No. 20-5696

IN THE

SUPREME COURT OF THE UNITED STATES

DAN GRANDBERRY — PETITIONER
(Your Name)

vs.

LORRIE DAVIS, Director, TDCJ — RESPONDENT(S)

III. ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Dan Grandberry
(Your Name)

810 FM 2821
(Address)

Huntsville, Texas 77349
(City, State, Zip Code)

(None)
(Phone Number)

IV. QUESTION PRESENTED

(a). Would the ordinary forfeiture rule, as codified in the Civil Rules, apply to the limitations period of Title 28 U.S.C. §2244(d)(1)?

1). Questions Fairly Included Therein:

A). Would a §2244(d)(1) timeliness issue raised by an applicant on State habeas corpus but had been refused to be alleged, or was "intelligently waived," by the State Court, be forfeited on federal habeas corpus?

B). Would a Federal District Court lack subject-matter jurisdiction, while keeping with the governing rules of Civil Procedure, to take judicial or authoratative, notice of a Habeas Rule 5(b) reply by the State raising the forfeited limitations defense for the first time, and, when afforded the opportunity, it did not develop below?

C). Then, would a federal court, without subject-matter jurisdiction, abuse its discretion by issuing an order denying a federal habeas petition, in part, as time-barred based on a forfeited limitations defense, and would that order be void?

V. LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

V(a). RELATED CASES

Grandberry v. State, 04-10-00895-CR, 2011 WL5245392 (Tex. App. Nov 2, 2011), Texas Court of Appeals.
Judgment Entered: Nov. 2, 2011.

Grandberry v. State, PD-1833-11, Texas Court of Criminal Appeals.
Judgment Entered: Apr. 25, 2012.

Ex parte Dan Grandberry, WR-81, 489-01 (Tex. Crim. App. Jul. 23, 2014), Texas Court of Criminal Appeals.
Judgment Entered: Jul. 23, 2014. (Deferred to Trial Court Findings)

Grandberry v. Stephens, CV. No. SA-14-CA-852-DAE, U.S. District Court for the Western District of Texas.
(Denied, in part, as time barred) Judgment Entered: Mar. 30, 2015.

RELATED CASES

Grandberry v. Davis, No. 15-50399, U.S. Court of Appeals for the Fifth Circuit. Judgment Entered: Feb. 04, 2016. (Deferred to U.S.D.C. Time bar)

Grandberry v. Davis, No. 16-7295, Supreme Court of the United States. Certiorari Denied: Feb. 21, 2017.

Grandberry v. Davis, Case: 5:14-CV-0852, U.S. District Court for the Western District of Texas. Judgment Entered: Jan. 09, 2019. (Rule 60(b)(4) motion to vacate a void judgment)

Grandberry v. Davis, No. 19-50121, U.S. Court of Appeals for the Fifth Circuit. Judgment Entered: Mar. 28, 2020. (Appealling the denial of a F.R.Civ.P. Rule 60(b)(4) motion)

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VI(a). INDEX TO APPENDICES

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TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

VII. OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

V III. JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was March 28, 2020.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

IX. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- F.R. Civ. P. Rule 1: These rules govern the procedure in all civil actions and proceedings in the United States District Courts.

- F. R. Civ. P. Rule 8(c)(1): In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including ... statute of limitations.

- F. R. Civ. P. Rule 12(b): Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required.

- F. R. Civ. P. Rule 15(a): A party may amend its pleading once as a matter of course.

- F. R. Civ. P. Rule 6(b)(4): [T]he Court may relieve a party of its legal representative from a final judgment, order, or proceeding for the following reasons: ... the judgment is void.

- F. R. Civ. P. Rule 81(a)(4)(A): These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in these proceedings is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases.

- F. R. Crim. P. Rule 52(b): A plain error that affects substantial rights may be considered even though it was not brought to the Court's attention.

