufkins* v. *Leapley*, 965 F.2d 1477, 1481-1482 (8th Cir.), cert. denied, 506 U.S. 895 (1992); cf. *Thomas* v. *Crosby*, 371 F.3d 782, 792-802 (11th Cir. 2004) (Tjoflat, J., specially concurring) (concluding that court of appeals had authority to consider legal issue habeas petitioner failed to raise in district court), cert. denied, 543 U.S. 1063 (2005).

default case law overwhelmingly extends to the courts of appeals. As applied by this Court in *Day*, that precedent equally compels the conclusion that courts of appeals are likewise permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition.

3. The inherent authority of federal courts to enforce, on their own motion, procedural bars to habeas relief stems from the important principles of finality, judicial efficiency, comity, and federalism that are implicated by federal habeas review of state court judgments. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 491 n.31 (1976). And those interests do not meaningfully dissipate after the district court enters its judgment.[5]

Even before AEDPA, this Court "impose[d] significant limits on the discretion of federal courts to grant habeas relief." *Calderon* v. *Thompson*, 523 U.S. 538, 554-555 (1998). "In light of 'the profound societal costs that attend the exercise of habeas jurisdiction,'" *id.* at 554 (quoting *Smith* v. *Murray*, 477 U.S. 527, 539 (1986)), it restricted, for example, the courts' ability to grant habeas relief on the basis of procedurally defaulted claims, *United States* v. *Frady*, 456 U.S. 152, 164-169 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72, 81-91 (1977),

[5] Federal courts have generally recognized that the systemic interests in finality and judicial efficiency are equally implicated by postconviction review of federal court judgments. See, *e.g.*, *United States* v. *Bendolph*, 409 F.3d 155, 162-164 (3d Cir. 2005) (en banc) (Section 2255 statute of limitations), cert. denied, 547 U.S. 1123 (2006); *Rosario* v. *United States*, 164 F.3d 729, 732-733 (2d Cir. 1998) (Section 2255 procedural default), cert. denied, 526 U.S. 1033, and 527 U.S. 1012 (1999); *United States* v. *Allen*, 16 F.3d 377, 378-379 & n.2 (10th Cir. 1994) (same); cf. *Danforth* v. *Minnesota*, 552 U.S. 264, 281 n.16 (2008) (noting that lower federal courts have also applied "the *Teague* rule" to motions under Section 2255).

retroactive application of "new rules," *Teague*, 489 U.S. at 308-310, non-prejudicial claims of trial error, *Brecht* v. *Abrahamson*, 507 U.S. 619, 637-638 (1993), or where the petitioner has abused the writ, *McCleskey* v. *Zant*, 499 U.S. 467, 477-496 (1991).

In enacting AEDPA, Congress sought "to further the principles of comity, finality, and federalism" that gave rise to this Court's own limitations on habeas relief. *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000); see *Mayle*, 545 U.S. at 662-663. In particular, Congress understood that collateral review of convictions undermines the finality that "is essential to both the retributive and the deterrent functions of criminal law," *Calderon*, 523 U.S. at 555, a concern that applies to postconviction review of federal as well as state convictions, *Frady*, 456 U.S. at 166; see *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) (noting that one of AEDPA's purposes is "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases").

To promote society's interest in the "finality" of criminal convictions and the "expeditious handling of habeas proceedings," AEDPA's limitation period was "designed to impose a tight time constraint on federal habeas petitioners." *Day*, 547 U.S. at 202, 208; see 28 U.S.C. 2244(d)(1); 28 U.S.C. 2255(f) (Supp. IV 2010). The limitations period "promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." *Day*, 547 U.S. at 205-206 (quoting *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)). Like the other limits on habeas review, AEDPA's statute of limitations "implicat[es] values beyond the concerns of the parties,"

id. at 205 (quoting *Acosta*, 221 F.3d at 123); reflects "the State's interest in the finality of convictions that have survived direct review within the state court system," *Calderon*, 523 U.S. at 555 (citation omitted); and helps alleviate the "heavy burden on scarce federal judicial resources [that] threatens the capacity of the system to resolve primary disputes," *McCleskey*, 499 U.S. at 491.

