No. 20- _____

IN THE

Supreme Court of the United States

ROLANDO GUS PAEZ,
Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Rule 4 of the rules governing Section 2254 cases in the United States District Court, which provides that "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner[,]" violate the federalism doctrine and/or the adversarial system?

PARTIES TO THE PROCEEDING

The Parties to the proceeding are the Petitioner, Rolando Gus Paez, and the Secretary, Florida Department of Corrections.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Rolando Gus Paez, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit is reproduced in the Appendix herein at App. 1a. The opinions of the United States Court of Appeals for the Eleventh Circuit is published and reported at *Paez v. Sec'y, Fla. Dep't of Corr.*, 931 F.3d 1304 (11th Cir. 2019), *vacated*, 944 F.3d 1327 (11th Cir. 2019), and *superseded*, 947 F.3d 649 (11th Cir. 2020). App. 2a, App. 25a, App. 26a, respectively. The denial of Petitioner's Petition for Rehearing *en banc*, issued on April 9, 2020, is not officially reported and is reproduced in the Appendix herein at App. 39a.

The Magistrate Judge's report and recommendation is not officially reported and is reproduced in the Appendix herein at App. 40a. The District Court's order is not officially reported and is reproduced in the Appendix herein at App. 54a.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit affirming the District Court's judgment was entered on January 7, 2020. A timely petition for panel rehearing and rehearing *en banc* was denied on April 9, 2020. The present petition is being filed by postmark on or before July 8, 2020. Supreme Court Rules 13.1, 13.3, 29.2, and 30.1. This Court properly has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RULE-BASED PROVISIONS INVOLVED

The Rules Governing Section 2254 Cases and Section 2255 Proceedings provide:

> The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

Rules Governing § 2254 Cases, R. 4.

STATEMENT

In June 2016, the Petitioner filed his 28 U.S.C. § 2254 petition with the United States District Court for the Southern District of Florida. The District Court referred the Petitioner's case to a Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases.

The Magistrate Judge, notwithstanding that the limitations periods are non-jurisdictional claims processing rules, *sua sponte* considered the timeliness of the Petitioner's Section 2254 petition purportedly pursuant to this Court's decision in *Day v. McDonough,* 547 U.S. 198, 199 (2006). Consequently, the Magistrate Judge issued his report and recommendation, which observed that "[f]rom the fact of the petition and state court records which this Court can take judicial notice, it is apparent that Petitioner has filed his petition beyond the applicable limitations period as set forth in 28 U.S.C. § 2244(b)." App. 40a-41a.

The Magistrate Judge ultimately concluded that: (1) 28 U.S.C. § 2244's one year period began to run on January 22, 2011 (which was thirty days after the state court's judgment for the Petitioner's violation of probation was entered); (2) the one-year clock ran unchecked for 327 days until the Petitioner filed his Fla. R. Crim. P. 3.850 motion collaterally attacking the violation of probation judgment on December 15, 2011; (3) the limitations period remained tolled until March 7, 2016; and (4) the limitations period ran unchecked for an additional 106 days before the Petitioner filed his Section 2254 petition with the District Court. App. 48a-49a.

The Petitioner submitted his objections to the report and the District Court issued its order adopting the report in full. App. 54a.

Following oral argument, the Court of Appeals issued an opinion vacating the District Court's decision and remanding for further proceedings. *Paez v. Sec'y, Fla. Dep't of Corr.*, 931 F.3d 1304 (11th Cir. 2019) (*"Paez I"*). The Court of Appeals held in the majority opinion that a trial court must order the State to respond even if the petition appears untimely. *Paez I,* 931 F.3d at 1309; App. 12a. Relying on this Court's decision in *Granberry v. Greer*, 481 U.S. 129, 135 n.7 (1987) and circuit precedent, the majority opinion concluded that "Rule 4 does not, however, permit district courts to *sua sponte* dismiss § 2254 petitions based on non-jurisdictional procedural bars to habeas relief at this stage of preliminary review." *Id.* (citation omitted); App. 12a. This is so, according to the majority opinion, because "hurdles can include untimeliness or nonexhaustion. And these are not the proper subject of Rule 4 dismissal because they do not go to the merits of the petition." *Id.*; App. 12a.