IX. CONSTITUTIONAL AND STATUTORY PROVISIONS

- Habeas Corpus Rule 4: The Clerk must promptly forward a petition to a judge ... and the judge must promptly examine it. If it plainly appears ... that the petitioner is not entitled to relief ... the judge must dismiss the petition. If the petition is not dismissed, the judge must order the respondent to file an answer.

- Habeas Corpus Rule 5(b): The answer must address the allegations in the petition ... it must state whether any claim in the petition is barred by failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.

- 28 U.S.C.§ 2244(d)(1): A 1-year period of limitations shall apply to an applicant for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court.

- 28 U.S.C. § 2254(b)(1)(A) and (c): An applicant for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that — the applicant has exhausted the remedies available in the courts of the state ... An applicant shall not be deemed to have exhausted the remedies available in the courts of the state ... if he has the right under the laws of the State to to raise, by any available procedure, the question presented.

X. STATEMENT OF FACTS

This petitioner seeks review of a judgment of the 5th Circuit Court of Appeals whose jurisdiction over the Question Presented is pursuant to 28 U.S.C. § 2253(c)(1) and (2). (Filed: 03/28/19), (Mandate: 03/31/20). The federal question was first raised to the Federal District Court of Texas, San Antonio Division in accordance with the F. R. Civ. P. Rule 60(b)(4). (Filed: 01/07/19). The Rule 60(b)(4) motion proffered that the District Court lacked the subject-matter jurisdiction to dismiss petitioners federal habeas petition, in part, as time barred because the state's highest court had "intelligently waived" the limitations defense below, and the limitations defense is therefore forfeited. The 60(b)(4) motion asked the 'Question Presented:' Would the ordinary forfeiture Rules, as codefied in the Civil Rules, apply to the limitations period of Title 28 U.S.C. § 2244(d)?

(a). Facts:

1). Petitioner was first to present this time-limitations default to the State's highest court on state habeas corpus petition as an affirmative defense. See Appendix - G.

2). State's Highest Court deferred to the findings of the Trial Court, in a summary "white-card" judgment.

X. STATEMENT OF FACT

Trial Court's Findings of Fact and Conclusion of Law became the State's Highest Court's opinion. See Appendix - F.

3). Petitioner raised double jeopardy grounds on state habeas corpus application. Consequently, the State Court "intelligently waived" any and all affirmative defenses that would be aligned with or coalesced with those included in Habeas Rule 5(b), stating, "because of the fundamental nature of double jeopardy protection ... enforcement of usual rules of procedural default serve no legitimate state interest." See Appendix - F.

4). On federal habeas corpus, petitioner informed the Court that he raised the time-limitations default issue below and the State Court declined to rely on any default. See Appendix - E.

5). Federal District Court denied § 2254, in part, as time-barred: resucitating the forfeited affirmative defense. See Appendix - D

6). 5th Circuit denied COA deferring to District Court's time-bar; without reaching the underlying constitutional claim. See Appendix - C

X. STATEMENT OF FACTS

7). Petitioner filed F.R. Civ. P. Rule 60(b)(4) Motion to Vacate a Void Judgment setting forth the 'Question Presented' contending: District Court's time-bar quickened a forfeited affirmative defense. As a result, that Court lacked subject-matter jurisdiction to take judicial or authoratative notice of the limitations defense — rendering its time-bar judgment void.

8). District Court denied Rule 60(b)(4) motion: Petitioner "failed to make showing" that the District Court lacked subject-matter jurisdiction over the limitations issue and "provided no relevant authority" to support Contention. See Appendix - B.

9). 5th Circuit denied COA: petitioner failed to show that the District Court lacked subject-matter jurisdiction. See Appendix - A.

. Both the District Court and the Circuit Court's determinations that Petitioner "failed to make a showing" and "provide no relevant authority" serve to underscore that the inability to provide constitutionally authoratative law is precisely the reason the 'Question Presented' requires review by this Court. Perhaps it would not be within the purview of the District Court or the Circuit Court to attempt to "decide an important question of federal law that has not been, but should be, settled by this Court" in light of Supreme Court Rule 10(c).