Because the costs associated with federal habeas review are "societal costs," *Calderon*, 523 U.S. at 554 (quoting *Smith*, 477 U.S. at 539), society's interests in enforcing the judicially and congressionally imposed limits on such review "transcend the concerns of the parties to [the] action." *Acosta*, 221 F.3d at 122 (citation omitted). As such, Congress has provided for federal courts to exercise a unique gatekeeper function. *E.g.*, Rule 4 of the Section 2254 Rules (providing that a district court "must promptly examine" the petition and "[i]f it plainly appears" that the petitioner "is not entitled to relief, * * * the judge must dismiss"); Rule 4(b) of the Rules Governing Section 2255 Proceedings (Section 2255 Rules) (same). That gatekeeping role is not limited to the district court. For example, a habeas petitioner cannot appeal "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. 2253(c)(1); see Fed. R. App. P. 22(b). This process "screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels." *Gonzalez*, No. 10-895, slip op. at 9. Congress also established "a 'gatekeeping' mechanism for the consideration of 'second or successive habeas corpus applications' in the federal courts." *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 641 (1998) (quoting *Felker* v. *Turpin*, 518 U.S. 651, 657 (1996)). Thus, "[b]efore a second or successive application [for a writ of

habeas corpus] is filed in the district court, the applicant [must] move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. 2244(b)(3)(A); see Rule 9 of the Section 2254 Rules; see also 28 U.S.C. 2255(h) (Supp. IV 2010); Rule 9 of the Section 2255 Rules. As these provisions demonstrate, Congress intended federal courts (including appellate courts) to play a more active role in habeas proceedings than they generally do in traditional civil litigation.

4. Even in ordinary civil and criminal litigation, appellate courts retain some discretionary authority to consider forfeited legal issues that, like procedural bars in habeas proceedings, implicate institutional or systemic values that transcend the concerns of the litigating parties.

For example, this Court has recognized that it may be appropriate for a federal court to raise a res judicata defense on its own motion in "special circumstances," even though res judicata is "an affirmative defense ordinarily lost if not timely raised." *Arizona* v. *California*, 530 U.S. 392, 410, 412 (2000) (citing Fed. R. Civ. P. 8(c)). And several courts of appeals have raised preclusion defenses *sua sponte* in appropriate circumstances.[6]

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[6] *E.g.*, *Bechtold* v. *City of Rosemount*, 104 F.3d 1062, 1068-1069 (8th Cir. 1997) (raising res judicata on its own motion to affirm district court); *Russell* v. *SunAmerica Sec., Inc.*, 962 F.2d 1169, 1172 (5th Cir. 1992) (same); *United States* v. *Real Prop. Located in El Dorado Cnty.*, 59 F.3d 974, 979 n.3 (9th Cir. 1995) (raising collateral estoppel *sua sponte* to affirm district court); see also *B. Willis, C.P.A., Inc.* v. *BNSF Ry.*, 531 F.3d 1282, 1297-1298 (10th Cir. 2008) (citing cases); *Stanton* v. *District of Columbia Court of Appeals*, 127 F.3d 72, 77 (D.C. Cir. 1997) (noting that "even a *party's* forfeiture of the right to assert" res judicata, which did not happen in that case, "does not destroy a *court's* ability to consider the issue sua sponte"); 18 Charles Alan Wright,

That is because certain preclusion defenses are "not based solely on the defendant's interest in avoiding the burdens of twice defending a suit" but, like AEDPA's statute of limitations defense, they are "also based on the avoidance of unnecessary judicial waste." *Arizona*, 530 U.S. at 412 (quoting *United States* v. *Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting)); see *Bechtold* v. *City of Rosemount*, 104 F.3d 1062, 1068 (8th Cir. 1997) (explaining that, with res judicata, "there is more at stake than relitigation between the parties"); *Stanton* v. *District of Columbia Court of Appeals*, 127 F.3d 72, 77 (D.C. Cir. 1997) (explaining that "res judicata belongs to courts as well as to litigants").

