IN THE SUPREME COURT OF THE UNITED STATES

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PATRICK DAY, :

Petitioner, :

v. : No. 04-1324

JAMES R. McDONOUGH, INTERIM :

SECRETARY, FLORIDA DEPARTMENT :

OF CORRECTIONS. :

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Washington, D.C.

Monday, February 27, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

J. BRETT BUSBY, ESQ., Houston, Texas; on behalf of the Petitioner.

CHRISTOPHER M. KISE, ESQ., Solicitor General, Tallahassee, Florida; on behalf of the Respondent.

DOUGLAS HALLWARD-DRIEMEIER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Respondent.

C O N T E N T S

P R O C E E D I N G S

[11:02 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument next in 04-1324, Day versus McDonough.

Mr. Busby.

ORAL ARGUMENT OF J. BRETT BUSBY

ON BEHALF OF PETITIONER

MR. BUSBY: Mr. Chief Justice, and may it please the Court:

The State does not dispute that it waived the affirmative defense of limitations by failing to raise it in the District Court and by conceding in its answer that Day's petition was timely. Yet, nearly a year into the case, after the parties had briefed the merits, the magistrate judge not only raised an argument that the petition was untimely, he actually imposed the State's limitations defense and dismissed the case, despite the State's procedural default and contrary concession.

That was error, for two reasons. First, it violates the general principle of the adversary system in the civil rules that it's error to impose a forfeited limitations defense sua sponte, and the statutory text in rules have confirmed that this principle applies to habeas. Second, the State's

concession of timeliness based on full information was an express binding waiver, and it was error for the District Court to override that concession.

JUSTICE GINSBURG: It was a computation error. This is not a -- this is not a case where the State chose to waive the statute of limitations. It miscalculated. Isn't that the case?

MR. BUSBY: Well, there was a 1-day miscalculation, Justice Ginsburg, on the -- on the 352 versus 353 days before the -- Mr. Day filed his State postconviction petition. But there's a legal dispute as to whether the days after -- between the time -- whether the --

JUSTICE GINSBURG: But we're not -- and we didn't take cert to decide if this claim was timely. We are on the assumption that it was untimely. But -- and what are the consequences of the State's failing to raise that?

MR. BUSBY: Well, our position is that by expressly conceding in their petition that it was timely, that that's an express waiver. I mean, they say that they would have -- what they would have had to say was, "We know we have a limitations defense. We're expressly giving that up, that the proper standard is the intentional relinquishment of" --

JUSTICE GINSBURG: But the --

MR. BUSBY: -- "a known right."

JUSTICE GINSBURG: -- the whole basis was the number of days that they calculated, and the magistrate said, "Oh, they miscalculated. There were more days involved."

MR. BUSBY: The -- yes, under Eleventh Circuit law, the magistrate said they should have counted that additional time at the end.

JUSTICE GINSBURG: Yes.

MR. BUSBY: But this Court has said that the standard for -- the standard for express waiver varies, depending on the right at stake. It's not always intentional relinquishment of a known right, as it is with some constitutional rights.

In fact, there are several Courts of Appeals that have said when you plead -- when you affirmatively plead the opposite of an affirmative defense, as they did here by saying it's timely, that that's enough for an express waiver. And --

JUSTICE GINSBURG: Suppose --

MR. BUSBY: -- this Court --

JUSTICE GINSBURG: Suppose the magistrate judge had said, "I notice this error in accordance with Eleventh Circuit law, so I am going to suggest to

the State that they amend their answer." The State certainly could -- under Rule 15, if the Federal rules apply, the State could have amended its answer and done just what the magistrate judge did.

MR. BUSBY: Well, certainly, Your Honor, they could have moved to amend their answer. We would have opposed it; and would, on remand, if the issue were to come up, on the ground that they had full information, and so that this is not an appropriate case to amend an answer. But I agree with you that that would have been one option, and that's the way that the Third Circuit analyzes this issue in the Long case and in the Bendolph case, using the principles of Rule 15. The Fifth -- the Eleventh Circuit did not do that here. It said that there was an obligation for the court to impose the limitations defense; it did not apply the Rule 15 --

JUSTICE GINSBURG: I --

MR. BUSBY: -- analysis.

JUSTICE GINSBURG: Did it say "an obligation," or that the court "could"? It didn't -- I didn't think it said the court "must."

MR. BUSBY: It did say, Your Honor, that there was an obligation for the court to impose it to further comity, finality, and federalism, and that can

be found on page 5(a) of the appendix to the petition, "A Federal Court that sits in collateral review has an obligation to enforce the Federal statute of limitations." And, in fact, they quote the Advisory Committee notes to Rule 4, saying the court has the duty to screen out. And they also expressly distinguished their precedent in Esslinger versus Davis, which relied on Granberry versus Greer, to say it was a discretionary analysis. They said, "We're not going to consider the discretionary issues raised in Esslinger and Granberry whether this dismissal would serve an important Federal interest. We're just going to say there's an obligation to impose this, and that the District" --

JUSTICE GINSBURG: Where is -- I see -- you're referring to page 4(a) and --

MR. BUSBY: 5(a), Your Honor.

JUSTICE GINSBURG: Yes. Which -- where is the sentence that says it -- that --

MR. BUSBY: The obligation is seven lines from the bottom, and it's that last paragraph, where they're distinguishing Esslinger. And the sentence of the previous paragraph is where they say there's a "duty."

JUSTICE GINSBURG: I thought that that duty

is in connection with Rule 4.

MR. BUSBY: Yes, Your Honor, and then they -- they rely on that duty to say that there is an obligation, in the next paragraph, and to distinguishing Essingler and say, "We don't have to go through this discretionary analysis, because there's an obligation."

And so, our position is that even --

JUSTICE KENNEDY: So, the -- it's right that there's an obligation if it notices it in the first instance on its first review.

MR. BUSBY: Well, we don't necessarily agree, Your Honor, if -- we don't necessarily agree that --

JUSTICE KENNEDY: And suppose, under the review proceedings, that District Court is looking at it for the first time, without yet having required a response, and he sees a statute of limitation. I assume there's an obligation.

MR. BUSBY: Under Rule 4?

JUSTICE KENNEDY: Sure.

MR. BUSBY: Well, Your Honor, if you'd look at what rule --

JUSTICE KENNEDY: I mean, if -- suppose it's an open-and-shut violation of the statute of

limitations, or barred by the statute of limitations --

MR. BUSBY: Uh-huh.

JUSTICE KENNEDY: -- does District Court have discretion to refer to the State for a response?

MR. BUSBY: Yes, Your Honor, we would say that --

JUSTICE KENNEDY: Really?

