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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

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

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

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

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

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

1 JUSTICE GINSBURG: But the --

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

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

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

10 JUSTICE GINSBURG: Yes.

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

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

21 JUSTICE GINSBURG: Suppose --

22 MR. BUSBY: -- this Court --

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

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

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

18 JUSTICE GINSBURG: I --

19 MR. BUSBY: -- analysis.

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

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

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

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

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

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

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

25 JUSTICE GINSBURG: I thought that that duty

1 is in connection with Rule 4.

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

8 And so, our position is that even --

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

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

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

20 MR. BUSBY: Under Rule 4?

21 JUSTICE KENNEDY: Sure.

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

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

1 limitations, or barred by the statute of limitations -
2 -

3 MR. BUSBY: Uh-huh.

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

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

8 JUSTICE KENNEDY: Really?

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

13 JUSTICE KENNEDY: No, my --

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

15 JUSTICE KENNEDY: No, my --

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

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

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

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

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

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

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

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

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

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

8 MR. BUSBY: Certainly. And their --

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

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

22 JUSTICE GINSBURG: Well, we could --

23 MR. BUSBY: -- Court recognized --

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

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

4 MR. BUSBY: Yes, Your Honor.

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

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

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

14 MR. BUSBY: Yes, Your Honor.

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

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

24 JUSTICE GINSBURG: There are very what
25 standards?

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

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

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

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

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

1 Court to allow the amendment.

2 JUSTICE ALITO: Are you --

3 MR. BUSBY: Now, also --

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

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

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

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

1 petition, you couldn't tell.

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

3 JUSTICE GINSBURG: There wasn't --

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

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

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

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

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

10 MR. BUSBY: Yes, Your Honor.

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

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

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

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

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

10 And so, our position is that that's the
11 reason that it should be done under Rule 15. It also
12 doesn't put the State in the position of being an
13 advocate -- excuse me -- it doesn't put the Court in
14 the position of being an advocate for the State and
15 having them say -- having the Court directly across
16 the bench from the Petitioner, not involving the
17 State, saying, "Here are -- I'm developing some
18 arguments on behalf of the State now why this is
19 untimely. What do you have to say about it?" That's
20 --

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

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

1 you want to make a motion to amend?"

2 JUSTICE SCALIA: Wink, wink?

3 MR. BUSBY: Well -- but --

4 [Laughter.]

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

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

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

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

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

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

18 MR. BUSBY: I beg your pardon?

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

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

1 shall not be granted unless you file within one year."

2 It doesn't even say, as it does in the capital
3 context, for certain -- for capital opt-in States,
4 that it must be filed by a certain time. It just says
5 "a period of limitation." And that has a settled
6 meaning that goes along with it.

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

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

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

12 MR. BUSBY: Yes.

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

14 MR. BUSBY: Well, I --

15 JUSTICE BREYER: And if --

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

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

18 MR. BUSBY: One --

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

22 MR. BUSBY: Uh-huh.

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

1 MR. BUSBY: Certainly.

2 JUSTICE BREYER: And we don't --

3 MR. BUSBY: And there could be --

4 JUSTICE BREYER: -- have to decide --

5 MR. BUSBY: -- good reasons to amend. For

6 example, the Bendolph case that you have before you,

7 there was an alteration in a date, and the Third

8 Circuit didn't ascribe that to any particular person,

9 but, nonetheless, the documents that the State had

10 before it had the wrong date on it from which to

11 calculate.

12 JUSTICE SCALIA: Must there be good reasons

13 for the judge to say, quote, "I'm surprised that you

14 haven't raised a statute of limitations defense"?

15 MR. BUSBY: Well, I --

16 JUSTICE SCALIA: Must there be good reason

17 for that? And, if not, aren't you asking us to waste

18 our time?