Similarly, every court of appeals to consider the issue has concluded that, in appropriate circumstances, appellate courts have discretion to consider whether an error was harmless even if the government failed to properly argue harmlessness. See *United States* v. *Rose*, 104 F.3d 1408, 1414-1415 (1st Cir.), cert. denied, 520 U.S. 1258 (1997); *United States* v. *Dolah*, 245 F.3d 98, 107 (2d Cir. 2001); *United States* v. *McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997), cert. denied, 524 U.S. 951 (1998); *United States* v. *Giovannetti*, 928 F.2d 225, 226-227 (7th Cir. 1991); *United States* v. *Causevic*, 636 F.3d 998, 1004 (8th Cir. 2011); *United States* v. *Gonzalez-Flores*, 418 F.3d 1093, 1100-1101 (9th Cir. 2005); *United States* v. *Doe*, 572 F.3d 1162, 1174-1176 (10th Cir. 2009), cert. denied, 130 S. Ct. 1687 (2010); *United States* v. *Adams*, 1 F.3d 1566, 1575-1576 (11th Cir. 1993), cert. denied, 510 U.S. 1198, and 510 U.S. 1206 (1994); *United States* v. *Pryce*, 938 F.2d 1343, 1348 (D.C. Cir. 1991), cert. denied,

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Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4405, at 89 & n.10 (2d ed. 2002).

503 U.S. 941, and 503 U.S. 988 (1992); see also *United States* v. *Peay*, 972 F.2d 71, 76 n.* (4th Cir. 1992) (Luttig, J., concurring in part and dissenting in part), cert. denied, 506 U.S. 1071 (1993); p. 13, n.4, *supra* (citing Fifth and Sixth Circuit habeas cases).[7] As the Seventh Circuit explained, when harmlessness has not been argued by the government, courts of appeals are "authorized" to consider harmless error "for the sake of protecting third-party interests including such systemic interests as the avoidance of unnecessary court delay." *Giovannetti*, 928 F.2d at 226. AEDPA's statute of limitations implicates similar systemic concerns.

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[7] These examples are not exhaustive. See, *e.g.*, *Cruz* v. *Melecio*, 204 F.3d 14, 22-25 & n.7 (1st Cir. 2000) (ordering stay of district court proceedings on abstention grounds not raised by the parties based on "considerations of federalism, comity, and sound judicial administration"). Indeed, as the court of appeals recognized, an appellate court retains the authority to affirm a lower court judgment "on any ground adequately supported by the record." J.A. 139a n.2 (citation omitted). And while a reviewing court may often decline to affirm on grounds that were not raised below, see *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 273 (2009), that is not a categorical limitation on the court's authority. See *United States* v. *Lawson*, 410 F.3d 735, 740 n.4 (D.C. Cir. 2005) ("[W]e may affirm on grounds other than those presented and relied on below."), cert. denied, 546 U.S. 1055 (2005); *Loftis* v. *UPS, Inc.*, 342 F.3d 509, 514 (6th Cir. 2003); *Jodoin* v. *Toyota Motor Corp.*, 284 F.3d 272, 277 n.2 (1st Cir. 2002); *Bechtold*, 104 F.3d at 1068; cf. *Schiro*, 510 U.S. at 228-229 (noting, with respect to forfeited *Teague* defense, that a respondent "is entitled to rely on any legal argument in support of the judgment below").

B. No Statute, Rule, Or Case Justifies Depriving An Appellate Court Of Its Inherent Authority To Enforce *Sua Sponte*, In Appropriate Circumstances, AEDPA's Limitations Defense

Petitioner does not dispute that an appellate court may enforce a variety of habeas defenses on its own motion. And petitioner acknowledges that a district court may dismiss an untimely habeas petition *sua sponte* under *Day*. Petitioner nevertheless contends that an appellate court categorically lacks power to enforce one particular habeas defense, the statute of limitations, on its own motion. No statute, rule, or case supports such an exception.

1. Petitioner first contends that the statute of limitations is an affirmative defense that is forfeited if not raised in a responsive pleading. Pet. Br. 25-26 (citing Fed. R. Civ. P. 8(c) and 12(b), and Rule 5(b) of the Section 2254 Rules). That is correct, but of little consequence.