MR. BUSBY: -- that they must do that, because, as this Court recognized in Pliler versus Ford, it's almost never apparent on the face of the petition --

JUSTICE KENNEDY: No, my --

MR. BUSBY: -- that there's an --

JUSTICE KENNEDY: No, my --

MR. BUSBY: -- open-and-shut --

JUSTICE KENNEDY: -- my hypothetical is that it is.

MR. BUSBY: Okay. I would think that even if it were apparent on the face of the petition, that the -- Rule 4 has two parts. In the first part of it, the nonadversary screening function, only applies when the petitioner is plainly not entitled to relief. And I think the better view of that -- of that clause is -- although there are some arguments in our brief that

don't take this view -- I -- after having given it thought, I think the better view of that clause is that it does not apply to an affirmative defense that's subject to waiver or tolling, that you can't say, based on an affirmative defense that's subject to waiver or tolling, that someone is plainly not entitled to relief. You could say, for example --

CHIEF JUSTICE ROBERTS: Because the other -- because the other side might make a mistake and not recognize it?

MR. BUSBY: Or it might be tolled, Your Honor. And there are also four different trigger dates in the statute for when it can first apply, that you aren't going to be able to tell, necessarily, three of them from the face of the petition.

JUSTICE SCALIA: Or the other side may say, "Although technically the statute of limitations applied here, taking all considerations into account we think that this prisoner acted with reasonable promptness, and perhaps the delay was somewhat attributable to the State." Do you think that that's a proper consideration?

MR. BUSBY: Absolutely, Your Honor. There -- the statute of limitations in AEDPA is designed to prevent delay, not to -- as Congress has said, it's

not a forfeiture provision; it's designed to move these complaints along speedily, particularly in capital cases, of which this is not one.

JUSTICE SCALIA: But you -- it could be argued that the Federal Government wants to move them along speedily, whether or not the State government wants to.

MR. BUSBY: Certainly. And their --

JUSTICE SCALIA: So, that would suggest that the State's voluntary waiver of a statute of limitations should not make any difference. It's a Federal -- it's a Federal interest involved, not a State interest.

MR. BUSBY: Well, they -- there is an interest in judicial efficiency that's at issue here, too, but we submit that it's far more inefficient for the Court to put limitations under this first category of Rule 4 and say that the Court must, on its own, look at limitations every time, without assistance from the parties, than it is to make the State do its job. I mean, they're the ones, as this --

JUSTICE GINSBURG: Well, we could --

MR. BUSBY: -- Court recognized --

JUSTICE GINSBURG: -- we could -- we could agree with you that there is isn't an obligation on

the Federal judge to raise it, but the question is, you know, the -- it could be a "must," it can be "may not," or it could be "may."

MR. BUSBY: Yes, Your Honor.

JUSTICE GINSBURG: And why shouldn't we treat this as a "may"? The judge noticed the clerical error and called it to the party's attention by an order to show cause.

MR. BUSBY: Well, the proper procedure under Rule 4 is not to call it to the party's attention in that way; it's --

JUSTICE GINSBURG: We're past Rule 4, because an answer has been ordered.

MR. BUSBY: Yes, Your Honor.

JUSTICE GINSBURG: So -- and it's only when the answer comes in that this issue is spotted.

MR. BUSBY: Yes. That's correct. And I agree with you that the proper procedure after that would be to bring the issue to the party's attention and let the State decide whether it wanted to file a motion to amend under Rule 15; and, if it did so, there are very clear standards that are applied, that were not applied in this case, to decide --

JUSTICE GINSBURG: There are very what standards?

MR. BUSBY: There are very clear standards, Your Honor --

JUSTICE GINSBURG: Yes, "leave shall be freely given."

MR. BUSBY: Yes, but there are also -- it's a -- again, it's a discretionary determination, and there are prejudice issues that should be considered as the --

JUSTICE GINSBURG: Well, what would be the prejudice that could be claimed by the habeas petitioner?

MR. BUSBY: Well, the prejudice in this case is that the standards of Rule 15 were not considered; but, in addition, there are -- there are well-recognized decisions, both from this Court and from the Courts of Appeals, that went -- that says a judge may deny leave to amend when the -- at the time the concession is made. And the answer -- the State had full information. And the State admits here that it had all the information it needed to make the limitations calculation attached to its answer, in which it conceded timeliness, and then -- but then waited a year, or several months, to bring it up later. And so, we would argue, if this were a Rule 15 analysis, that it would not be appropriate for the

Court to allow the amendment.

JUSTICE ALITO: Are you --

MR. BUSBY: Now, also --

JUSTICE ALITO: Are you saying that the error is simply that it wasn't done via Rule 15? What if we were to say that the same considerations apply when it's simply raised sua sponte by the -- by the -- by the District Court? What would be your objection to that?

MR. BUSBY: Well, that would be -- that's the Respondent's position, and I think, in addition to those considerations, if you disagree that this is a forfeiture, that -- and you disagree that this is an express waiver, and you get to their position that, you know, this is a discretionary test and you should just apply the same Rule 15 factors, I think you need to also apply a presumption against sua sponte consideration.

There's one way to do it under Rule 4, and that's the most efficient way. It's also the way that comports with judicial neutrality in the adversary system. And so, to encourage people --

JUSTICE GINSBURG: But you couldn't do this under Rule 4, because, as you, I think, recognized, that, just from the petition, from the habeas

petition, you couldn't tell.

MR. BUSBY: I'm sorry, Justice --

JUSTICE GINSBURG: There wasn't --

MR. BUSBY: -- Ginsburg, I misspoke. I meant to say Rule 15. But if -- to encourage parties to do this under Rule 15, the Court should adopt a presumption against sua sponte consideration. And this -- in Arizona versus California, which they rely on heavily, they say that this type of consideration should be reserved for rare circumstances. And we cite several cases in our brief where that -- that also support that proposition. So, we would submit, if you do get to this analysis, Justice Alito, that there should also be a presumption involved.

JUSTICE ALITO: Well, if you think it's -- if it's done under Rule 15, would the considerations necessarily be exactly the same in a habeas case as in an ordinary civil case?

MR. BUSBY: Not necessarily. I mean, there -- but we do submit that the timing issue that we just raised, about them having full information, would certainly be something we'd argue to the District Court in its discretion. But another thing you have to consider, to your point, is that limitations is something that's -- that has a subtle meaning and

derive -- and is directly addressed by Civil Rules 8 and 12. And this Court, in Gonzalez and Mayle, says that when that happens, that's where you start, with the civil rules. And then you ask if there's anything in the habeas statutes or rules that's inconsistent with that approach, with the -- with the forfeiture approach of the civil rules.

JUSTICE GINSBURG: Yes, but the civil rules allow for amendment.

MR. BUSBY: Yes, Your Honor.

JUSTICE GINSBURG: There's 8(c), and there's 12(b), but there's also 15.