Additionally, the majority opinion observed that it could not "imagine how it could plainly appear from the petition that the petitioner is not entitled to relief on non-jurisdictional procedural grounds, as required for Rule 4 dismissal. A State may waive these defenses. And a district court cannot know from the face of the petition whether a State will choose to waive its defenses." *Id.* (cleaned up); App. 12a-13a.

Finally, the majority opinion noted that:

> The Rule's text could not be plainer: "If the petition is not dismissed" as nonmeritorious, Rule 4 says "the judge *must* order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." Rules Governing § 2254 Cases, Rule 4 (emphasis added). The Rule gives district courts "flexibility" to order something other than an answer, such as a motion to dismiss where the petition appears untimely or unexhausted on its face, where the case warrants it. *Id.* R. 4 comm. n. But Rule 4 does not leave district courts any room to dispense altogether with a response of some form once a petition is not dismissed as nonmeritorious.

Id.; App. 13a.

In addressing this Court's *Day* decision, the majority opinion remarked that "that district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." *Id.*; App. 14a (quoting Day, 547 U.S. at 209). The majority opinion was informed by the fact that

> This limitation [i.e., discretion to raise a timeliness issue *sua sponte*] tracks Rule 4's requirements. *Day* confirms that a court must seek the parties' position on timeliness before dismissing a § 2254 petition on that ground. *Day*'s ruling on this point is in keeping with the usual practice that litigants, not courts, advance claims and defenses. As the Supreme Court explained in a post-*Day* case, "a federal court does not have carte blanche to depart from the principle of party presentation basic to our adversary system." *Wood v. Milyard*, 566 U.S. 463, 472 (2012). Indeed, in *Wood*, the Supreme Court ruled the Tenth Circuit abused its discretion by dismissing a habeas petition on timeliness grounds that the State deliberately and intelligently waived. Just as the District

> Court here would have abused its discretion if it overrode the Secretary's choice to waive timeliness, it abused its discretion by asserting the defense on the Secretary's behalf without knowing the Secretary's position. Both approaches depart equally from the principle of party representation.

Id. at 1310; App. 15a-16a (some citations omitted).

Consequently, the Court of Appeals reversed and remanded with directions to the District Court to order the State to respond.

The State petitioned for rehearing, and the Court of Appeals vacated the decision. *Paez v. Sec'y, Fla. Dep't of Corr.*, 944 F.3d 1327 (11th Cir. 2019); App. 25a.

The Court of Appeals reversed course by adopting the dissenting opinion in *Paez I,* and ultimately held that "the District Court did not err by *sua sponte* dismissing Mr. Paez's § 2254 petition after giving him notice of its decision and an opportunity to be heard in opposition. Our conclusion is supported by the text of Rule 4, the Advisory Committee Notes to Rule 4, and Supreme Court precedent." *Paez v. Sec'y, Fla. Dep't of Corr.*, 947 F.3d 649, 653 (11th Cir. 2020) (*"Paez II"*); App. 35a.

REASONS FOR GRANTING THE WRIT

I. RULE 4 VIOLATES THE FEDERALISM DOCTRINE AND ADVERSARIAL SYSTEM.

"The federal system rests on what might at first seem a counterintuitive insight, that freedom is enhanced by the creation of two governments, not one." *Bond v. United States,* ("*Bond I*") 564 U.S. 211, 220–21 (2011) (cleaned up). "The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Id.* at 221.

Consequently, "[i]n our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Bond v. United States*, ("*Bond II*") 572 U.S. 844, 854 (2014). Thus, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the usual constitutional balance of federal and state powers." *Id.* at 858 (cleaned up). "These precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Id.* at 859. Indeed, by default is the "assumption that Congress normally preserves the constitutional balance between the National Government and the States. That assumption is grounded in the very structure of the Constitution." *Id.* at 862–63 (cleaned up).

