No. 05-3

In the Supreme Court of the United States

HERBERT L. BENDOLPH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JOHN C. RICHTER
Acting Assistant Attorney General
THOMAS M. GANNON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, in a collateral challenge pursuant to 28 U.S.C. 2255, a district court has authority to raise *sua sponte* a potential statute of limitations issue where the government did not raise the statute of limitations in its response to the Section 2255 motion.

2. Whether the court of appeals erred in affirming the dismissal of petitioner's Section 2255 motion as untimely without remanding the case for an evidentiary hearing on the question whether the limitations period should have been equitably tolled.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rules—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 05-3

HERBERT L. BENDOLPH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-55a) is reported at 409 F.3d 155. The opinion of the district court (Pet. App. 56a-61a) is not reported in the *Federal Supplement* but is *available at* 2001 WL 641084.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2005. The petition for a writ of certiorari was filed on June 24, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Delaware, petitioner was convicted of possessing a firearm as a previously convicted felon, in violation of 18 U.S.C. 922(g)(1). The district court sentenced him to a term of 235 months of

imprisonment. The court of appeals affirmed. *United States* v. *Bendolph*, 116 F.3d 470 (3d Cir. 1997) (Table). This Court denied review. *Bendolph* v. *United States*, 522 U.S. 939 (1997).

On October 18, 1998, petitioner filed a motion to correct, vacate, or set aside his sentence under 28 U.S.C. 2255. The district court dismissed the motion as time-barred. Pet. App. 56a-61a. A panel of the court of appeals heard argument, but before the panel issued a decision, the court of appeals heard the case en banc and affirmed. *Id.* at 1a-55a.[1]

1. On January 31, 1996, following a jury trial in the United States District Court for the District of Delaware, petitioner was found guilty on one count of possessing a firearm as a previously convicted felon. Petitioner was sentenced to a term of 235 months of imprisonment. See 01-2468 Pet'r C.A. Br. 2.

Petitioner appealed, challenging the district court's denial of a suppression motion and the court's modification, on the government's motion, of the transcript of the suppression hearing. See 97-7104 Pet'r C.A. Br., 1997 WL 33710229, at *1-*3. On May 5, 1997, the court of appeals affirmed by judgment order. *United States* v. *Bendolph*, 116 F.3d 470 (3d Cir. 1997) (Table). On May 27, 1997, the court of appeals issued a certified copy of its judgment in lieu of a formal mandate. C.A. App. 20a-21a.[2] On August 25, 1997, petitioner sought review

---

[1] In the en banc court, petitioner's case was consolidated with *United States* v. *Otero*, No. 02-2624 (3d Cir.). The court of appeals' disposition of *Otero*, see Pet. App. 10a-11a, 34a, does not affect the issues raised in the petition.

[2] Citations to "C.A. App." and "C.A. Supp. App." are to the Joint Appendix and Supplemental Appendix filed in the Third Circuit in No.

in this Court, see C.A. App. 22a-59a; the petition was filed 89 days after the court of appeals issued a certified copy of the judgment in lieu of a formal mandate, but more than 90 days after the court of appeals entered its judgment. In at least two places, the certiorari petition suggested that May 27, 1997, was the effective date of the judgment of the court of appeals. See C.A. App. 28a, 29a; see also 01-2468 Pet'r C.A. Br. 2-3; 01-2468 Gov't C.A. Br. 1-2. This Court denied review on October 20, 1997. *United States* v. *Bendolph*, 522 U.S. 939 (1997).[3]

2. a. On October 18, 1998, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. See C.A. App. 60a-74a. With respect to the timing of his direct appeal, the pro se motion did not provide a date for the judgment of the Third Circuit but stated that this Court denied his petition for a writ of certiorari on October 20, 1997. See *id.* at 61a.[4] Two weeks after the petitioner filed the Section 2255 motion, the district court ordered the government to file a response. Pet. App. 7a, 13a. On

---

01-2468, petitioner's appeal of the district court's denial of his Section 2255 motion.