XI. REASON FOR GRANTING PETITION

(a). Consideration of a Seminal and Important Question of Law Critical to the Application of Law as a Whole.

There was a defect in the Federal District Court's procedure that spawned a question of law, review of which is critical to the application of law. Review is essential, not just for this petitioner, but considering future cases and the law as a whole. The 'Question Presented' is a seminal inquiry into the relationship between the ordinary forfeiture rule as codified in the Civil Rules and the and the limitations period of AEDPA §2244(d). As presented here, the question was broached by Supreme Court Justice Antonin Scalia in Day v. McDonough, 547 U.S. 198, 126 S.Ct. 1675 (2006), but remains open.

Justice Scalia thought it important to develope the question of the relationship. Jurispudence, with its concern for future cases and the law as a whole, would be remiss to pass upon this opportunity to debate the question.

In Day, writing the majority opinion, Justice Ginsberg argued that "a statutory time-limitation is [forfeitable]." I.d. @ U.S. 202. And in his dissenting opinion, Justice Scalia makes the similar argument that "the statute of limitations is susceptible to forfeiture." I.d. @ U.S. 212. But the inquiry here does not just asks whether a statutory time-limitation can be forfeited, but asks how it can be forfeited based on the "ordinary forfeiture rule"

embodied in the Civil Rules. And that was the question broached by Scalia. And the 'Reasons for Granting' offered in this petition, is guided by the reasoning of J. Scalia in Day.

(b.). Civil Rules Govern All Federal District Courts Procedures and Proceedings.

The Federal Rules of Civil Procedure (F. R. Civ. P.) for the United States District Courts (USDC) govern the procedure in all civil actions and proceedings in USDC's. These rules apply to all proceedings for habeas corpus and quo warranto to the extent that they are not "specified in federal statute, the rules governing section 2254 Cases, or the rules governing 2255." See: F.R. Civ. P. Rule 1 and Rule 81 (a)(4)(A). Also, the Civil Rules "adopt traditional forfeiture rules for unpleaded limitations defenses." - Scalia; Rule 8(c)(1), 12(b) and 15(a). And important to the question presented, the traditional forfeiture rules in "ordinary civil pratice do not allow a forfeited affirmative defense, whose underlying facts were not developed below, to be raised for the first time on appeal. Weinburger V. Salfi, 95 S.Ct. 2457 (1915).

The application of the United States Codes is procedural in USDC's. Therefore, the application of AEDPA's time-limitations in District Courts would be governed by the Civil Rules of procedure. That being so, would it follow that the traditional forfeiture rule applies to AEDPA time-limitations? That is, as the first 'fairly included' question asks:

Would a §2244(d) time-limitations default, first raised by the applicant to the state's highest court, but intelligently waived by that court, be forfeited on federal habeas corpus? And, would that forfeited affirmative defense (whose underlying facts were not developed below) be cognizant when raised by the State for the first time on appeal?

A requirement that a limitations defense should be raised below, if available, is not unreasonable. In fact, that requirement extends even to constitutional errors in criminal trials. They too may not be raised for the first time on federal habeas review except by a showing of "cause" and "prejudice" or a "fundamental miscarriage of justice." F.R. Crim. P. Rule 52(b); Coleman v. Thompson, 111 S.Ct. 2546, 2365 (1991); U.S. v. Mimms, 43 F3d 217 (5th Cir. 1998).

(C.) Civil Practice Imposes Forfeiture of an Affirmative Defense Not Developed below.

In Day v. McDonough, that petitioner presents the question of whether a federal court would lack the authority to dismiss a habeas petition as untimely sua sponte, after the State waived the defense in its Habeas Rule 5(b) answer. Writing the majority opinion, Justice Ginsberg answered, in "certain circumstances," No. But she went on to say "ordinarily in civil litigation a statutory time-limit is forfeited if not raised in the defendant's answer or in an amendment thereto." @ U.S. 202. But, neither Day's question nor Ginsberg's opinion address the question set forth here of whether the ordinary forfeiture rules embodied in the

Civil Rules apply to AEDPA statute of limitations.