MR. BUSBY: Yes, I agree. And that was not used in this case. I -- and I -- we agree that that would be an appropriate way to raise this.

JUSTICE GINSBURG: It seems the height of technicality to say that the judge could suggest, "Now, State, I will entertain a motion to amend the answer, under Rule 15," instead of saying, "I'm issuing an order to show cause why this action is not out of time."

MR. BUSBY: Well, I don't agree, Your Honor, because there's a specific analysis that goes along with Rule 15 that wasn't applied here. But, in addition to that, there's an efficiency interest to be

served by having the State calculate and make the motion, rather than putting the burden on the Federal Court to do it. The Court, we submit, should make the State -- they -- this Court, in Pliler, said the State's in the best position to make the limitations calculation. It's an error-prone fact-intensive, burdensome calculation, and they shouldn't be allowed to foist that burden on the Court. The Court should make them do their job.

And so, our position is that that's the reason that it should be done under Rule 15. It also doesn't put the State in the position of being an advocate -- excuse me -- it doesn't put the Court in the position of being an advocate for the State and having them say -- having the Court directly across the bench from the Petitioner, not involving the State, saying, "Here are -- I'm developing some arguments on behalf of the State now why this is untimely. What do you have to say about it?" That's --

JUSTICE SCALIA: Why does -- proceeding under 15 does not do that; whereas, proceeding this way does?

MR. BUSBY: Well, proceeding under 15, I -- proceeding under 15, you would say to the State, "Do

you want to make a motion to amend?"

JUSTICE SCALIA: Wink, wink?

MR. BUSBY: Well -- but --

[Laughter.]

JUSTICE SCALIA: I mean, there is some value in that, I think, particularly where the State has expressly conceded timeliness. I mean, the magistrate judge in this case, all that he had before him was the express concession from the State. He never -- the State never said anything in the District Court, even after he issued his notice to the Petitioner to show cause why it wasn't untimely. So, the magistrate judge, all he had before him was the State's position that it was timely.

CHIEF JUSTICE ROBERTS: Isn't that concern present in Granberry, as well? And yet, the Court reached the opposite result there.

MR. BUSBY: I don't think so, Your Honor, because in Granberry the State raised the issue for the first time on appeal, the court did not. So, there, you do have the adversary system at work. In addition, Granberry is different for several other reasons. Exhaustions is, unlike limitations, unique to habeas corpus; it's not covered by Rule 8. And, also, it's a common-law limit that this Court has

developed on habeas relief. It's not a statutory affirmative defense. And, as our brief points out, Congress has treated these very differently when it codified them in AEDPA. And this applies not only to exhaustion, but nonretroactivity, abuse of the writ, and procedural default. I'm sorry, procedural default was not codified. But they other defenses -- the other limits on habeas relief that the Petitioner relies on were codified very differently in AEDPA; whereas, for exhaustion it says, "Relief shall not be granted unless you exhaust." That's a substantive limit on relief.

For limitations, however, it says when you're --

CHIEF JUSTICE ROBERTS: One that requires the court to raise it sua sponte, even if it's not raised by the State.

MR. BUSBY: I beg your pardon?

CHIEF JUSTICE ROBERTS: One that requires the court to raise it sua sponte, even if not raised by the State, correct?

MR. BUSBY: Potentially, yes, if you codify it as a substantive limit on relief. Whereas, limitations is simply codified -- it says, "a period of limitations shall apply." It doesn't say, "Relief

shall not be granted unless you file within one year." It doesn't even say, as it does in the capital context, for certain -- for capital opt-in States, that it must be filed by a certain time. It just says "a period of limitation." And that has a settled meaning that goes along with it.

JUSTICE BREYER: Your position is, it should be like any other civil case.

MR. BUSBY: Yes, Your Honor. And --

JUSTICE BREYER: You can raise it sua sponte, we've said, in exceptional circumstances.

MR. BUSBY: Yes.

JUSTICE BREYER: I don't know what they are.

MR. BUSBY: Well, I --

JUSTICE BREYER: And if --

MR. BUSBY: -- I'm not --

JUSTICE BREYER: -- they're not there --

MR. BUSBY: One --

JUSTICE BREYER: -- then the judge could say, "You know, I'm surprised that you haven't raised statute of limitations."

MR. BUSBY: Uh-huh.

JUSTICE BREYER: And then the lawyer for the State says, "Oh, my goodness. Quite right. We'd like to amend."

MR. BUSBY: Certainly.

JUSTICE BREYER: And we don't --

MR. BUSBY: And there could be --

JUSTICE BREYER: -- have to decide --

MR. BUSBY: -- good reasons to amend. For example, the Bendolph case that you have before you, there was an alteration in a date, and the Third Circuit didn't ascribe that to any particular person, but, nonetheless, the documents that the State had before it had the wrong date on it from which to calculate.

JUSTICE SCALIA: Must there be good reasons for the judge to say, quote, "I'm surprised that you haven't raised a statute of limitations defense"?

MR. BUSBY: Well, I --

JUSTICE SCALIA: Must there be good reason for that? And, if not, aren't you asking us to waste our time?

MR. BUSBY: I don't think so.

JUSTICE SCALIA: Why don't you do it the easier way and --

MR. BUSBY: I don't think so, Your Honor. You're -- if you put -- if you put limitations as something that the judge must raise, I think you're asking the judge to waste his time rather than leaving

it to the parties to raise it.

JUSTICE SCALIA: Well, what's your answer as to whether there is any limitation on the judge just suggesting, "By the way, you know, is there some reason why you haven't pleaded statute of limitations?" Can a -- can a judge do that?

MR. BUSBY: Well, I would think that, you know, it would be evaluated under an abuse-of-discretion standard, and I haven't -- I haven't given much --

JUSTICE SCALIA: And what -- when would it be an abuse of discretion?

MR. BUSBY: For a judge to --

JUSTICE SCALIA: Yes.

MR. BUSBY: -- invite the State to amend?

JUSTICE SCALIA: Right.

MR. BUSBY: I would say if -- it would be, in this case, perhaps, because of the State's express concession to the contrary, and -- so that that might be one circumstance. But I don't think this --

CHIEF JUSTICE ROBERTS: Well, it wouldn't --

MR. BUSBY: -- Court needs to --

CHIEF JUSTICE ROBERTS: -- be an abuse of --

MR. BUSBY: -- circumscribe --

CHIEF JUSTICE ROBERTS: It wouldn't be an

abuse of discretion for him to suggest an amendment if he's got the opportunity to rule on the amendment later on. And then presumably the ruling would be reviewed for abuse of discretion.

MR. BUSBY: That's a good point, Your Honor. I don't think this Court needs to circumscribe the judge's authority to suggest an amendment. I think you could wrap it all into the ruling and evaluate that for abuse of discretion.