[3] In the present collateral proceeding, the United States did not challenge petitioner's assertion in the court of appeals, see 01-2468 Pet'r C.A. Br. 3-5, that his petition for a writ of certiorari to this Court on direct review contained an apparently altered version of the certified judgment entered by the court of appeals in lieu of a formal mandate. See 01-2468 Gov't C.A. Br. 1-2 & n.2. The government did challenge petitioner's assertions about the origin of the alteration, noting that those assertions, which were based on extra-record interviews by petitioner's current appellate counsel, were without factual support in the record. See *id.* at 1-2.

[4] On a form for Section 2255 motions, petitioner wrote "AFFIRMATION OF CONVICTION (?) DENIAL OF CERT, 10/20/97," next to the question inquiring about the "Date of result" of his direct appeal. C.A. App. 61a.

December 17, 1998, the government responded to the merits of the claims in the motion without addressing the one-year statute of limitations in Section 2255. See C.A. App. 75a-85a; 28 U.S.C. 2255 para. 6. On January 14, 1999, petitioner moved to compel discovery. On March 15, 1999, the government responded to the motion without referring to Section 2255's statute of limitations. See C.A. App. 86a-90a. On April 21, 1999, the district court denied the motion to compel. See *id.* at 14a. In August 1999, the matter was reassigned to another district court judge. See Pet. App. 7a-8a; C.A. App. 14a.

b. In August 2000, the district court *sua sponte* entered an order reviewing the record as it related to the timeliness of petitioner's motion and noting that the motion appeared to be time-barred under the statute of limitations established in Section 2255 by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105(2), 110 Stat. 1220. See C.A. App. 91a-93a. The court requested the parties' views on the issue. *Id.* at 93a. In its response of September 28, 2000, the government adopted the court's analysis and contended that petitioner's Section 2255 motion should be denied as time-barred. See *id.* at 94a. Petitioner responded pro se, contending that his motion was timely as measured by the date that his certiorari petition was denied and, in the alternative, that the statute of limitations should be equitably tolled because of the errors of his counsel on direct review. See *id.* at 95a-99a; C.A. Supp. App. SA3-SA7. Petitioner did not object to the district court's consideration of the timeliness issue. See C.A. App. 95a-99a; C.A. Supp. App. SA3-SA7.

The district court denied petitioner's Section 2255 motion as untimely. Pet. App. 56a-61a. The court ruled that because petitioner's certiorari petition on direct review was filed late, the statute of limitations period in Section 2255 began to run on the date that the certiorari petition should have been filed, rather than on the date this Court denied review. See *id.* at 58a-59a (citing *Kapral* v. *United States*, 166 F.3d 565, 575, 577 (3d Cir. 1999)). The court concluded that, by that measure, petitioner's Section 2255 motion was filed beyond the applicable one-year statute of limitations. See *ibid.*[5] The district court also declined to equitably toll the statute of limitations period, reasoning that "any mistake or miscalculation by petitioner's counsel regarding the applicable statute of limitations does not warrant equitable tolling." *Id.* at 59a-60a (collecting cases).

3. Petitioner appealed, and the court of appeals granted a certificate of appealability. See Pet. 4 n.12. After a three-judge panel heard argument but before issuance of an opinion, the court of appeals heard the case en banc with another pending case raising similar issues. See Pet. App. 4a-5a; see also note 1, *supra*.

a. The en banc court of appeals affirmed. See Pet. App. 1a-35a. The court first held that Section 2255's "limitations period is not jurisdictional and therefore is subject to equitable considerations such as waiver." *Id.* at 21a. Nevertheless, the court of appeals held that the United States' failure to raise the statute of limitations defense in its answer did not deprive the district court of the power to raise the issue *sua sponte*. *Id.* at 11a-35a.

---

[5] Petitioner does not challenge that conclusion in this Court.

