No. _____

IN THE

Supreme Court of the United States

HOLLINS TIZENO,

Petitioner,

v.

GERALD JANDA, WARDEN

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Petitioner, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel in the Ninth Circuit under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: June 18, 2019

By: */s/ Jonathan C. Aminoff*
JONATHAN C. AMINOFF*
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**Counsel of Record*

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court may sua sponte raise a waived procedural default defense and, if so, under what circumstances is it appropriate to do so.

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OPINIONS BELOW

The Ninth Circuit's opinion denying relief was not reported. *Tizeno v. Madden*, 765 Fed. Appx. 214 (9th Cir. 2019). Pet. App. 1-4.

JURISDICTION

The Ninth Circuit's opinion affirming the denial of habeas relief was filed on March 20, 2019. Pet. App. 1-4. The Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 8(c)(1): "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense…."

Rules Governing Section 2254 Cases 5(b): "The answer … must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations."

Title 28 U.S.C. Section 2254(a): "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

Petitioner Hollins Tizeno was convicted of a 1990 murder and attempted murder based almost exclusively on 17-year-old Bianka Logie's claim that she saw Tizeno riding a bicycle away from the general location of the shooting. Pet. App. 25-32. Evidence was admitted at trial that Logie was a habitual liar who had been twice institutionalized for behavior including pathological lying. Pet. App. 35-36. Yet the state's entire case rose and fell with Logie. Indeed, the magistrate judge who denied the habeas petition found that absent Logie's testimony, there was insufficient evidence to establish probable cause that Tizeno had committed the crime. Pet. App. 67. Twenty years after the trial, a county public defender interviewed Logie, who was then serving prison time for one of her many felony convictions, and at that time Logie signed a declaration under penalty of perjury admitting that she had falsely accused Tizeno.

After the district court denied Tizeno's federal habeas petition brought pursuant to 28 U.S.C. § 2254, Tizeno discovered new evidence that established that the Los Angeles Police Detective who obtained Logie's identification of Tizeno had a history of coercing young women to make faulty identifications. Pet. App. 73-96. Indeed, the Los Angeles District Attorney's Office dismissed all charges in an unrelated first-degree murder case after information about the detective's misconduct came to light, freeing that defendant after over 30 years in custody. *Id.*

Yet Tizeno remains in prison. The district court found his claims for relief were procedurally defaulted. The only evidence Tizeno could proffer to try to establish actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995), to bypass the

default were Logie's recantations. Not surprisingly the district court found that Logie, with her history of pathological lying and felony convictions, was not a credible witness who could support a finding of actual innocence. Pet. App. 46-61.

But the district court's procedural default finding was emblematic of a larger issue in the courts. After Tizeno filed his habeas petition in district court, the state moved to dismiss due to failure to exhaust. As it turned out, the county public defender who had represented Tizeno in state habeas had failed to plead a federal basis for Tizeno's claims for relief. The district court stayed Tizeno's case for unrelated reasons, and Tizeno filed a new petition in state court to exhaust the federal basis of his claims. The state court denied those claims on procedural grounds. Pet. App. 72. After the district court lifted the stay, the state raised the procedural default defense, however they claimed the state court had denied Tizeno's claims as untimely, rather than under the repetitious or piecemeal bar that the state court had actually imposed. Pet. App. 18. In the magistrate judge's report and recommendation denying the petition following discovery and an evidentiary hearing, the magistrate sua sponte raised the repetitious or piecemeal bar for the first time. Pet. App. 17-23. Tizeno filed objections stating that the bar was now waived and, alternatively, it was ambiguous whether the state was applying the repetitious or piecemeal bar, and the repetitious bar was not adequate to bar federal review. The state filed a response, and the district court accepted the magistrate's report without explanation and denied habeas relief. Pet. App. 5, 6. In an unpublished decision, the Ninth Circuit held that Tizeno had received adequate

notice of the bar via the report and recommendation, and an adequate opportunity to respond via his objections, and affirmed the district court's ruling. Pet. App. 1-4.

REASONS FOR GRANTING THE WRIT

In *Trest v. Cain*, 522 U.S. 87 (1997), this Court left open "whether, or just when, a habeas court may consider a procedural default that the State at some point has waived, or failed to raise." In the wake of *Trest*, however, "the Courts of Appeals have unanimously held that, in appropriate circumstances, courts, on their own initiative, may raise a petitioner's procedural default, i.e., a petitioner's failure properly to present an alleged constitutional error in state court, and the consequent adequacy and independence of state-law grounds for the state-court judgment." *Day v. McDonough*, 547 U.S. 198, 206 (2006). The contours of those "appropriate circumstances" have been left to the lower courts to decide, and despite the direction this Court has provided, have led to wildly differing results.