JUSTICE STEVENS: I suppose it might be an abuse of discretion if you'd already had a hearing and took -- and decided that there was merit to the plaintiff's claim, and then decided, "Well, now I'm going to just throw it out on limitations," might be an abuse of discretion.

MR. BUSBY: I would agree with that, yes, Your Honor.

CHIEF JUSTICE ROBERTS: Well, then why doesn't that same standard apply to the decision of the Court to raise it sua sponte?

MR. BUSBY: Well, because in this case you have an express concession. And so, it's a -- this Court has said, and other courts have said, that when you have an express concession, it's error to override that concession and impose the defense sua sponte.

The Court should, instead, assume that the concession is valid and that refusal to honor it is an abuse of discretion. You --

JUSTICE GINSBURG: Were those --

MR. BUSBY: -- don't want to strip --

JUSTICE GINSBURG: -- cases -- were those cases of a miscalculation on the part of the State? The judge's view was that the State had miscalculated under eleventh-amendment -- under Eleventh Circuit precedent.

MR. BUSBY: Well, Your Honor, most of those cases involved other issues, like exhaustion and procedural default, where the State later came back and said, "We were mistaken that they exhausted," or, "We were mistaken that they didn't procedurally default this claim." So, it's a similar mistake claim, but, nonetheless, the State affirmatively pleaded the opposite of either exhaustion, procedural default, or limitations. And the court held them to that.

JUSTICE SCALIA: So, you'd say it would be okay if the State didn't expressly concede the statute of limitations point.

MR. BUSBY: Possibly. But, again, I think if you -- if you use the analysis of the civil rules

that applies here, by virtue of Civil Rule 81 and Habeas Rule 11, that it's error -- our first position is that it's error to override the forfeiture --

JUSTICE SCALIA: That's --

MR. BUSBY: -- except in --

JUSTICE SCALIA: That's what I thought your --

MR. BUSBY: Yes.

JUSTICE SCALIA: -- position was.

MR. BUSBY: Except in exceptional --

JUSTICE SCALIA: Okay. So, this --

MR. BUSBY: -- circumstances.

JUSTICE SCALIA: -- a fallback position.

MR. BUSBY: Yes. That's correct. And then our second fallback position is that even if Your -- even if Your Honors agree that the court could -- has discretion to override the express waiver, that there's at least a discretionary analysis that has to apply under Civil Rule 15 that's coupled with a presumption in -- against sua sponte dismissal that the Eleventh Circuit didn't apply here.

JUSTICE BREYER: Why, just out of curiosity -- I'm not familiar with the actual practice of a lot of civil cases, but when somebody -- let's say the defendant in an ordinary tort case forgets to put in

the statute of limitations, and the case is all tried and finished. At the very end, he says, "Oh, my God." And now he goes in and asks to amend it under Rule 15. Do judges normally say, "Fine"?

MR. BUSBY: I -- they normally say no, that that's --

JUSTICE BREYER: Because it's --

MR. BUSBY: The -- because the case has gone on down the road on another theory, and it's prejudicial to the parties, and it wastes -- it's a waste of the court's judicial resources to --

JUSTICE GINSBURG: But here, nothing --

MR. BUSBY: -- bring it up.

JUSTICE GINSBURG: -- happened. Nothing happened. There was --

MR. BUSBY: Well --

JUSTICE GINSBURG: The answer was put in, and then there were no further proceedings. Nothing else went on in the court.

MR. BUSBY: Well --

JUSTICE GINSBURG: It's quite different -- I don't know any judge that would allow a defendant, after the trial is over, to raise the statute of limitations. But, up front, it's a different situation.

MR. BUSBY: Well, we disagree that this was up front, Your Honor. The answer in a -- habeas corpus cases, of course, heavily deals with the merits, as it did in this case. And then, Mr. Day replied. And, as the State's amicus brief points out, that's all that usually happens in most habeas corpus cases. So, we were near the end of the proceeding, as -- if you think of the run-of-the-mine habeas corpus case.

And, also, speaking of run-of-the-mine habeas corpus cases, this is a very rare instance. There are -- there are lots of procedures for courts to vindicate the interest that the State describes in comity, finality, and federalism, whether inviting a motion to -- whether ordering the State to file a motion to dismiss under Rule 4, which we submit would be the proper procedure, or, if the State fails to raise it in its answer in certain circumstances, inviting them to file a motion to amend under Rule 15. That takes care of these interests in the run-of-the-mine case.

There's no need to vindicate those interests in this case by creating an exception to the rules. This Court has said, in Lonchar and in Carlisle, that where there are civil rules that deal with the -- and

habeas rules -- that deal with how these things happen, the Court cannot use its inherent powers to circumvent those rules. And we submit that that's exactly what the court did here.

Now, in addition, I'd like to point the Court to New York versus Hill, which is not cited in our briefs, but can be found at 528 U.S. at 114 to -15 and also 118, on this express waiver issue. And this is a case where the Court recognized exactly the point that we make here, that not all -- you don't always have to show intentional relinquishment of a known right for that to be the standard for waiver. It depends on the right at issue. There, it was an International Agreement on Detainers Act case, and the Court held that the -- that the defendant's assent to delay waived the time limitation of the Interstate Agreement on Detainers Act, expressly waived it. And that's our -- that's our position here, is that the State's affirmative pleading of timeliness is an express waiver.

In addition, the State could -- certainly couldn't prevail, under the Brady versus U.S. standard that applies to plea agreements, for saying that its concession was not knowing. There's no -- there's no suggestion here that the State was misled. There's no

suggestion that they didn't have all the information they needed to make the calculation. And Brady says that simply misapprehending a factor -- a relevant factor in the analysis is not enough. And that's at 397 U.S. at page 757.

In addition, the State makes an argument about policies beyond the concerns of the parties, and that the State -- that those should be vindicated in this case. But I'd like to point out that this Court has not adopted the "beyond the concerns of the parties" test; rather, it's acknowledged that Congress entrusts even important public policies, like comity, finality, and federalism, to the adversary process; and, thus, their -- and even private rights that benefit society can be waived, in Christiansburg Garment, for example.

With the Court's permission, I'd like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Kise.

ORAL ARGUMENT OF CHRISTOPHER M. KISE

ON BEHALF OF RESPONDENT

MR. KISE: Mr. Chief Justice, and may it please the Court:

The District Court's sua sponte action here

was consistent with AEDPA and the habeas rules. It was consistent with this Court's habeas jurisprudence. And it was consistent with the purpose behind, and not prohibited by, Federal Rules 8 and 12.

This case is not about the State's waiver. And we would agree that -- with Justice Scalia, that the waiver is not the beginning and end of it. We're not conceding that the State, in fact, waived it here, but we're saying that that's not essential to the answer to this question, because it's not the beginning and the end of the analysis.