Relying on its decisions in *Long* v. *Wilson*, 393 F.3d 390 (3d Cir. 2004), petition for cert. pending, No. 04-10035 (filed May 6, 2005), and *Robinson* v. *Johnson*, 313 F.3d 128 (3d Cir. 2002), cert. denied, 540 U.S. 826 (2003), which addressed similar issues in habeas cases under 28 U.S.C. 2254, the court reasoned that "the interests underlying the AEDPA's statute of limitations that are applicable to § 2255 motions are furthered, not hindered, by courts exercising discretionary power *sua sponte* in post-answer cases." Pet. App. 25a. The court noted that these interests include furthering the finality of judgments, preserving judicial resources, curbing the abuse of the writ of habeas corpus, and promoting the public reputation of judicial proceedings and the public interest generally. *Ibid.*; see *id.* at 17a-20a, 28a-29a.

The court rejected the argument that "the AEDPA statute of limitations is the government's alone to use or lose," and that courts may not act on their own motion. Pet. App. 26a. The court observed that this argument rested on the mistaken premise that Section 2255 proceedings were indistinguishable from ordinary civil cases. See *id.* at 25a. The court further noted that, "[u]nlike ordinary civil litigation, the practical reality of habeas is that the government may lack, for long periods of time, the file documents necessary to knowledgeably analyze timeliness." *Id.* at 29a.

Accordingly, the court of appeals held that a district court has the authority in Section 2255 proceedings to raise *sua sponte* AEDPA's statute of limitations, either before or after an answer has been filed, as long as it provides notice and an opportunity to respond. Pet. App. 28a-31a. The court of appeals further held that, if the district court raises the issue after a response has been filed that does not raise a statute of limitations

defense, the district court must examine whether the habeas petitioner will be prejudiced by the delay in raising the issue. See *id.* at 30a-31a.

Applying these principles to petitioner's case, the court held that the district court had the power to flag the potential statute of limitations issue *sua sponte*, even if the government's actions constituted waiver;[6] that the district court had provided petitioner with sufficient notice of, and a sufficient opportunity to respond to, the district court's raising of the timeliness issue; that the district court's raising of the issue was not so late that petitioner was prejudiced; and that the government's delay in raising the issue had not been in bad faith. See Pet. App. 31a-34a. Accordingly, the court affirmed the district court's dismissal of petitioner's Section 2255 motion as untimely. See *id.* at 34a.

b. Judge Nygaard filed an opinion dissenting in relevant part, see Pet. App. 36a-53a, and Judge Sloviter filed a dissenting opinion. See *id.* at 54a-55a. The other dissenting judges joined both dissents. See *id.* at 36a, 54a. Judge Nygaard would have remanded the case for an evidentiary hearing on equitable tolling, see *id.* at 36a-39a, and believed that the government had waived the statute of limitations issue by failing to raise it in its response to the Section 2255 motion. See *id.* at 39a-47a. In Judge Nygaard's view, the majority's decision rendered the concept of waiver a nullity and

---

[6] Although during oral argument before the three-judge panel, the United States acknowledged that it had waived the statute of limitations within the meaning of the Third Circuit's decision in *Robinson*, see Pet. App. 48a n.26 (Nygaard, J., dissenting), the United States argued to the en banc court that it had not waived the statute of limitations in light of the Third Circuit's subsequent interpretation of *Robinson* in *Long*. See Gov't C.A. Supp. Br. 4 & n.1.

impermissibly permitted the district court to act as *de facto* government counsel. See *id.* at 48a-52a. Judge Sloviter contended that the majority's reliance on the Third Circuit's decision in *Long*, which permitted a respondent to adopt a magistrate's *sua sponte* raising of the limitations issue as a constructive amendment to its answer, eviscerated the Third Circuit's holding in *Robinson*, which required that the statute of limitations defense be asserted in a timely manner. See *id.* at 54a-55a.

ARGUMENT

1. Petitioner contends (Pet. 8-19) that the Third Circuit's decision conflicts with that of other courts of appeals on the question whether, in habeas cases, a district court may *sua sponte* raise the statute of limitations where the respondent has answered the petition without asserting that the petition is untimely. The decision below is correct, and this case is not a suitable vehicle for resolving the tension in the courts of appeals identified by petitioner. The petition should be denied.

a. The court of appeals' decision is correct, whether viewed through the prism of the special rules that apply to Section 2255 proceedings or the rules that apply to ordinary civil cases.

i. The Rules Governing Section 2255 Proceedings (Section 2255 Rules) expressly authorize a district court to consider, on its own initiative, whether grounds exist for dismissal of a Section 2255 motion. The current version of Rule 4(b) provides that "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion."