19 MR. BUSBY: I don't think so.

20 JUSTICE SCALIA: Why don't you do it the

21 easier way and --

22 MR. BUSBY: I don't think so, Your Honor.

23 You're -- if you put -- if you put limitations as

24 something that the judge must raise, I think you're

25 asking the judge to waste his time rather than leaving

1 it to the parties to raise it.

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

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

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

13 MR. BUSBY: For a judge to --

14 JUSTICE SCALIA: Yes.

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

16 JUSTICE SCALIA: Right.

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

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

22 MR. BUSBY: -- Court needs to --

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

24 MR. BUSBY: -- circumscribe --

25 CHIEF JUSTICE ROBERTS: It wouldn't be an

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

5 MR. BUSBY: That's a good point, Your Honor.

6 I don't think this Court needs to circumscribe the
7 judge's authority to suggest an amendment. I think
8 you could wrap it all into the ruling and evaluate
9 that for abuse of discretion.

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

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

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

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

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

4 JUSTICE GINSBURG: Were those --

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

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

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

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

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

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

4 JUSTICE SCALIA: That's --

5 MR. BUSBY: -- except in --

6 JUSTICE SCALIA: That's what I thought your
7 --

8 MR. BUSBY: Yes.

9 JUSTICE SCALIA: -- position was.

10 MR. BUSBY: Except in exceptional --

11 JUSTICE SCALIA: Okay. So, this --

12 MR. BUSBY: -- circumstances.

13 JUSTICE SCALIA: -- a fallback position.

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

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

1 the statute of limitations, and the case is all tried
2 and finished. At the very end, he says, "Oh, my God."

3 And now he goes in and asks to amend it under Rule
4 15. Do judges normally say, "Fine"?

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

7 JUSTICE BREYER: Because it's --

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

12 JUSTICE GINSBURG: But here, nothing --

13 MR. BUSBY: -- bring it up.

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

16 MR. BUSBY: Well --

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

20 MR. BUSBY: Well --

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

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

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

20 That takes care of these interests in the run-of-the-
21 mine case.

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

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

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

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

1 suggestion that they didn't have all the information
2 they needed to make the calculation. And Brady says
3 that simply misapprehending a factor -- a relevant
4 factor in the analysis is not enough. And that's at
5 397 U.S. at page 757.

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

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

19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

20 Mr. Kise.

21 ORAL ARGUMENT OF CHRISTOPHER M. KISE

22 ON BEHALF OF RESPONDENT

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

25 The District Court's sua sponte action here

1 was consistent with AEDPA and the habeas rules. It
2 was consistent with this Court's habeas jurisprudence.

3 And it was consistent with the purpose behind, and
4 not prohibited by, Federal Rules 8 and 12.

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

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

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

1 JUSTICE SCALIA: You think the court "must."

2 MR. KISE: No, Your Honor.

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

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

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

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

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

24 JUSTICE SOUTER: What --

25 MR. KISE: -- District Court --

1 JUSTICE SOUTER: What would you say --
2 assuming that we're beyond Rule 4, what would you say
3 simply to a rule that said, "Yes, we recognize that
4 there remains a discretion -- not an obligation, but a
5 discretion -- on the part of the court to raise this."

6 But, just as a -- as a general rule, judicial
7 efficiency is better served by avoiding the use of
8 discretion unless the State, in fact, raises the
9 limitations issue, itself. The courts have a lot of
10 things to do, and they shouldn't be spending their
11 time canvassing pleadings to see whether there might
12 be an issue that the State missed; so that in the
13 absence of some extraordinary circumstance, it would
14 be an abuse of discretion to exercise it as the -- as
15 the Circuit suggests it should have been exercised
16 here. What would you say to that position?

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

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

7 JUSTICE SOUTER: What --

8 MR. KISE: -- because the Court --

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

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

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

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

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

9 JUSTICE SOUTER: That would be an abuse.

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

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

16 MR. KISE: Well, Justice --

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

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

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

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

11 [Laughter.]