In every federal civil case, a defendant must raise its affirmative defenses in the pleading that responds to a plaintiff's complaint and unless granted leave to amend, the failure to plead a defense waives that defense. Fed. R. Civ. P. 8(c). There is no exception to Rule 8(c) for accidental or unintentional omissions of certain defenses. *See, e.g., Harris v. Sec'y U.S. Dept. of Veterans Affairs*, 126 F.3d 339, 343 N.2 (D.C. Cir. 1997). Nor does the rule give preferential treatment to government defendants. Compare Rule 8(c) (which makes no distinction in defendants) to Rule 12(a)(2) (which states that if a government official is sued in her official capacity she has 60 days, instead of the standard 20 days, to file a responsive pleading).

Habeas corpus actions are considered civil proceedings to which the federal rules of civil procedure generally apply. *See* Habeas Corpus Rule 12 (stating that the rules of civil procedure may be applied to habeas corpus actions to the extent they are not inconsistent the rules governing habeas actions or statutory provisions). And Rule 8(c) is consistent with the habeas rules. *See* Habeas Rule 5(b) ("The answer … must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.").

Yet this Court has exempted the most significant affirmative defenses -- exhaustion of state remedies,[1] non-retroactivity,[2] and statute of limitations[3] -- to habeas petitions from the strictures of Rule 8(c), and allowed the circuit courts to unanimously hold the same for procedural default.

The Court has placed few limitations on the lower courts in raising affirmative defenses sua sponte. The Court has stated that "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." *Day*, 547 U.S. at 210. However, *Day*'s notice requirement appears at odds with the Court's decisions in *Granberry v. Greer*, 481 U.S. 129 (1987) and *Wood v. Milyard*, 566 U.S. 463 (2012) in which the Court held that

[1] *Granberry v. Greer*, 481 U.S. 129, 133 (1987).

[2] *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994).

[3] *Day v. McDonough*, 547 U.S. 198 (2006).

courts of appeals may sua sponte raise exhaustion and timeliness for the first time on appeal.

The Court has also stated that district courts may consider forfeited defenses when "extraordinary circumstances so warrant," *Wood*, 566 U.S. at 471 (citing *Day,* 547 U.S. at 201), and that district courts must assess "'whether the interests of justice would be better served' by addressing the merits or by dismissing the petition[.]" *Day*, 547 U.S. at 210-11 (quoting *Granberry*, 481 U.S. at 136).

Although the lower courts are aligned in their ability to raise procedural default sua sponte, they are divided in terms of when it is appropriate to do so. In fact, their justification for raising procedural default sua sponte range from concerns over finality and comity, *see, e.g., Beaver v. Marshall*, 119 F.3d 993, 999 (1st Cir. 1997), to subjective determinations of whether the state was blameworthy for failing to raise the issue, *see, e.g., Vang v. Nevada*, 329 F.3d 1069, 1073 (9th Cir. 2003), to conclusions that procedural default may be "manifest from the record and, hence" do not require further factual finding. *Rosario v. United States*, 164 F.3d 729, 732-33 (2d Cir. 1998). And lower courts are not requiring a showing by the state of extraordinary circumstances nor making a finding that the interests of justice supports the court's revival of a waived defense. *See, e.g., Ocampo v. Vail*, 649 F.3d 1098, 1107 n. 11 (9th Cir. 2010) (applying the extraordinary circumstances analysis only to sua sponte applications of affirmative defenses on appeal); *Hill v. Braxton*, 277 F.3d 701 (4th Cir. 2001) (applying affirmative defenses sua sponte

with no consideration of extraordinary circumstances and interpreting the interests of justice requirement as equivalent to the notice requirement).

The Court should resolve whether lower courts may raise procedural default sua sponte and, if so, under what circumstances they may do so. This case is the perfect vehicle for settling this matter. First, it squarely presents the first aspect of the issue: whether district courts may raise procedural default sua sponte. Second, the specifics of this case would allow the Court to define the contours of the "appropriate circumstances" consistent with this Court's line of cases concerning affirmative defenses in the habeas context.