Section 2255 Rules, Rule 4(b);[7] see 28 U.S.C. 2255 (permitting courts to dispose of a Section 2255 motion without "caus[ing] notice thereof to be served upon the United States attorney" and without "grant[ing] a prompt hearing" if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief"). Rule 4 thus clearly contemplates summary dismissal of a Section 2255 motion by a district court on any fatal ground, even if the ground is one that, in an ordinary civil case, generally must be asserted by the opposing party.

In light of this rule, and the similarly-worded rule that applies to federal collateral challenges of state convictions under 28 U.S.C. 2254, every court of appeals to consider the issue has held that a district court has the authority to raise *sua sponte* AEDPA's statute of limitations, at least before a response to the habeas petition is filed. See, *e.g.*, *Jackson* v. *Secretary for Dep't of Corrs.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (per curiam) (Section 2254 case); *Hill* v. *Braxton*, 277 F.3d 701, 705 (4th Cir. 2002) (same); *Herbst* v. *Cook*, 260 F.3d 1039, 1042 (9th Cir. 2001) (same); *Acosta* v. *Artuz*, 221 F.3d 117, 122-124 (2d Cir. 2000) (same); *Kiser* v. *Johnson*, 163 F.3d 326, 328-329 (5th Cir. 1999) (same); see also *United States* v. *Sosa*, 364 F.3d 507, 513 (4th Cir. 2004) (applying *Hill* in Section 2255 case). These courts reason that the rule "differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses." *Kiser*, 163 F.3d

[7] Before the amendments that became effective on December 1, 2004, this portion of Rule 4 provided: "[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal."

at 328; see, *e.g.*, *Acosta*, 221 F.3d at 123 (*sua sponte* dismissal for failure to comply with the AEDPA limitations period "is consistent with the authority provided to the district courts in 2254 Habeas Rule 4 and 2255 Habeas Rule 4(b)").

As these cases have recognized, the statute of limitations in AEDPA "implicates values beyond the interests of the parties." See, *e.g.*, *Acosta*, 221 F.3d at 121 (citing cases). Collateral review of criminal convictions entails "profound societal costs." *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998). "Congress enacted AEDPA to advance the finality of criminal convictions. * * * To that end, it adopted a tight time line, a one-year statute of limitation period." *Mayle* v. *Felix*, 125 S. Ct. 2562, 2573 (2005). In adopting that one-year limitation for Section 2255 motions, Congress "clearly intended to limit collateral attacks upon judgments obtained in federal criminal cases." *United States* v. *Thomas*, 221 F.3d 430, 434 (3d Cir. 2000). Indeed, such a limitation is "the very *raison d'etre* of the AEDPA." *Ibid.* As the court of appeals here recognized, that limitation furthers finality, preserves judicial resources, curbs the abuse of the writ of habeas corpus, and promotes the public reputation of judicial proceedings and the public interest generally. Pet. App. 25a; see *id*. 17a-20a, 28a-29a.

As the court below held, these same considerations compel the conclusion that a district court retains the power to raise *sua sponte* AEDPA's statute of limitations, even though the United States files a responsive pleading failing to do so. Pet. App. 28a-31a, 34a-35a. As an initial matter, nothing in the text of Rule 4 limits the district court's power to dismiss motions when "it plainly appears * * * that the moving party is not entitled to

relief" to the time period before the United States files a response. Section 2255 Rules, Rule 4. Indeed, a district court with subject matter jurisdiction always has authority to apply the governing law. Section 2255 expressly empowers district courts to "determine the issues and make findings of fact and conclusions of law." 28 U.S.C. 2255. And the public interests animating AEDPA's statute of limitations are no less important after the court calls for a response than they are before it does so.