12 JUSTICE BREYER: -- and there would be more
13 for lawyers to look up. Whereas, if you just say Rule
14 15, it's finished.

15 MR. KISE: Respectfully, Your Honor, I
16 believe this Court's already done that, though, in
17 Granberry and Caspari. I mean, that's what you've
18 already said, is that, under -- that habeas is
19 different. And I think it's important to point out,
20 we're not asking for a different construction of Rules
21 8 and 12. We're asking this Court to apply the same
22 exception that is applied in the extraordinary case.
23 The Petitioner takes the position -- and Petitioner is
24 alone in this contention -- that "ordinarily" means
25 "never." Even the law professor amici don't take

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

4 JUSTICE GINSBURG: Would you say it's --

5 MR. KISE: -- the ordinary rule --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 an express waiver case as opposed to a forfeiture
2 case?

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

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

1 these --

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

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

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

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

3 JUSTICE SCALIA: All right.

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

7 JUSTICE GINSBURG: But why would --

8 MR. KISE: -- judgment is correct.

9 JUSTICE GINSBURG: -- why would you deal
10 with that hypothetical when the Eleventh Circuit, in
11 all fairness, said, "We join the Second, Fourth,
12 Fifth, and Ninth Circuit, and rule that, even though
13 the statute of limitations is an affirmative defense,
14 the District Court may review the timeliness of the
15 2254." That's what -- the question that the court
16 thought it was deciding.

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

1 appropriate test. In the first instance, I would say
2 that the Eleventh Circuit did not, in fact, apply that
3 test, did not believe that it was obligated to, but if
4 this Court were to disagree, as Justice Scalia has
5 presented the hypothetical, then I would say that the
6 District Court did, in fact, apply the correct test.
7 The District Court, as noted in -- on page 8(a) of the
8 petition appendix, the footnote in the magistrate's
9 report and recommendation cites Jackson, the Eleventh
10 Circuit case which stands for the discretionary
11 proposition, and indicates specifically that it is
12 relying on a discretionary test. And so, the District
13 Court in this case, in fact, applied the test that we
14 are advocating, and in -- and, frankly, got it right.

15 The District Court applied discretion, raised the
16 issue, provided a notice and an opportunity to be
17 heard, conducted the analysis of prejudice -- there
18 was no prejudice in this case -- and ruled, on that
19 basis. And that ruling was consistent with this
20 Court's habeas jurisprudence, and it was consistent
21 with AEDPA and with the habeas rules.

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

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

2 CHIEF JUSTICE ROBERTS: Well, you --

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

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

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

24 CHIEF JUSTICE ROBERTS: Right.

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

1 That is our position.

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

4 MR. KISE: Yes, Your Honor.

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

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

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

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

5 JUSTICE STEVENS: Yes.

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

8 If the Court has no further questions, thank
9 you.

10 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

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

13 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

14 FOR THE UNITED STATES, AS AMICUS CURIAE,

15 IN SUPPORT OF RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 JUSTICE SCALIA: The answer --

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

12 JUSTICE SCALIA: -- is yes.

13 MR. HALLWARD-DRIEMEIER: Yes. Yes. The
14 court is not absolutely limited by the affirmative
15 defenses asserted by the State. For -- and that is
16 perhaps most easily seen with respect to affirmative
17 defenses such as failure to exhaust, nonretroactivity.

18 If the court was going to have to assess a brand-new
19 constitutional claim that the habeas petitioner --

20 CHIEF JUSTICE ROBERTS: But with respect to
21 some --

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

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

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

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

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

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

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

18 [Laughter.]

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

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

6 If there are no further questions --

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

8 Mr. Busby, you have 4 minutes remaining.

9 REBUTTAL ARGUMENT OF J. BRETT BUSBY

10 ON BEHALF OF PETITIONER

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

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

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

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

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

25 Also, both "exhaustion" and

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

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

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

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

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

8

9 The case is submitted.

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

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