Justice Ginsberg does shed light on my question where she makes the point that traditional threshold restraints and §2244(d) can be viewed as aligned. The Justice argues that "[a] statute of limitations defense is not jurisdictional . . . In this respect, the limitations defense resembles other threshold barriers," i.d. @ U.S. 205, i.e., procedural bar, exhaustion of state remedies, and non-retroactivity. She also points out that the "statute of limitations is explicitly aligned with the other affirmative defenses [via their] inclusion in habeas Rule 5(b)." (State's answer must state whether any claim in the petition is barred by a failure to exhaust state remedies, a precedural bar, non-retroactivity, or a statute of limitations). I.d. @ U.S. 202.

Justice Scalia, in his dissenting opinion, clearly demonstrates the alignment of the AEDPA time limitation with the other affirmative defenses within Rule 5(b). I.d. @ U.S. 212. However, Scalia makes the additional seminal observation that, as with the traditional threshold constraints it is aligned with, "the statute of limitation is susceptible to forfeiture." Although the two Justices' opinions diverge on the question presented by Day, their opinions appear to converge on the question presented in this petition. They agree: (1) AEDPA's time limitations are aligned with traditional affirmative defenses; (2) Legislature appears to suggest alignment by including each in Rule 5(b); (3) all are non-jurisdictional, and, by a fortiori; (4) both

traditional threshhold barriers and AEDPA time limitations are subject to the forfeiture rule.

It is important to Scalia's point to observe that legacy threshhold constraints' susceptibility to forfeiture usually depend on what occurred below. E.g., the Fifth Circuit, when undertaking habeas review under AEDPA, asks whether the petitioner has both "exhausted state remedies" and whether he has "fairly presented" his claim in the State Court. Carty v. Thaler, 583 F3d 244 (5th Cir. 2009). The U.S.D.C.s' jurisdiction over the issue usually hinges on the disposition of the restraint barrier in the State's Highest Court. Ordinarily, in civil litigation, traditional affirmative defenses must be developed below before alleged above:

• The Procedural Default Doctrine essentially states that a federal court "lacks jurisdiction" to review the merits of a habeas corpus petition if a State Court has refused to review the complaint because a petitioner failed to follow state-court procedure. Conversely, when a State Court has declined to rely upon a procedural default, the default no longer "bars" consideration of the issue in federal court. Contrell v Wainwright, 788 F3d 1573 (11th Cir. 1984). And in Davis v. Singletary, the 11th Circuit observed, "It is settled that once the State Courts have ignored any procedural bar and rejected a claim on the merits - not in the alternative, but as the only basis of decision — the claim is not barred from federal habeas review." 119 F 3d 147 (11th Cir. 1997).

• The rule governing Exhaustion of State Remedies demands that a claimant must seek relief from the State before federal judicial review is available. In O'Sullivan v. Boercket, the Supreme Court held that federal habeas re-~~view~~ lief is available to state prisoners "only after they have exhausted the claim in state court." And the claim "must be presented to the State Supreme Court... to satisfy exhaustion requirement." 526 U.S. 839, 119 S.Ct. 1728 (1999). Also see, § 2254 (b)(1)(A) and, (c). The exhaustion requirement is designed to give the state courts the "initial opportunity to pass upon and, if necessary, correct errors of federal law." Ruiz v. Quarterman, 460 F3d 638 (5th Cir. 2006).