As the court below observed, courts have recognized comparable authority in similar circumstances. See, *e.g.*, Pet. App. 21a-22a & n.14. In *Granberry* v. *Greer*, 481 U.S. 129, 134 (1987), this Court held that a court of appeals had the power to dismiss a habeas petition for the failure to exhaust state remedies even though the State failed to raise nonexhaustion in the district court. This Court concluded that "[t]he appellate court is not required to dismiss for nonexhaustion notwithstanding the State's failure to raise it, and the court is not obligated to regard the State's omission as an absolute waiver of the claim." *Id.* at 133. Rather, an appellate court should consider the interests of comity, federalism, and judicial efficiency, *id.* at 135, and 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. As the Third Circuit observed in *Long*, after *Granberry*, "[i]t is now widely recognized that judges have discretion to raise procedural issues in habeas cases." 393 F.3d at 403. Indeed, at least eleven circuits have extended *Granberry*'s reasoning to procedural default, concluding that habeas courts may raise *sua sponte* that affirmative defense, even if the respondent fails to do so. See, *e.g.*,

Yeatts v. *Angelone*, 166 F.3d 255, 261-262 (4th Cir.) (collecting cases from the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits)), cert. denied, 526 U.S. 1095 (1999); *Lorraine* v. *Coyle*, 291 F.3d 416, 425-426 (6th Cir. 2002); *King* v. *Kemna*, 266 F.3d 816, 822 (8th Cir. 2001) (en banc); see *Trest* v. *Cain*, 522 U.S. 87, 90 (1997) (reserving the issue).

AEDPA's statute of limitations advances concerns no less important than those advanced by the doctrines of exhaustion and procedural default. Although the interests of comity and federalism do not apply in the context of Section 2255 motions, the public interests in the finality of judgments and in judicial economy plainly do. See *United States* v. *Frady*, 456 U.S. 152, 166 (1982).

ii. Even putting aside the special concerns raised by the fact that this is a collateral challenge to a final judgment, the decision below is consistent with the rules of procedure governing ordinary civil cases. Those rules may be applied in Section 2255 proceedings to the extent that they are not inconsistent with statutory provisions or the Section 2255 rules. See Section 2255 Rules, Rule 12; Fed. R. Civ. P. 81(a)(2); *Mayle*, 125 S. Ct. at 2569. Although, in ordinary civil cases, affirmative defenses generally must be raised in a first responsive pleading, "a defense may be raised in a number of ways even if the defense is not presented in the initial response." 2 James W. Moore, *Moore's Federal Practice* § 8.07[3], at 8-38 (3d ed. 2005).

For example, under Rule 15(a) of the Federal Rules of Civil Procedure, leave of court to amend an answer "should be freely given when justice so requires." See 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278, at 684-685 (3d ed. 2004)

(noting that "Rule 15(b) does give the trial court discretion, which a number have exercised, to permit the amendment of the pleadings over objection when doing so will promote the presentation of the merits of the action, the adverse party will not be prejudiced by the sudden assertion of the defense, and will have ample opportunity to defend against the substance of the issue"). In addition, affirmative defenses may be raised for the first time by a defendant in a post-answer dispositive motion or by the district court *sua sponte* when resolving such a motion. See Moore, *supra*, at 8-36 to 8-40. Accordingly, allowing the United States here to rely post-answer upon the statute of limitations, where petitioner suffered no prejudice as a result, fully accords with the rules of ordinary civil practice. See, *e.g.*, *Long*, 393 F.3d at 399-401.

iii. Petitioner's principal argument on the merits in this Court is that the decision below is unfair, as it places the district court in the role of advocate. Pet. 16-19. That contention is unfounded. The decision below merely recognizes that the district court has the authority to call to the attention of the parties a question as to whether, under the governing law, the statute of limitations has run and to request the parties' views on that issue. Far from being improper, that course represents sound case management on the part of the district court.

b. In any event, this is not a suitable vehicle to review the purported conflict asserted by petitioner for several independent reasons.

i. Because petitioner did not object in the district court to the court's *sua sponte* raising of the statute of limitations issue, nor did he contend that the United States waived the issue by failing to raise it in its

answer, see C.A. App. 95a-99a; C.A. Supp. App. SA3-SA7, a threshold issue exists as to the standard of review that should be applied to the first question presented in his certiorari petition. Furthermore, if the appropriate standard is plain-error review, a definitive interpretation of the power of district courts, post-answer, to raise *sua sponte* a potential issue about Section 2255's statute of limitations would not be necessary to resolve this case.