This case is also not about, as the Petitioner alleges in the brief and makes inference on the Eleventh Circuit's opinion, about obligating courts to act in all circumstances.

This case is about the proper exercise of discretion. And what we're really asking this Court to do is really three things: to acknowledge again that this authority exists, to say that this is when the court may exercise that authority under the circumstances presented by this case, And then, thirdly, that this is how the Court goes about exercising this authority, by providing notice and opportunity to be heard, and conducting an analysis of prejudice. And --

JUSTICE SCALIA: You think the court "must."

MR. KISE: No, Your Honor.

JUSTICE SCALIA: Well, don't you think that's what this court thought? And, if so, shouldn't we perhaps send it back to see whether, if the court knew that it had discretion, it would have done this?

MR. KISE: Your Honor, respectfully, I don't think that that's what the Eleventh Circuit thought. I think that that is an interpretation of the Eleventh Circuit's language. However, I think that where the phrase that Counsel pointed to in the opinion -- on page 5(a), referencing "obligation" -- I believe that the Court there was referring to, specifically under Rule 4, that the court has this obligation. I think it -- because it's in that discussion that the Court is talking about the obligation. And I would submit that, indeed, under Rule 4, in response, I believe, to Justice -- a point Justice Kennedy raised, I would say that, under Rule 4, I think it is obligation. I think what Rule 4 is, is a reflection of Congress -- excuse me -- of the rule advising the court that, "You must exercise this authority that you already have at this particular time. This is the time when you need to be looking for these things."

JUSTICE GINSBURG: Yes, but, Mr. Kise, the -

- Mr. Busby told us that the reference was in the following paragraph, and it is the sentence, "A Federal Court that sits in collateral review of a criminal judgment of a State Court has an obligation to enforce the Federal statute of limitations." That's the sentence that suggests that the Court of Appeals thought that there was an obligation, the District Court, to raise the statute of limitations on its own motion.

MR. KISE: Your Honor -- and I was referring to that sentence, and perhaps I wasn't clear, but I would -- I would say that they are still talking about Rule 4. But even if they're not talking about Rule 4, even if, in fact, this Court believes that the District -- that the Circuit Court's analysis is flawed, then we must keep in mind that this Court is reviewing judgments, not opinions. And this Court could easily do what it did in Gonzalez, which is, even though the analysis is not consistent with what this Court -- I mean, frankly, if the Court takes that view with what we're asking the Court to do here -- but you can nevertheless affirm the judgment. Because the District Court did, in fact, get it right. The --

JUSTICE SOUTER: What --

MR. KISE: -- District Court --

JUSTICE SOUTER: What would you say -- assuming that we're beyond Rule 4, what would you say simply to a rule that said, "Yes, we recognize that there remains a discretion -- not an obligation, but a discretion -- on the part of the court to raise this." But, just as a -- as a general rule, judicial efficiency is better served by avoiding the use of discretion unless the State, in fact, raises the limitations issue, itself. The courts have a lot of things to do, and they shouldn't be spending their time canvassing pleadings to see whether there might be an issue that the State missed; so that in the absence of some extraordinary circumstance, it would be an abuse of discretion to exercise it as the -- as the Circuit suggests it should have been exercised here. What would you say to that position?

MR. KISE: I would say, respectfully, Your Honor, that that is somewhat inconsistent, if not entirely inconsistent, with what this Court said in Granberry and Caspari, dealing with the same sort of raising of affirmative defenses. From that standpoint, from a procedural standpoint, I would say that Granberry and Caspari are procedurally indistinct, in that this Court said that it is appropriate, in these circumstances, for the court to

look at affirmative defenses. Obviously, they have substantive differences, which my -- which Counsel has pointed out, but, from a procedural standpoint, were the Petitioner to prevail here, I would think this Court needs to recede procedurally from Granberry and Caspari --

JUSTICE SOUTER: What --

MR. KISE: -- because the Court --

JUSTICE SOUTER: What, then, would be the significance here of the fact that the State conceded that there was no limitations problem? In a case like that, wouldn't it be a good rule to avoid judicial inquiry?

MR. KISE: Well, Your Honor, I think that the State's concession, as Justice Scalia pointed out, is not the beginning and end of it, in the first instance. Secondly, it --

JUSTICE SOUTER: No, but it bears on the exercise of discretion.

MR. KISE: Yes, Your Honor, it does. And we would agree that it bears on the exercise of discretion. And, in a circumstance such as this one, where the attachments, the record itself, indicated that there was a discrepancy between the position the State was taking and what the record actually

reflected, it was appropriate for the District Court to raise the issue and then consider the interests of the parties. If the District Court had been presented simply with nothing in the record, just a blanket statement by the -- by Florida that, "We concede," and there was nothing to raise the question, then we would -- we would say that it's not appropriate for the court to simply pull issues out of the sky.

JUSTICE SOUTER: That would be an abuse.

MR. KISE: Yes, Your Honor. I would say that it would be an abuse.

JUSTICE BREYER: District judges can't comment on the cases? And -- they suddenly raise something, curious about something; and, lo and behold, it becomes the subject of an amendment.

MR. KISE: Well, Justice --

JUSTICE BREYER: That's a violation of -- I mean, what I'm driving at is, I don't really understand Rule 15 thoroughly, because I'm not a trial lawyer. And why do we have to decide every matter? Why don't we let the District judge free to run his trial and just say, "Hey, we don't want to proliferate law. It's complicated enough already. Let's leave it to Rule 15, whatever that might be"?

MR. KISE: I think leaving it to Rule 15 is

one way to do it. And doing it in these particular cases is another way. Giving the courts discretion to raise the --

JUSTICE BREYER: Yes, but the other way means we're now going to have a new area of law. The new area of law consists of habeas law involving what is the equivalent of an amendment suggested by the judge to bring up a statute. That would be good, because West would then have five more pages, with a new keynote --

[Laughter.]

JUSTICE BREYER: -- and there would be more for lawyers to look up. Whereas, if you just say Rule 15, it's finished.

MR. KISE: Respectfully, Your Honor, I believe this Court's already done that, though, in Granberry and Caspari. I mean, that's what you've already said, is that, under -- that habeas is different. And I think it's important to point out, we're not asking for a different construction of Rules 8 and 12. We're asking this Court to apply the same exception that is applied in the extraordinary case. The Petitioner takes the position -- and Petitioner is alone in this contention -- that "ordinarily" means "never." Even the law professor amici don't take

position, and there is not a case that we have been able to locate in the country that says that "ordinarily" means "never," that --

JUSTICE GINSBURG: Would you say it's --

MR. KISE: -- the ordinary rule --

JUSTICE GINSBURG: -- means it's "hardly ever"? I mean, we do follow the principle of party presentation. And judges are not supposed to be intruding issues on their own, they are supposed to follow the party's presentation. So, would this be -- if it's not "never," would it be at least "hardly ever," that it's appropriate for a judge to interject an affirmative defense on his own motion?