The same was true in *Day,* yet this Court held that a district court could consider the timeliness of a state prisoner's habeas petition despite the State's failure to assert a limitations defense in its answer. 547 U.S. at 209; *id.* at 202 (noting that "[o]rdinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto") (citing Fed. R. Civ. P. 8(c), 12(b), and 15(a)). In *Day*, the limitations defense was raised in the district court (indeed *by* the district court), but that is not a distinction found in the federal rules upon which petitioner relies. After *Day*, it is clear that a federal court is not bound by a State's failure to comply with the letter of the federal civil or habeas rules—both of which require a litigant to

raise a statute of limitations defense in a *responsive pleading*—and petitioner's continued reliance on those rules is unavailing.

Moreover, this Court's decision in *Granberry* demonstrates that Rule 5(b) of the Section 2254 Rules is not dispositive. At the time of *Granberry*, Rule 5 specified only one affirmative defense that the State was required to address in its answer: "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." 481 U.S. at 132 n.5; see Rule 5 of the Section 2254 Rules (1976). This Court observed that the rule imposed on the State "a duty to advise the district court whether the prisoner has, in fact, exhausted all available state remedies." *Granberry*, 481 U.S. at 134. The Court nevertheless held that the court of appeals "is not obligated to regard the State's omission as an absolute waiver of the claim." *Id.* at 133.

2. Rule 5(b) now sets forth four defenses that a State is required to raise in its answer, if one is filed. See Rule 5(b) of the Section 2254 Rules. No sound reason justifies categorically precluding an appellate court from considering a statute of limitations defense not asserted by the State, when that same court is free to consider unpreserved claims of exhaustion, nonretroactivity, and procedural default. See pp. 11-13, *supra*. To the extent petitioner suggests that the limitations defense is somehow different from all of those other defenses, the Court already rejected those arguments in *Day* and they are equally without merit here.[8]

[8] Petitioner contends that the other habeas defenses, unlike AEDPA's statute of limitations, "were created by the courts in an exercise of their traditional equitable authority." Pet. Br. 28. Petitioner also argues that the limitations defense "does not raise the same

Petitioner relies on 28 U.S.C. 2254(b)(3), which provides that a "State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. 2254(b)(3). Based on that provision, petitioner contends that other defenses, as to which Congress has made no similar provision, are forfeited under the more stringent rules that purportedly apply to civil cases generally. Pet. Br. 22. But that statutory provision was not added to Section 2254 until AEDPA's enactment in 1996, § 104, 110 Stat. 1218, "nearly a decade after" this Court had already upheld, in *Granberry*, an appellate court's authority to address an exhaustion defense despite the State's failure to raise it in the district court. See *Day*, 547 U.S. at 206 n.4. And no statutory provision (then or now) addresses whether or when a State can waive nonretroactivity, yet this Court in *Schiro*, 510 U.S. at 229, held that a reviewing court "undoubtedly" has discretion to address that defense in the first instance. See *Caspari*, 510 U.S. at 389. Thus, to the extent petitioner suggests that strict forfeiture of defenses not timely raised in the district court is the rule absent an express statutory exception, *Granberry*, *Schiro*, and *Caspari* all refute that suggestion.

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comity and federalism concerns as exhaustion or procedural default." *Id.* at 27. In holding that "it would make scant sense to distinguish * * * AEDPA's time bar from other threshold constraints on federal habeas petitioners," *Day*, 547 U.S. at 209; see *id.* at 205-206, this Court rejected both distinctions. Cf. *id.* at 214 (Scalia, J., dissenting). Moreover, in focusing exclusively on comity and federalism, petitioner ignores the other institutional concerns, such as the finality of criminal judgments, judicial efficiency, and the conservation of scarce judicial resources, on which the limitations defense (and the other defenses) are also grounded.

Nor does Congress's adoption in Section 2254(b)(3) of an explicit rule with respect to waiver of the defense of exhaustion give rise to a negative inference that Congress intended to adopt an absolute and binding rule of timely assertion or forfeiture with respect to other habeas defenses. Rather, the amendment was specifically "designed to disapprove those decisions which have deemed states to have waived the exhaustion requirement, or barred them from relying on it, in circumstances other than where the state has expressly waived the requirement." H.R. Rep. No. 23, 104th Cong., 1st Sess. 10 (1995). Thus, "[h]aving pinpointed that problem, [Congress] gave a pinpoint answer." *United States* v. *Vonn*, 535 U.S. 55, 71 (2002) (Congress's adoption of a harmless-error standard in Fed. R. Crim. P. 11(h) to respond to judicial holdings failing to conduct harmless-error review evinced no intent to displace plain-error review of forfeited claims.). Absent an express statutory provision, the "intermediate approach" set forth in *Granberry*, 481 U.S. at 131, and applied in *Day*, 547 U.S. at 210, should control.