The United States argued in the court of appeals that, as a result of petitioner's failure to object in the district court, he was entitled only to plain-error review. See Gov't C.A. Br. 5-6; Gov't Supp. Br. 4. Although the court of appeals stated that its review was "plenary," Pet. App. 11a, it provided no rationale for its failure to apply the plain-error standard. Cf. *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (noting that courts have no authority to create exceptions to plain-error standard of Fed. R. Crim. P. 52(b)).

Although this Court has not squarely decided the issue, it has suggested that an unpreserved claim of error in a Section 2255 proceeding is subject, at most, to plain-error review. See *Frady*, 456 U.S. at 167 n.15 ("A court of appeals * * * could invoke the 'plain error' standard on direct review of a district court's conduct of a § 2255 hearing, if the court of appeals found a sufficiently egregious error in the § 2255 proceeding itself that had not been brought to the attention of the district court."); see also Section 2255 Rules, Rule 12 (providing that either the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure may be applied to Section 2255 proceedings, when not inconsistent with

any statutory provision or the Section 2255 rules).[8] To prevail in this Court under a plain-error standard of review, petitioner would have to establish that any error by the district court was "clear" or "obvious." *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993). Given the authority discussed above, see pp. 8-15, *supra*, petitioner cannot (and does not attempt to) make that showing.

ii. The conflict alleged by petitioner is not directly implicated by this case. Petitioner points to only two published court of appeals decisions that it claims are in conflict with the decision below. See Pet. 10-13 (citing *Scott* v. *Collins*, 286 F.3d 923, 930 (6th Cir. 2002), and *Nardi* v. *Stewart*, 354 F.3d 1134, 1141 (9th Cir. 2004)). As an initial matter, both of those decisions interpret a district court's *sua sponte* powers in the context of Section 2254 petitions challenging state court convictions. Indeed, with the sole exception of this case, the published court of appeals decisions squarely addressing the question presented have arisen in the context of Section 2254 proceedings, rather than in Section 2255 proceedings.[9] Although the issues are related, and the proper conclusion in each context may well be the same (as the court below concluded, Pet.

---

[8] Cf. Fed. R. Civ. P. 46 (requiring party to "make[] known to the court * * * the party's objection to the action of the court and the grounds therefor" at the time the ruling or order of the court); Fed. R. Civ. P. 51(d)(2) (allowing consideration for "plain error" of unpreserved objections to jury instructions if error "affect[s] substantial rights").

[9] Petitioner also points (Pet. 10 n.28, 13 n.36) to two unpublished decisions addressing the issue in the Section 2255 context, but those decisions have limited or no precedential value in their own circuits. See *Armstrong* v. *United States*, 107 Fed. Appx. 522 (6th Cir. 2004); *Celikoski* v. *United States*, 21 Fed. Appx. 19 (1st Cir. 2001).

App. 16a-21a), the fact remains that the decision below is the only published court of appeals decision resolving the issue in the Section 2255 context.[10]

Moreover, this case is not squarely in conflict with either *Scott* or *Nardi*. Neither of the respondents in those cases appears to have affirmatively advanced a statute of limitations defense in the district court, even after the court raised the issue. See *Scott*, 286 F.3d at 925, 928 (noting that "[a]lthough Rule 15(a) allows for the possibility of amending a pleading to include a previously omitted affirmative defense, the mere possibility of amendment through Rule 15(a) does not cure respondent's actual failure to raise the defense"); *Nardi*, 354 F.3d at 1142 n.5 ("[E]ven after the court raised the timeliness issue, Respondent never asserted or otherwise adopted the defense as its own."). In contrast here, once the district court raised the potential statute of limitations issue, the United States affirmatively advocated dismissal on untimeliness grounds, thereby effectively moving to amend its answer.