MR. KISE: Yes, Your Honor, I would say that it is "hardly ever," and that's what we're dealing with here. It's what the Court was dealing with in Granberry and Caspari, these limited circumstances where the interests transcend the interests of just the parties before the court and where it is, from the -- from a review of the record, as District judges do every day looking at the record and identifying issues, and to avoid the sort of conundrum that's presented by the Petitioner agreeing that the District judge could simply look at the State and, as Justice Scalia said, wink, wink, "It's okay for you to raise

this issue now," to avoid the roundabout that is occasioned by that. If it is, in fact, permissible in these circumstances for the District Court to raise the issue, then doing it the way the court did it here, and the way that was approved in Bendolph, and the way that we believe the Eleventh Circuit approved it, is entirely appropriate, because it's consistent with what this Court said in its habeas jurisprudence.

JUSTICE SCALIA: What if Congress wanted to leave it to the State to waive the statute of limitations provision? How could it have made that clear? I mean, I would have thought that if they made it a statute of limitations provision instead of a jurisdictional provision -- I mean, they could have said, you know, "No jurisdiction if it's filed beyond a certain date, and we mean it." But it put it as a statute of limitation, which normally is waivable. And I would think that that is an indication that Congress thought, "Really, if the State thinks that in this particular case we shouldn't hew to the technicality of the statute of limitation, the State ought to be able to waive it.

MR. KISE: And I think that's why it is set up the way it is, Your Honor, but it's just that the waiver is not the beginning and end of it. For

example, where the State might wish to waive the statute of limitations and simply move to the merits would be in a situation where there might be some complex argument over equitable tolling and where the merits are relatively straightforward. Rather than spending the court's time and the resources involved and litigating over equitable tolling, the State might simply say, "We realize that there is this technicality here, but we're going to get to the merits, because otherwise we're going to spend an inordinate amount of time litigating."

JUSTICE SCALIA: Well, it's always a technicality. What you're saying is, the only time that the State can do that is when the answer to the statute of limitations is unclear. And I'm saying sometimes the State may say, "The answer is clear, but doggone it, this is just too picky-picky, too technical in this particular case."

MR. KISE: And, Your Honor, our test allows for that, as well. It's up to the District Court to decide whether, in that particular case, the circumstances require the application. There is some discretion. I don't think that the State could --

CHIEF JUSTICE ROBERTS: Would it -- would it always be an abuse of discretion for the District

Court to do this if the State wanted to reach the merits?

MR. KISE: I don't think so, Your Honor, because it would depend on why the State wanted to reach the merits. Perhaps the State was engaging in some sort of gaming of the system, as Petitioner alleges could happen. If there was, in fact, some actual sandbagging going on, where the State is holding this issue in reserve as a strategic matter, and the District Court simply says, "No, we're not going to allow that." And it would really be the same analysis under Rule 15. If the court were to have sandbagged, so to speak, under Rule 15 and waited to file a late amendment, the court would engage in the same analysis. The court would say, "Well, wait, do I really want to permit the State, now, to assert this?"

CHIEF JUSTICE ROBERTS: There's no question of -- put aside a sandbagging case, there's no question of sandbagging, and that the -- the State just wants to litigate on the merits rather than on the statute of limitations.

MR. KISE: It would not always be an abuse of discretion. I --

CHIEF JUSTICE ROBERTS: In other words, can they have it -- would it be an abuse of discretion in

an express waiver case as opposed to a forfeiture case?

MR. KISE: I don't think that you could say, in all circumstances -- no, Your Honor, it would not be an abuse of discretion in all circumstances. But I do think the District Court needs to factor in the interests of the State and the reasons why the State is willing to proceed forward. And if the State, for example, is, as I believe an example was given by the court, that the State is -- believes that, "Well, perhaps it's appropriate to waive the statute here, or to not rely on the statute here, because of something maybe we have done, or that it -- the Petitioner didn't -- missed the deadline by a certain period of time, and we think that, in this particular case, it's all right to reach those merits."

So, I can't -- I don't think we should say that it's always an abuse of discretion, but I think we need to leave it to District Courts to make that determination, just as this Court did in Granberry and Caspari. This Court gave District Courts that discretion, because these are the types of cases where that discretion is appropriate. This Court's already identified that, in habeas cases, we are to treat Rules 8 and 12 as the exception being applied, that

these --

JUSTICE GINSBURG: I thought in Granberry the Court gave the Court of Appeals that discretion, since it hadn't -- the point had been missed in the District Court, been missed by everybody, until the Court of Appeals.

MR. KISE: Well, Your Honor, in fact, this Court did give the Court of Appeals that discretion, but even more so than we would give the District Court that discretion, because, Why should we wait for the process to get all the way to the Court of Appeals? If this Court is going to say it's appropriate for the Court of Appeals to look at an affirmative defense, then certainly, in keeping with that reasoning, it would be appropriate for a District Court to raise it before we've gone through the entire process of litigation in the District Court and then getting ourselves to the Court of Appeals.

JUSTICE SCALIA: You acknowledge at least this much, or am I incorrect? And it's important for me to know that. You acknowledge at least this much, that if we read this opinion, as you do not, to be saying that the court "must" do this so that the court was not really considering all factors in the exercise of its discretion, we would have to remand.

MR. KISE: No, Your Honor, I would not, and I'll tell you why I would not.

JUSTICE SCALIA: All right.

MR. KISE: It's because, just as in Gonzalez, the Court is not reviewing the opinion. The Court is reviewing the judgment. And the --

JUSTICE GINSBURG: But why would --

MR. KISE: -- judgment is correct.

JUSTICE GINSBURG: -- why would you deal with that hypothetical when the Eleventh Circuit, in all fairness, said, "We join the Second, Fourth, Fifth, and Ninth Circuit, and rule that, even though the statute of limitations is an affirmative defense, the District Court may review the timeliness of the 2254." That's what -- the question that the court thought it was deciding.

MR. KISE: I would agree that the court thought it was deciding discretion, but I was responding, I -- to what I thought was Justice Scalia's question about, What if this Court does not agree with that? If this Court believes that the Eleventh Circuit, in fact, was applying an obligation rule, a mandatory rule, then it would require remand. And I -- what I'm saying, Your Honor, is -- is that we would not, because the District Court applied the

appropriate test. In the first instance, I would say that the Eleventh Circuit did not, in fact, apply that test, did not believe that it was obligated to, but if this Court were to disagree, as Justice Scalia has presented the hypothetical, then I would say that the District Court did, in fact, apply the correct test. The District Court, as noted in -- on page 8(a) of the petition appendix, the footnote in the magistrate's report and recommendation cites Jackson, the Eleventh Circuit case which stands for the discretionary proposition, and indicates specifically that it is relying on a discretionary test. And so, the District Court in this case, in fact, applied the test that we are advocating, and in -- and, frankly, got it right. The District Court applied discretion, raised the issue, provided a notice and an opportunity to be heard, conducted the analysis of prejudice -- there was no prejudice in this case -- and ruled, on that basis. And that ruling was consistent with this Court's habeas jurisprudence, and it was consistent with AEDPA and with the habeas rules.