And like the affirmative defenses AEDPA time-limitations is aligned with, its susceptibility to forfeiture would depend on what occurs in the court below when the timeliness issue is "fairly presented" to the State Supreme Court. Therefore, for all the threshold barriers in alignment, the ordinary forfeiture rule applies. This petitioner who "[sought] state relief" and who was first to present the untimeliness issue to the State Supreme Court has "fairly presented" that issue to the State Court and has given it the "initial opportunity to pass upon" or "correct" the error (or default) of federal law, thereby, developing, or forfeiting, the affirmative defense below. And where the state court "[refuse] or decline to rely upon the default", the "unpleaded limitations defense" is then "forfeited" to the State and the Federal District Court is "procedurally barred" from admitting the issue or denial from using the forfeited defense as basis for ^of a federal habeas petition - even in part. F.R. Civ. P. Rule 8(c), 12(b),

and 15(a); Weinburger v. Salfi, 95 S. Ct. 2457 (1975) (Ordinary civil practice do not allow a forfeited affirmative defense, whose underlying facts were not developed below, to be raised for the first time on appeal.); McCoy v Lynaugh, 874 F2d 954 (5th Cir. 1989).

In truth to procedurally bar an appellant's claim from habeas review, the State Supreme Court need only invoke the procedural default, failure to exhaust, time limitation default (if fairly presented with the issue), or non-retroactivity doctrine, in its ruling on the state habeas application, and the application is barred from federal habeas review. And it would have been so with the AEDPA statute of limitations in this case. When petitioner presented the State's Highest Court with the timeliness issue, that Court would have only needed to say that I am barred to bar me from federal review. In doing so, the the limitations defense would have been developed below, and the U.S.D.C. gains subject-matter jurisdiction and may then be cognizant of the affirmative defense alleged in the State's Rule 5(b) answer. Instead, the limitations defense was not developed below when made available, but deliberately passed upon; waiving and forfeiting the affirmative defense. Therefore, the U.S.D.C. lacked the authority to take judicial or authoratative notice of the forfeited issue.

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(d). Absent Some Affirmative Incompatibility With Habeas Practice, Forfeiture Rules would Apply to Unpleaded, Undeveloped, and Waived Limitations Defenses.

The Civil Rules, including forfeiture rules, for unpleaded, undeveloped and waived limitations defenses apply to all proceedings of federal habeas review as long as the Civil Rules are not inconsistent with other federal rules and statutes. Woodford v. Garceau, 538 U.S. 202, 203, 123 S.Ct. 1398 (2008); Gozalez v. Crosby, 125 S.Ct. 264 (2005). I.e.,

- Habeas Rule 5(b) provides that the State's answer must state whether any of petitioner's claims are barred by exhaustion, procedural default, non-retroactivity, or a statute of limitations. Forfeiture is not inconsistent with Rule 5(b).
- Habeas Rule 4 provides for a sua sponte screening and dismissal of a habeas petition only prior to the filing of the State's reply. Forfeiture is not inconsistent with Rule 4.
- And applying the Forfeiture Rule to the limitations period of 28 U.S.C. 2244(d) does not contradict or undermine any provision of the habeas statute: "by imposing an unqualified 'period of limitations' against the background understanding that the defense of 'limitations' must be raised in the answer, the statute implies that the usual forfeiture rule is applicable." Civil Rule 8(c), 12(b); -J. Scalia.

(e). A §2244(d) Affirmative Defense is Forfeitable.

This Court has been consistent in maintaining the position that, like other threshold barriers, the enactment of time-limitations such as §2244(d) produce defenses that are "non-jurisdictional" and thus subject to waiver and forfeiture. Zipes v. Trans-World Airlines, Inc., 102 S.Ct. 1127 (1992); Ebhart v. U.S.,

126 S.Ct. 403 (2005); Kontrick v. Ryan, 124 S.Ct. 906 (2004). There is, however, a fundamental distinction between traditional threshold barriers and AEDPA time-bar. The threshold restraints that may be raised "sua sponte - ante," were crafted by "habeas courts themselves seen as necessary to protect comity and finality." Day @ U.S. 214. AEDPA statute of limitation, on the other hand, was borne of legislature. Pre-AEDPA (1996), other than these court crafted defenses, "no limitation, not even equitable laches, was imposed to vindicate comity and finality." And since comity and finality did not compel any time limitation at all, "it follows a fortiori" that they do not vindicate the compulsion to make a "legislatively created, forfeitable time-limitation non-forfeitable." -J. Scalia @ i.d. It would be unreasonable to insist that the habeas limitation period should not be subject to waiver and forfeiture.