3. Petitioner also relies on *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), and *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam). See Pet. Br. 23-25. Neither case, however, arises in the habeas context and neither directly addresses whether (or when) a federal appellate court retains authority to consider a nonjurisdictional time limit on its own motion.

In *Kontrick*, this Court held that a debtor forfeits Federal Rule of Bankruptcy Procedure 4004(a)'s time limit for a creditor to object to the debtor's discharge by failing to raise it "before the bankruptcy court reaches the merits of the creditor's objection." 540 U.S. at 447. In so holding, the Court determined that Rule 4004(a) is

a nonjurisdictional "claim-processing rule" that cannot be raised "after the party has litigated and *lost* the case on the merits." *Id.* at 453-456, 460 (emphasis added). In *Eberhart*, the government appealed the district court's grant of a motion for new trial and raised the timeliness of the defendant's motion under Federal Rule of Criminal Procedure 33(a) for the first time on appeal. 546 U.S. at 13-14. Applying its decision in *Kontrick*, the Court held that Rule 33(b)'s time limits were not jurisdictional and therefore did not "compel" relief in circumstances where (as there) the government had "forfeited that defense." *Id.* at 19.

Both cases establish that certain nonjurisdictional time limits are subject to forfeiture, but that is not in dispute here. The question is whether Section 2244(d)'s statute of limitations defense *may* be raised by a federal appellate court on its own motion, despite the State's forfeiture. Neither case directly addresses whether (or when) a court of appeals might consider a forfeited time limit on its own motion. See *United States* v. *Mitchell*, 518 F.3d 740, 745 (10th Cir. 2008) ("*Kontrick* and *Eberhart* do not specifically speak to the issue of whether a court may *sua sponte* raise timeliness under non-jurisdictional federal rules."). And the issue here is not what a court of appeals should do with a forfeited statute of limitations defense in an ordinary civil or criminal proceeding, but rather what an appellate court may do with *AEDPA*'s limitations defense which, as this Court recognized in *Day*, implicates broader societal interests.[9]

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[9] Notably, in *Kontrick* and *Eberhart*, the losing party sought to *reverse* the district court's judgment by asserting a time bar for the first time after an adjudication of the merits. See *Kontrick*, 540 U.S. at 447, 460; *Eberhart*, 546 U.S. at 14. As noted above (see p. 19, n.7,

4. As petitioner correctly notes, *Day* did rely in part on the district court's authority "to freely allow amendments to pleadings while a matter is still pending." Pet. Br. 32-33. This Court recognized that the district court could have informed the State of its computation error and entertained an amendment to the State's answer under Federal Rule of Civil Procedure 15(a), and saw "no dispositive difference between that route" and the district court raising the issue *sua sponte*. *Day*, 547 U.S. at 209. *Day*, however, did not rest solely on that ground and the decisions on which *Day* relied were not based on Rule 15(a) at all.

As discussed, the Court in *Day* relied on a long line of cases holding that federal courts, including appellate courts, have discretion to consider habeas defenses such as exhaustion, nonretroactivity, and procedural default, despite the State's failure to properly raise those defenses. See 547 U.S. at 206-207. And the Court concluded that "it would make scant sense" to treat AEDPA's time bar differently from those "other threshold constraints on federal habeas petitioners." *Id.* at 209; see *id.* at 205-206. *Granberry*, the "pathmarking" case on which the Court relied (see *Day*, 547 U.S. at 206), certainly did not rest on the *district* court's authority to grant leave to amend; the State raised the issue of exhaustion for the first time on appeal. *Granberry*, 481 U.S. at 130; see *Schiro*, 510 U.S. at 229 (noting that *this Court* "undoubtedly" had the authority to reach a nonretroactivity defense not raised below); pp. 11-13, *supra* (citing court of appeals' case law holding that *ap-*

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supra), even in ordinary civil litigation, courts have followed a more flexible rule when considering whether to affirm a district court's judgment on grounds other than those raised below.

pellate courts have the authority to reach procedural default for the first time on appeal).[10]

II. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION BY REACHING THE TIMELINESS ISSUE IN THIS CASE

That an appellate court *may* consider the timeliness of a habeas petition on its own motion does not mean that it is obliged to do so, or that it retains the discretion to do so in every case. Rather, this Court in *Day* and *Granberry* set forth the proper scope of a federal habeas court's discretionary authority. The court of appeals complied with those directives.