However, in this case, *Paez II*'s construction of Rule 4 allows the Federal Government — through the unelected judiciary — to impose assertion of an affirmative defense on behalf of a State, and then provide relief to the State, all without the State's permission or even knowledge. Such interferes upon traditional state authority in the prosecution and litigation tactics of local criminal activity. *See id.* at 858 ("[p]erhaps the clearest example of traditional state authority is the punishment of local criminal activity."). Moreover, because this Court has "traditionally viewed the exercise of state officials' prosecutorial discretion as a valuable feature of our constitutional system," *id.* at 864–65, such interferes with the sovereignty of the several States as "nothing in the [habeas rules] shows a clear intent

to abrogate that feature." *Id.* at 865. These considerations militate in favor of this Court granting discretionary review. *See* Supreme Ct. R. 10(c).

Moreover, a State is free to actively waive an affirmative defense, *see Wood*, 566 U.S. at 465, and a federal court lacks the authority to override a State's deliberate waiver of a limitations defense," *id.* at 466. Consequently, "a federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system[.]" *Id.* at 472. It necessarily follows that construing Rule 4 to permit dismissal based on a yet-to-be asserted (and potentially waived), non-jurisdictional, claims-processing rule upsets the delicate state-federal balance of our country's constitutional design. *Accord Georgia Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1288 fn. 34 (11th Cir. 2019) ("federalism further secures liberty by diffusing power among different sovereigns").

Furthermore, allowing federal judges, in the main, to assert affirmative defenses on behalf of State litigants (a savvy and frequent litigant in federal court) lends to the perception that the trial judge has improperly taken on the role of partisan. *See United States v. Marzano,* 149 F. 2d 923, 926 (2d Cir. 1945). Which is why "courts generally lack the ability to raise an affirmative defense *sua sponte*." *Burgess v. United States*, 874 F.3d 1292, 1296 (11th Cir. 2017) (cleaned up, quoting *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1239 (11th Cir. 2010)). Such is founded upon the bedrock "principle [that] party presentation [is] basic to our adversary system," *id.* (citing *Wood*, 566 U.S. at 472), "and the court's invocation of a party's affirmative defense generally conflicts with that ideal[,]" *id.*

Indeed, just last week this Court reiterated that "[i]n our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith,* 590 U.S. ___, ___ (slip op. at 3) (May 7, 2020). To that end, courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* (cleaned up); *see also Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, *J.*) ("courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."). Consequently, permitting a federal judge to be a partisan for a state government clearly raises federalism and part presentation concerns; this Court should address this important question of federal law. *See* Supreme Ct. R. 10(c).

However, the Court of Appeals' original decision (*Paez I*) complies with the Constitutional-Doubt Canon. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 247 (2012) (citing *United States ex rel. Attorney General v. Delaward & Hudson Co.,* 213 U.S. 366, 408 (1909) ("[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt.")). This canon of statutory construction "militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality." *Id.* (citing *Crowell v. Benson,* 285 U.S. 22, 62 (1932)). The Constitutional-Doubt Canon, in turn, leads to "[t]he elementary rule [] that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007) (cleaned up).

Requiring a state respondent to assert or waive (*see Wood, supra*) a non-jurisdictional bar (even after being identified by a trial court, *see Day,* 547 U.S. 198) in a responsive pleading would not violate the party presentation role of our adversary system and would not implicate the federalism concerns the Petitioner raises here. At bottom, a state respondent is free to assert in a responsive pleading any affirmative defense it sees fit; but federal courts cannot step into the shoes of a State to assert legal positions for it.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND THIS CASE PRESENTS A GOOD VEHICLE.

Habeas cases brought under Section 2254 are ubiquitous and Rule 4's gatekeeping function, by necessity, touches every habeas case filed with the district courts. If Rule 4's gatekeeping function is constitutionally suspect, then it necessary follows that scores of habeas cases have been improperly dismissed. Thus, the question presented is an important federal question that should be decided by this Court. *See* Supreme Ct. R. 10(c).

Additionally, this case squarely presents the question as it was addressed by the Court of Appeals in the affirmative in the majority opinion in *Paez I,* and in the negative in *Paez II.* Consequently, this case is an ideal vehicle for the Court to consider the intersection of federalism, party presentation, and Rule 4.

CONCLUSION

For the foregoing reasons, the Petitioner prays that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

By: /s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III Date: 2020.06.05 13:41:20 -04'00' Dated: June 5, 2020

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