The U.S. Supreme Court is also consistent in holding that the "passage of time alone could not extinguish the habeas corpus rights of a person subject to an unconstitutional incarceration." Pennsylvania ex. rel. Herman v. Claudy, 76 S.Ct. 233 (1956). Nothing in the history or tradition of the Supreme Court's "refusing to dismiss a habeas petition as untimely" justifies an act by a Federal District Court to quicken a forfeitable limitations defense. Day @ U.S. 215-216.

(f). The District Court Lacked Subject-Matter Jurisdiction, Abused Its Authority, Then Rendered A Void Order.

A federal court's order is void, for purposes of Rule 60(b)(4), only if the court lacked subject-matter or personal jurisdiction, or it violates Due Process of law. F.R. Civ. P. Rule 60(b)(4). The Court would lack subject-matter jurisdiction when it renders an order by a "clear usurpation of power." Wendt V. Leonard, 431 F3d 410 (4th Cir. 2005). And a District Court acts with a clear usurpation of power when it "renders an order outside its legal powers," or where it makes an "unlawful seizure and assumption" of of the "position and authority" of the courts below. Black's Law Dictionary, 8th ed.; Peoples V. Campbell, 379 F3d 1208 (4th Cir. 2004); U.S. V. Indoor Cultivation Equipment, 53 F3d 1311, 1316 (7th Cir. 1995).

Here, petitioner was first to raise the untimeliness issue on application for state habeas corpus. In the Brief in Support, petitioner stated, '[I hope] to show an Absence of Substantial Delay, or a Good Cause for Delay, or that [my] claim falls Within an Exception to Bar Untimeliness. See Appendix-G. Petitioner "fairly presented" the untimeliness issue to the State Supreme Court.

On §2254 petition, petitioner informed the U.S.D.C. that he raised the defaulted §2244(d)(1) issue below. And the State Court's response was to waive any and all affirmative defenses (those aligned by Rule 5(b)), stating, "because of the fundamental nature of double jeopardy (grounds for appeal) protection... enforcement of usual rules of procedural default serve no legitimate

State interest." See Appendix -F. The State Supreme Court declined to rely on the timeliness issue and, thereby, "Intelligently waived" the affirmative defense. Yet, on federal habeas corpus, the U.S.D.C. resuscitated the unpleaded, undeveloped, waived and forfeited limitations defense.

1). District Court Lacked Subject-Matter Jurisdiction.

It is true that a U.S.D.C., in its wide discretion and "in certain circumstances," may raise time-limitation or a procedural bar "sua sponte-ante" in a habeas proceeding. But, framed about by the governing rules of Civil Procedure, this petition's second 'fairly included' question asks whether a U.S.D.C. would lack the subject-matter jurisdiction to give cognizance to a reply by the State raising a forfeited limitations defense that the State Supreme Court declined to enforce or develope below, after having opportunity to do so?

The power, authority and jurisdiction to enforce and/or impose the AEDPA limitation constraint, in this case, rested with the State Supreme Court when it was pesented with the timeliness default in the first instance. Where that Court intentionally and intelligently decided not to "enforce" any "rules of procedural default" — which would include the "usual" those aligned by Rule 5(b). — it thereby waived the limitations defense. State Courts that waive procedural requirements in the first instance, forgo the opportunity to develope the defense below, and they "deprive the State Respondent of an opportunity to present the claim." Aguilar v. Dretke, 428 F3d 526 (5th Cir. 2005).