CHIEF JUSTICE ROBERTS: Why doesn't your position on the underlying merits of the timeliness question create an incentive for every habeas petitioner to file a cert petition?

MR. KISE: I'm not sure I follow your --

CHIEF JUSTICE ROBERTS: Well, you --

MR. KISE: -- your question, Your Honor.

CHIEF JUSTICE ROBERTS: -- you only get the extra 90 days if you actually file, under your explanation for why this cert petition is -- why this habeas petition is untimely. In other words, if this individual had filed a cert petition with us, his petition -- his habeas petition would be timely. And he's only going to get the extra period, as I understand your position on the timeliness, if he files a cert petition.

MR. KISE: I understand our position to be that they do not get the 90 days, postconviction. And if that is misstated in our brief -- but I -- certainly we're not attempting to encourage the filing of cert petitions by habeas petitioners. And we believe the statute provides for the 90 days, postdirect review, but not after following State postconviction. Once the State postconviction proceedings are no longer pending, meaning that they are completed for State purposes, not including the 90 days --

CHIEF JUSTICE ROBERTS: Right.

MR. KISE: -- that's when they terminate.

That is our position.

CHIEF JUSTICE ROBERTS: Even if they file a cert petition.

MR. KISE: Yes, Your Honor.

CHIEF JUSTICE ROBERTS: So, doesn't that put them in the position of sometimes having to file that -- the habeas petition while the cert petition is still pending, if they file one?

MR. KISE: Yes, Your Honor, it might. It does present that conundrum. But that's what the statute provides. That is the way the statute has provided for it. And we think that interpretation is consistent, because there certainly -- as was referenced in the first oral argument, there is some expectation that the court might grant certiorari, but it's not in the -- the likely case. And so, to suspend the congressional purpose of moving these cases through the system on the chance that the one in a thousand, or perhaps more than one in a thousand, case is granted certiorari would not be an appropriate process to utilize. And I think the Circuit Courts bear that out. The opinions of all but one of the Circuits bear that -- bear that --

JUSTICE STEVENS: Is there a conflict on the Circuits on that point? I don't know.

MR. KISE: Your Honor, one Circuit -- ten of the Circuits go in the direction that we advocate, and Abela, the Sixth Circuit case that is cited, I believe, by the Petitioner --

JUSTICE STEVENS: Yes.

MR. KISE: -- moves in the other direction. And it is only recently that they have done that.

If the Court has no further questions, thank you.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Hallward-Driemeier, we'll hear now from you.

ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

FOR THE UNITED STATES, AS AMICUS CURIAE,

IN SUPPORT OF RESPONDENT

MR. HALLWARD-DRIEMEIER: Mr. Chief Justice, and may it please the Court:

There is nothing in either the habeas rules or the Federal Rules of Civil Procedure that deprives the District Court of its authority sua sponte to recognize the untimeliness of a habeas petition. To the contrary, to the extent the rules speak to the issue at all, they confirm that in light of the significant social cost of Federal review of State Court convictions, the Federal Courts have a unique

responsibility to weed out unmeritorious claims and to enforce the limitations on habeas review.

Rule 4 imposes an obligation on the court to dismiss unmeritorious petitions without even calling for an answer by the State. Now, Rule 4 is not applicable here, but the absence of an obligation to note the deficiency sua sponte does not connote a prohibition on acting sua sponte; rather, it suggests that it lies in the court's discretion. That is exactly how this Court addressed similar question in Granberry, where it rejected the two extremes -- one, recognizing the limitation as jurisdictional, that the court was obligated to raise it sua sponte, but also rejecting the opposite extreme, that the court was prohibited to address an issue that had not been preserved in the District Court.

JUSTICE BREYER: Why, though, would we have a special rule in this respect for habeas cases? Same question I've had throughout. Treat it like any other civil case.

MR. HALLWARD-DRIEMEIER: It's not really a special rule that we're advocating.

JUSTICE BREYER: All right, if it's not a special rule, then the answer to this is, just say, "No, you don't have to raise it sua sponte. Moreover,

you cannot raise it sua sponte, except in exceptional circumstances," cite the three cases that said that. And, as far as you're suggesting it to people, you could do it just as much as you do in any other civil case, no special rule. If they want to move to amend, fine, end of case, we did it in a paragraph.

MR. HALLWARD-DRIEMEIER: The relevant analogy in the civil context is not to what a court would do with a statute of limitations defense in the civil context, it is to what would the court do with respect to an affirmative defense that, like the habeas limitations, implicates broader social interests?

JUSTICE BREYER: Well, the same with strike suits. You know, there are a lot of class-action strike suits and so forth that at least one group of people think are terrible and the other group think are great. So, you say, "Well, we're going to have a special thing here for amendments in strike suits. Have a special amendment for some" -- you know, why proliferate law?

MR. HALLWARD-DRIEMEIER: Well, the Court recognized -- Arizona v. California is an example of the broader social interests that are implicated by the affirmative defense of res judicata. And the

Court noted, in Arizona versus California, that it would be appropriate for the court to raise that defense sua sponte. And, of course, Plaut versus Spendthrift Farm says the same thing.

JUSTICE GINSBURG: Not generally. Statute of limitations, like res judicata, they are 8(c) affirmative defenses, and preclusion doctrine is for the party to waive or not, just like the statute of limitations. I don't think there's any rule that says a judge in the run-of-the-mine case acts properly by interjecting preclusion into a case where no party has raised it.

MR. HALLWARD-DRIEMEIER: Well, our point is that it is a matter for the court's discretion. And there may well be circumstances where it would be an abuse of discretion to interject a timeliness objection. For example, if the case had gone on for years, and a trial had been held, as Your Honor suggested in the question earlier, that might well be an abuse of discretion, but it would not -- for example, take the case where the District Court had dismissed, at the outset, on the merits, and it went up to the Court of Appeals, and the Court of Appeals said, "You know, that merits issue is a very difficult one. And, in fact, we think we might have to remand

for an evidentiary hearing on that issue. But, you know, this case was untimely filed. We can dispose of it on that basis. And we can save all of those judicial and party resources by addressing that issue now." We think that would be an appropriate exercise of the court's discretion.