iii. Review of the question presented at this point would be premature. Even considering the Section 2254 cases, only three circuits besides the Third Circuit have published decisions squarely addressing whether a district court has the authority, post-answer, to *sua sponte* raise a potential statute of limitations problem, and the Eleventh Circuit has done so only in short per curiam opinions. See *Day* v. *Crosby*, 391 F.3d 1192,

---

[10] Petitioner asserts (Pet. 19) that this case presents the issue in the contexts of both Section 2254 and Section 2255, but the basis for that assertion is not clear. While it is true that the court of appeals reasoned the result should be the same in both contexts, petitioner sought relief solely under Section 2255, as did Mr. Otero, the movant whose case was consolidated with petitioner's in the court of appeals. See Pet. App. 4a.

1194-1195 (11th Cir. 2004) (per curiam), petition for cert. pending, No. 04-1324 (filed Mar. 30, 2005) (holding that "[a] concession of timeliness by the state that is patently erroneous does not compromise the authority of a district court *sua sponte* to dismiss a habeas petition as untimely, under AEDPA"); *Jackson*, 292 F.3d at 1349. In addition, the courts in *Scott* and *Nardi* did not have the benefit of the Third Circuit's thoughtful discussion of the liberal right to amend answers under the Federal Rules of Civil Procedure. See *Long*, 393 F.3d at 399-401.

As such, the issue would benefit from further ventilation in the circuits. That process might result in the elimination of the tension in the circuits that currently exists. But even if it did not, future opinions are likely to take into account the careful analysis of the court below in a way that helps to promote a fuller understanding of the issue.

2. Petitioner also claims (Pet. 20-22) that the court of appeals erred when it did not remand his case to the district court for an evidentiary hearing on the issue of equitable tolling. That claim does not warrant review. In the first place, petitioner alleges no conflict on this fact-bound issue. Second, the majority opinion in the court of appeals did not address this claim,[11]

[11] The en banc majority did not directly address petitioner's request, see Pet'r C.A. Reply Br. 10, that the court of appeals remand the case to the district court for fact-finding to determine whether equitable tolling was appropriate. The majority did, however, make it clear that a court has the inherent power *sua sponte* to address an intentional alteration of a court document that conceals the untimeliness of a Supreme Court filing, and that its inherent power "does not depend on the responding party's position." Pet. App. 31a. Given that the dissenting judges advocated remand for an evidentiary hearing on the equitable tolling issue, *id.* at 36a-39a, the fact that the majority did not order a remand suggests that it either endorsed *sub silentio* the district

and this Court does not normally grant review on issues not passed on by the court below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). And in any event, the district court correctly declined to equitably toll the statute of limitations. Even if it is assumed that the statute may be equitably tolled, see *Pace* v. *DiGuglielmo*, 125 S. Ct. 1807, 1814 n.8 (2005) (noting that the Court has "never squarely addressed the question"), and it further is assumed that the apparent alteration of the court of appeals' judgment entry was an error made in good faith, rather than a deliberate attempt to conceal the untimeliness of petitioner's previous petition for a writ of certiorari, it is well-settled that mistakes or miscalculations by a petitioner's counsel of applicable filing deadlines do not warrant equitable tolling. See, *e.g.*, *Steed* v. *Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (attorney's miscalculation based on "interpretation of a novel legal issue" of habeas limitations period is not basis for equitable tolling); *Kreutzer* v. *Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) (counsel's confusion about applicable statute of limitations does not warrant equitable tolling for filing of habeas petition), cert. denied, 534 U.S. 863 (2001); *Harris* v. *Hutchinson*, 209 F.3d 325, 330-331 (4th Cir. 2000) (same); *Taliani* v. *Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (same).

---

court's disposition of the equitable tolling issue, see *id*. at 59a-60a, or agreed with the government that the proffers on appeal relating to the equitable tolling claim were not properly in the record, see note 3, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JOHN C. RICHTER
Acting Assistant Attorney General
THOMAS M. GANNON
Attorney

SEPTEMBER 2005