Here, the report and recommendation raising the defense sua sponte was filed almost 3 years after the habeas petition was filed. Pet. App. 7-61. During those three years, the parties engaged in extensive litigation, discovery (including serving subpoenas duces tecum on multiple state agencies and depositions of multiple witnesses), and an evidentiary hearing wherein multiple witnesses were subpoenaed to testify. This litigation was largely focused on the magistrate judge's preliminary finding that Tizeno had put forth sufficient evidence of actual innocence and of the state's misconduct. Pet. App. 62-71. As the Court held in *Granberry,* the resources the lower court has committed to the case as well as the subject matter of the litigation should be a factor in considering whether the circumstances are appropriate to raise procedural default sua sponte. *Granberry*, 481 U.S. at 135 (finding that the affirmative defense of exhaustion should have been considered waived when the district court had already held a trial on the merits and found that

there was a miscarriage of justice.). Applying *Granberry,* the Court could use this case to establish that although district courts have discretion to raise procedural default sua sponte, they should not do so when the "main event" has passed or if the interests of justice favor hearing the merits of a petition, such as when the habeas cases involves issues of possible innocence or government misconduct. *See Granberry*, 481 U.S. at 132 (expressing "reluctance to adopt rules that allow a party to withhold raising a defense until after the 'main event' ... is over.") (quoting *Wainwright v. Sykes*, 433 U.S. 72, 89-90).

The practical consequences of leaving these issues in the circuit courts' hands are wildly differing standards and applications of this Court's precedent, and the Court need look no further than Tizeno's case to understand the need for this Court's intervention. Here, the state had originally asserted a procedural default based upon the state court's invocation of a timeliness bar. Pet. App. 18. This Court has previously upheld California's timeliness bar as adequate and indepdent to bar federal habeas review. *Walker v. Martel*, 562 U.S. 307 (2011). As a result, the magistrate court concluded that Tizeno would have to meet the high bar of *Schlup* actual innocence in order to have his claims heard on the merits. In then deciding that Tizeeno had not met his *Schlup* burden, the magistrate reversed course and held that the state court had not imposed a timeliness bar, but rather a repetitious or piecemeal bar. Pet. App. 18. Although Petitioner objected, the district judge summarily upheld that magistrate's sua sponte application of the procedural default defense and denied relief. Neither the magistrate nor the

district judge ever decided which specific bar the California court had applied: repetitious or piecemeal or some combination thereof. Pet. App. 6, 7-61. And although Tizeno alerted the court to the fact that the repetitious bar is not adequate to bar federal review, *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991), the district court denied relief. Pet. App. 5.

Were the Court to take this issue up and establish rules consistent with its prior jurisprudence, habeas cases would proceed efficiently and justly. First, district and magistrate judges are required under Habeas Rule 4 to conduct an initial screening of the petition and to dismiss petitions when they believe the petitioner is plainly not entitled to relief. Habeas Rule 4; *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 657 (4th Cir. 2006) (the "quasi-inquisitorial role of a district court in such proceedings to screen initial filings, that justified our departure from the general rule that a defendant must either timely raise a statute of limitations defense or waive its benefits."). If the court intends to raise an affirmative defense sua sponte, it should be required to do so during this screening period as contemplated by the rules. Otherwise, the courts should hold the state to the requirements of Rule 5. If, thereafter, the district court becomes aware of an affirmative defense and the main event of the case has yet to be decided and the interests of justice support raising the defense, the district court should issue an order to show cause to the state as to whether extraordinary circumstances warrant reviving the waived affirmative defense. If that had occurred here, then the parties could have litigated the applicable procedural bar, the court would rightly have held

that the applied bar was ambiguous and therefore did not bar relief, and the court could have reached the merits of the case without needing to consider *Schlup* actual innocence.

Instead, Tizeno remains in prison after almost 30 years based on the identification of a habitual and compulsive liar obtained by a police detective known for unlawfully coercing identifications.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: June 18, 2019

By: */s/ Jonathan C. Aminoff*
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CERTIFICATE OF SERVICE

I, Jonathan C. Aminoff, a Deputy Federal Public Defender in the Office of the Federal Public Defender who was appointed as counsel for Petitioner under the Criminal Justice Act, 18 U.S.C. § 3006(A)(b), hereby certify that on June 18, 2019, a copy of Motion for Leave to Proceed *In Forma Pauperis*; Petition for Writ of Certiorari were mailed postage prepaid to:

The names and addresses of those served are as follows:

Dana M. Ali Counsel for Respondent
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 18, 2019.

/s/ Jonathan C. Aminoff
Jonathan C. Aminoff*

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**Counsel of Record*