When the District Court dismissed my federal habeas petition, in part, as time barred, it quickened a forfeited affirmative defense, made an unlawful seizure and assumption of the position and authority of the Court below, and rendered an order outside its legal powers. That was a clear usurpation of power. Consequently, the District Court lacked subject-matter jurisdiction to take judicial or authoratative notice of the limitations defense.

2). District Court Abused Authority and Issued a Void Order.

The final 'fairly included' question asks whether a District Court without subject-matter jurisdiction would abuse its authority by by issuing an order dismissing a federal habeas petition, in part, as time barred and would that order be void?

The action by the District Court to unlawfully usurp the jurisdiction of the Court below, then render an order outside its legal powers was a clear abuse of discretion. It cannot be argued that the time-bar order was congruent with the Federal Rules of Civil Procedure, because the "Civil Rules adopt traditional forfeiture rules." The District Court's ruling does not allow for forfeiture. Nor can it be argued that the order was pursuant to Habeas Rule 4. Rule 4 requires "sua sponte" dismissals "only prior to" the filing of the State's reply. The U.S.D.C.'s time bar order was neither "sua sponte" (it did not come from an initial screening) nor "prior to" the State's answer. As a result, the District Court's order time-barring this petitioner, in this case, is void. Morgan, 74 S. Ct. 247 (Jurisdiction error renders proceeding invalid.)

XII. CONCLUSION

The Question Presented is specific, and of essential importance to the application of Law. Inspired by Justice Scalia, the question remains open: Would the ordinary forfeiture rule, as codified in the Civil Rules, apply to the limitations period of 28 U.S.C. § 2244(d)(1)?

As the question applies here, when this petitioner's application for state habeas corpus was filed, the AEDPA 1-year statute of limitations had expired. Believing his untimeliness would be excusable under § 2244(d)(1) "equitable exception;" or under Wainwright V. Syke's "cause and prejudice" standard; or under Murray V. Carrier's "fundamental miscarriage of justice" doctrine. Petitioner, therefore, preemptively raised his untimeliness default to the State Supreme Court. In doing so, petitioner fairly presented the time-limitation issue to the State High Court. See Appendix-G.

In the High Court's response, it determined that because of the constitutional nature of my double jeopardy claim, it would not enforce a procedural default. Now, since the limitations issue was raised below, would the ordinary forfeiture rule, as codified in the Civil Rules, apply any differently here than it would with any of the other affirmative defenses limitations is co-joined with within Habeas Rule 5(b)? If not, then would jurisdiction over the disposition of that issue rest with the State's highest court, giving it the "initial opportunity to pass upon and, if necessary, correct 'errors of federal law?"

Whether the State Court strategically witheld the limitations defense or simply chose to relinquish it, the Court articulated its reasoning and therefore made a clear and intelligent choice not to enforce any constraint barriers. The State Supreme Court's decision not to pursue the limitations defense precipitated these events:

(1). Prevented the limitation defense from development below — making it susceptible to the ordinary forfeiture rule;

(2) Forfeited the limitation defense;

(3) Deprived respondent the opportunity to evoke the affirmative defense in its Rule 5(b) answer;

(4) Precluded the U.S.D.C. from acquiring subject-matter jurisdiction over the timeliness issue, or taking judicial or authoritative notice of the affirmative defense; and

(5) Brands any order to the contrary by the U.S.D.C. as a clear usurpation of power and an abuse of discretion — rendering the order VOID for purposes of Rule 60(b)(4).

Petitioner was significantly prejudiced by the actions of the District Court. The void order subverted the integrity of the habeas proceedings by becoming the sole reason given by the Court of Appeals in its refusal to grant petition for issuance of a C.O.A. And, I was thereby denied a full round of habeas review. See Appendix - C.

The District Court's order dismissing my habeas petition, in part, as time barred was void ab *inito* and therefore the void judgment cannot be the basis for a Circuit Court of Appeals to deny a COA. This petition for writ of certiorari should be granted.

Respectfully Submitted,

August 14, 2020