Here, as Your Honor noted earlier, this was the first thing that happened in the District Court after the filing of the petition, the answer, and the reply. There was no waste of judicial resources by the fact that it was raised sua sponte by the court in the first thing that the court did after that briefing. There was no prejudice to the Petitioner, because it was omitted from the State's responsive pleading. There is -- as the Court said in Granberry, the failure to plead it perhaps waives the District -- the State's opportunity to insist on the defense. The State, because it said, in its answer here, erroneously, that the petition was timely filed, or if it had said nothing, would have waived its opportunity to stand on, and insist on, that defense. But it is not an absolute forfeiture. It does not bar the party from suggesting at a later time, "We would like to amend," or, in this case, the court to note it sua sponte.

The court did, here, of course, give the Petitioner every opportunity --

JUSTICE SCALIA: Excuse me. From what you just said, I take it that means that even when the State is unwilling to change its mind and says, "No, we would still prefer not to assert the defense," you would allow the court to impose it.

MR. HALLWARD-DRIEMEIER: We believe that the court is not absolutely limited by the defenses --

JUSTICE SCALIA: The answer --

MR. HALLWARD-DRIEMEIER: -- asserted by --

JUSTICE SCALIA: -- is yes.

MR. HALLWARD-DRIEMEIER: Yes. Yes. The court is not absolutely limited by the affirmative defenses asserted by the State. For -- and that is perhaps most easily seen with respect to affirmative defenses such as failure to exhaust, nonretroactivity. If the court was going to have to assess a brand-new constitutional claim that the habeas petitioner --

CHIEF JUSTICE ROBERTS: But with respect to some --

MR. HALLWARD-DRIEMEIER: -- was asserting --

CHIEF JUSTICE ROBERTS: -- of those, of course, AEDPA specifically promulgates new rules about when they're waived, and not. And they -- Congress

hasn't done that with respect to the statute of limitations.

MR. HALLWARD-DRIEMEIER: That's right. And obviously, as the State suggested, if the State didn't want to stand on the statute of limitations defense because, for example, it was particularly messy, there was going to be a lot of litigation about equitable tolling, it would in inappropriate for the court to insist on litigating that issue. But if, for example, the State said, "Well, you know, if we didn't stand on this defense, instead this Petitioner would go back to the State Court, and the State's Courts are going to be very hospitable to this claim. We think you're more likely to deny relief, so we'd rather have it litigated here," it would inappropriate for the State to try to force the Federal Court to litigate that issue instead of the State Court. These are all fact-specific, case-specific considerations. And that's what the Court did in Granberry. It remanded -- after setting aside both extreme positions, it remanded to the Court of Appeals for a case-specific application of discretion.

As to the question of whether the Eleventh Circuit here believed that there was an absolute obligation, I think that it's relevant to note that,

although there was one point at which it said, "The court was obligated to enforce the statute of limitations" -- and, of course, that's true if the State has preserved the defense -- there were three other points in the Court of Appeals opinion where it used discretionary or nonmandatory language. For example, at petition appendix 4(a), the court said that the District Court "may dismiss." At the petition appendix 5(a), it said that the State's failure to raise "does not bar" the court from acting sua sponte. Again, at petition appendix 6(a), the State's concession, quote, "does not compromise the authority of the District Court." All of those are phrased in more permissive language --

CHIEF JUSTICE ROBERTS: But, of course, "may" is -- "may" is embraced within "must." If you "must," you "may."

[Laughter.]

MR. HALLWARD-DRIEMEIER: Well, perhaps the -- perhaps the even most clear indication of what the Court of Appeals viewed this is its citation to Jackson as an application of Jackson. And in Jackson there is no question, because Jackson said, quote, "The District Court possessed the discretion to raise sua sponte." And the -- and the magistrate judge, as

the State's counsel, mentioned -- in footnote 1 of its opinion, cites that same standard and makes clear that it's raising this at a -- as a matter of its discretion. So, remand for the exercise of discretion would be -- serve no purpose in this case.

If there are no further questions --

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Busby, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF J. BRETT BUSBY

ON BEHALF OF PETITIONER

MR. BUSBY: Thank you, Mr. Chief Justice.

I'd like to begin by addressing the "must" versus "may" issue that Counsel discussed. For the reasons I mentioned, I think the better reading of the Eleventh Circuit's opinion is that there was an obligation, and that the most clear indication of that is its distinction of Esslinger, which expressly applied a Granberry-type analysis. But, even if the Court believes that the Eleventh Circuit was only saying "may," and that the District Court was only saying "may," and recognized the that it had discretion -- and there is a footnote in the magistrate's opinion that cites to Jackson that says, "We have discretion" -- I would submit that if you read Jackson, it's a standardless discretion. There

are no factors anywhere in Jackson of the type that this Court discussed in Granberry. It -- and there's no indication that the -- that the magistrate judge considered any of those factors. There's no indication that the Eleventh Circuit considered any of those factors. And it's certainly an abuse of discretion for a court to apply the wrong legal standard or fail to consider the relevant factors that channel that discretion.

And so, we -- our position is that, because the factors under Rule 15 and the other factors in our brief were not applied, that a remand, at a minimum, is appropriate in this case.

Also, I'd like to speak to Granberry and Caspari. Again, those involve exhaustion and nonretroactivity. And I submit that it's not correct to characterize those two doctrines as affirmative defenses; rather, the way that Congress codified them is on -- as substantive limits on relief, unlike "limitations," which it just said "period of limitations," which the commonly accepted meaning is an "affirmative defense." And so, that makes those very different from an affirmative defense, in terms of sua sponte consideration.

Also, both "exhaustion" and

"nonretroactivity" are unique to habeas. They're not mentioned anywhere in Rules 8 and 12. Whereas, "limitations," of course, is mentioned explicitly. And so, our position is that Rule 8 and 12, not necessarily always, but at least in all but extraordinary cases, would prevent the judge from raising this sua sponte.

Also, I would say that the rules that we rely on don't deprive the court of sua sponte authority, they channel that authority. Under Rule 4, they can plead it, or the court can make a motion to dismiss -- ask the -- order the State to make a motion to dismiss based on limitations under Habeas Rule 4. They can plead it in their answer, under Habeas Rule 5 and Civil Rules 8 and 12, or they can amend their answer, under Civil Rule 15. That's the way the drafters of the rules wanted them to do this. And Lonchar and Carlisle say they cannot -- that a judge cannot use his sua sponte power to circumvent the requirements of those rules.

Finally, I'd like to mention that civil -- the statutes of limitations in civil cases also implicate broader social interests. And some of them, we've discussed in our brief. And, even more so, because there are lots of protections in AEDPA cases

that don't apply in civil cases. There are presumptions of correctness and those sorts of things. But courts in civil cases, nonetheless, say that statutes of limitations can be waived. And the result should be no different here.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

The case is submitted.

[Whereupon, at 11:58 a.m., the case in the above-entitled matter was submitted.]