1. As with the exhaustion of state remedies, the cases in which Section 2244(d)'s limitations defense is not properly raised by the State "present a wide variety of circumstances which the courts of appeals * * * are able to evaluate individually." *Granberry*, 481 U.S. at 136. "[B]efore acting on its own initiative," a federal habeas court should (i) "accord the parties fair notice and an opportunity to present their positions," *Day*, 547

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[10] In any event, Federal Rule of Civil Procedure 15(a) could come into play if a case is remanded. If remand is otherwise appropriate, an appellate court could surely identify a potential timeliness issue and suggest that the State seek leave to amend its answer to add a statute of limitations defense on remand. Cf. *Harris* v. *Secretary, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 345 (D.C. Cir. 1997) (noting that the government could seek leave on remand to amend its responsive pleading to raise the defense of untimeliness). In the many cases where a ruling favorable to the habeas petitioner would result in a remand, permitting the court of appeals to enforce the time bar on its own motion (rather than requiring amendment of the answer on remand) would conserve judicial resources and advance "Congress' intent in AEDPA 'to eliminate delays in the federal habeas review process.'" *Gonzalez*, No. 10-895, slip op. at 9 (quoting *Holland*, 130 S. Ct. at 2562).

U.S. at 210; (ii) "assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue," *ibid.*; and (iii) "'determine whether the interests of justice would be better served' by addressing the merits or by dismissing the petition as time barred," *ibid.* (citing *Granberry*, 481 U.S. at 136).

Petitioner does not claim that he was prejudiced by the State's failure to challenge the timeliness of his habeas petition in the district court or on its own motion in the court of appeals. And petitioner was given ample opportunity to present his views. Section 2244(d)'s statute of limitations was raised first by the district court and petitioner filed several briefs on that issue, without once mentioning his 1995 postconviction motion. See pp. 3-4, *supra*. Only after the State brought the 1995 motion to the court's attention did the district court dismiss the petition on its merits. *Id.* at 4-5. On appeal, the court raised the limitations defense at the same time it granted petitioner a certificate of appealability and appointed counsel, and petitioner (with the assistance of counsel) filed three additional briefs addressing the time bar. *Id.* at 5-6 & n.1. Although petitioner now contends that the court of appeals lacked any authority to consider the timeliness of his petition, he never made that argument on appeal (and did not argue that the State waived that defense until his petition for panel rehearing). *Id.* at 6 & n.1.

Under those circumstances, the court of appeals correctly concluded that "the interests of justice would be served in reaching the timeliness issue given the extensive time period involved." J.A. 140a n.2 (citing *Day*, 547 U.S. at 210); see *ibid.* (noting that the timeliness issue "was raised in the district court and addressed by

[petitioner]" and that "the parties have briefed the issue on appeal").

2. The Court in *Day*, however, also made clear that it would "count it an abuse of discretion [if a court were] to override a State's deliberate waiver of a limitations defense." 547 U.S. at 202. In carving out that exception, the Court focused on whether the State made a "deliberate" and "intelligent" "cho[ice] to waive a statute of limitations defense." *Id.* at 202, 210 n.11. As petitioner acknowledges, to satisfy that standard the State must clearly manifest its intent to "relinquish[] a known right." Pet. Br. 35; see *Kontrick*, 540 U.S. at 458 n.13 (explaining the difference between forfeiture, *i.e.*, "the failure to make the timely assertion of a right" and waiver, *i.e.*, "the 'intentional relinquishment or abandonment of a known right'") (quoting *United States* v. *Olano*, 507 U.S. 725, 733 (1993)).

Because a federal habeas court's authority to raise a limitations defense *sua sponte* is based in large part on institutional interests that extend beyond the interests of the parties before the court, the deliberate-waiver exception recognized in *Day* should be narrowly construed. Only if a State knows it has a meritorious limitations defense and clearly and unambiguously disclaims it should a federal court be deprived of its inherent authority to raise the limitations bar on its own motion.[11]

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[11] A State may determine that the interests of justice are better served by having the federal court consider the merits of a constitutional challenge, rather than assert an otherwise available procedural defense. Cf. Tr. of Oral Arg. at 41-44, *Maples* v. *Thomas*, No. 10-63 (Jan. 18, 2012) (Justices Kennedy and Alito questioning whether the State was precluded from waiving procedural default and consenting to a decision on the merits given the unique facts of the case). Precluding an appellate court from dismissing a petition as untimely when the

3. The case-specific question at issue here is whether the court of appeals "overr[o]de" (*Day*, 547 U.S. at 202) the State's deliberate waiver and thereby abused its discretion in reaching the timeliness issue on its own motion. On balance, and in context, the court of appeals did not abuse its discretion.

The State's declarations in its district court filings were "cryptic." J.A. 140a n.2. In both its pre-answer and answer, the State asserted that it was not "challeng[ing]," but also was not "conceding," the timeliness of petitioner's habeas petition. J.A. 70a; see J.A. 87a. The State made this assertion after first disclosing to the district court the existence of a 1995 motion for state postconviction relief (which petitioner had never mentioned); noting some uncertainty as to how the 1995 motion would affect the timeliness issue; and explaining that if the 1995 motion had been "abandoned," tolling would not be appropriate. J.A. 70a; see J.A. 87a (cross-referencing pre-answer response). Taken together, the State's actions in the district court certainly amounted to a forfeiture, but fell short of a clear and unambiguous waiver.

Significantly, the State clarified any ambiguity on appeal. When the court of appeals requested briefing on the limitations defense, the State did not repeat its prior statements. The State did not decline to challenge the petition's timeliness nor did it affirmatively waive that defense. Instead, the State forcefully argued that the habeas petition was untimely.[12] See Resp. C.A. Supp.

State has made such a deliberate and unambiguous waiver serves that purpose; extending the deliberate-waiver exception to include equivocal statements or mistaken concessions does not.

[12] A closer question might be presented if the State's "cryptic" (J.A. 140a n.2) statements in the district court had been its last word on the

Br. 17-23. And, in response, petitioner did not ask the court of appeals to enforce any purported waiver made in the district court. See Pet. C.A. Supp. Reply Br. 1-8. Indeed, petitioner never mentioned waiver until his petition for panel rehearing, see Pet. for Panel Reh'g 3-9—after the court of appeals *sua sponte* raised and rejected that argument, J.A. 140 n.2.

The relevant question under *Day* is whether the federal habeas court "overr[o]de" (547 U.S. at 202) the State's deliberate and intelligent waiver. At the time the appellate court concluded that the habeas petition was time barred, it clearly did not. Cf. *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990) (declining to decide *Teague* nonretroactivity issue in light of State's affirmative representation at oral argument, "when asked about the issue," that it "had chosen not to rely on *Teague*"). In those circumstances, and in light of the institutional interests served by allowing an appellate court broad discretion to consider AEDPA's statute of limitations defense *sua sponte*, the court of appeals cannot be said to have overridden a deliberate and intelligent wavier by the State.[13]

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subject. Here, the court of appeals effectively provided the State with an opportunity to clarify its position and only after the State made clear that it was not waiving the limitations defense did the appellate court decide that issue.

[13] Contrary to petitioner's suggestion (Pet. Br. 38-42), there is little reason to think that the State delayed pursuit of a limitations defense to further some strategic advantage. The State was the first to disclose petitioner's 1995 motion for state postconviction relief (his best argument for timely filing). And the State affirmatively argued that the habeas petition was untimely only after it prevailed on the merits and only after the court of appeals requested briefing on that issue. As respondents note, "[i]t would have been a curious strategy indeed to raise the issue in the district court, but not preserve it, in the hope that

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MELISSA ARBUS SHERRY
Assistant to the Solicitor General
JOSHUA S. JOHNSON
Attorney

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the Court of Appeals would resurrect the issue on its behalf." Resp. Br. 50.