NO. 22-6593

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN C. HEISER – Petitioner

vs.

RICKY DIXON,
SECRETARY FLORIDA DEPARTMENT OF CORRECTIONS, et al, Respondent(s)

ON PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Mr. Heiser humbly asks this Honorable Court to invoke its judicial discretion and consider the following questions:

1. THIS COURT SHOULD EXERCISE ITS CERTIORARI JURISDICTION IN ORDER TO REVIEW A QUESTION OF WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION PURSUANT TO *DAY V. McDONOUGH*, 547 U.S. 198, 126 S. CT. 1675, 164 L. ED. 2D 376 (2006) WHEN IT SUA SPONTE DISMISSED HEISER'S HABEAS PETITION BY OVERRIDING THE STATE'S DELIBERATE WAIVER OF THE LIMITATIONS DEFENSE WHERE THE STATE'S TIMELINESS CONCESSION RESULTED FROM THE DECISION TO PROCEED ON THE MERITS AS INDICATED BY IT'S TRAVERSE AND THE PRINCIPLE OF PARTY PRESENTATION?

2. THIS COURT SHOULD EXERCISE ITS CERTIORARI JURISDICTION IN ORDER TO REVIEW A QUESTION OF WHETHER THE ELEVENTH CIRCUIT SHOULD HAVE ISSUED A COA BECAUSE REASONABLE JURISTS WOULD FIND IT DEBATABLE THAT THE DISTRICT COURT ERRED BY SUA SPONTE DISMISSING HEISER'S HABEAS APPLICATION WITHOUT DUE NOTICE OR OPPORTUNITY TO RESPOND PURSUANT TO *WOOD V. MILYARD*, 566 U.S. 463, 132 S. CT. 1826, 182 L. ED. 2D 733 (2012)

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:

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Steven C. Heiser. The Respondent is Ricky Dixon, Secretary, Florida Department of Corrections.

RELATED CASES

Mr. Heiser has no knowledge of any publicly held corporation owning 10% or more of any parties stocks or that have an interest in the outcome of this particular case

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

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix A and I 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[●] is unpublished.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 United States district court appears at Appendix G to the petition and is
[●] reported at; or, 2021 U.S. Dist. Lexis 179106
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

The opinion of the highest state court to review the merits appears at Appendix N to the petition and is
[●] reported at at **Heiser v. State**, 239 So. 3d 669; 2017 Fla. App. Lexis 16887 (Fla. 2d DCA 2017); 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.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case Was on August 10, 2022.

[ ] 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: September 23, 2022, and a copy of the order denying rehearing appears at Appendix A.

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

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 November 15, 2017; and March 5, 2018.
A copy of that decision appears at Appendix N and O
[ ] 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.

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

IN THE
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PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The Eleventh Circuit denied Mr. Heiser's certificate of appealability on August 10, 2022, [Pet. App. I] and denied his Motion for Reconsideration on September 23, 2022. [Pet. App. A] This petition for Writ of Certiorari is timely. See Sup. Ct. R. 13.3 ("... if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment"); 28 U.S.C. § 2101(c). Jurisdiction exists pursuant to 28 U.S.C. § 1254(1). This Court has jurisdiction. See *Hohn v. United States*, 524 U.S. 236 (1998) ("We hold this Court has jurisdiction under §1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals.").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment of United States Constitution, section one, provides:

All persons born or naturalized in the States United, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside, No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C.A § 2253, provides:

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF CASE

A. The Facts of the Crime

Heiser's imprisonment arises from the September 9, 1991, Barnett bank robbery that took place in Bradenton, Florida. At approximately 9:54 A.M. three masked men wearing gloves carrying firearms and dressed in different colored sweatsuits entered the Barnett bank in Oneco located in Bradenton, Florida and took approximately 13,164 dollars of U.S. currency from four bank teller drawers.

On October 31, 1991, the State of Florida filed an accusatory pleading in the form of an information charging Heiser with armed robbery with a firearm in violation of Florida Statute 812.13 (1991) [Pet. App. B]

On May 8, 1992, Detective Frank Desrosiers showed Branch manager Ms. Jacquline Peebles three picture photographs consisting of one picture of each codefendant. This procedure took place approximately 8 months after the bank was robbed.

Ms. Peebles was deposed on Friday, July 31, 1992, just two days prior to the start of Heiser's trial on August 3, 1992.

The identification procedure shown to Ms. Peebles was never investigated or challenged prior to or during Heiser's trial. [Pet. App. C]

The State offered Heiser a 20 year three year minimum mandatory habitual offender sentence predicated only on the stipulation that Heiser testify truthfully against the two Russell brothers. The State made it clear that without truthful

testimony against the Russell's there was no deal. Heiser chose to exercise his right to trial and rejected the plea offer. [Pet. App. C]

Essentially during trial, Ms. Peebles identified Heiser in front of his jury by the shape of his eyes and eyebrows despite the robbers wearing ski masks.

Although the State presented its case through a number of witnesses and circumstantial evidence, the damaging testimony came from Ms. Jacquline Peebles and the suggestive and unlawful out-of-court and in-court identification procedure used and incorporated in this case and in this trial and ultimately resulted in the State's conviction.

A jury convicted Heiser of robbery with a firearm on August 6, 1992. On August 27, 1992, the Florida State trial court sentenced Heiser to life in prison, and the State appellate court *per curiam* affirmed the conviction and sentence on April 22, 1994.

B. State Court Proceedings

Heiser unsuccessfully challenged his 1992 conviction and sentence in collateral proceedings between 1994 and 2014. In August of 2015, Heiser filed a motion to correct illegal sentence under Florida Rule of Criminal Procedure 3.800(a). He argued that his sentence did not include the three-year mandatory minimum term required by § 775.087(2). Fla. Stat. (1991), for possession of a firearm during the commission of the offense. The State Attorney's office conceded the issue in its response from the courts second order to show cause. The state court granted Heiser's motion to correct his sentence, stating: "[D]efendant claims an

entitlement to de novo resentencing for the purpose of adding a minimum mandatory term to the life sentence imposed on that count." The court scheduled a "limited resentencing" hearing for December 1, 2016. [Pet. App. K]

At the hearing, the state court amended Heiser's sentence to include the three-year mandatory minimum term but denied Heiser's request for a *de novo* resentencing hearing. [Pet. App. L and M]

Heiser filed a direct appeal with the Florida Court of Appeals and raised the following claim:

> WHETHER THE TRIAL COURT ERRED WHEN IT DID NOT GRANT APPELLANT A DE NOVO RESENTENCING? [RESTATED]

The State appellate court *per curiam* affirmed the State trial court's ruling on November 15, 2018, [Pet. App. N] and issued the mandate on March 5, 2019. [Pet. App. O]

C. Federal Court Proceedings

Heiser filed his application for a writ for habeas corpus on June 1, 2018. [Pet. App. C]

On August 6, 2018, Magistrate Judge Anthony E. Porcelli issued an order directed to the Attorney General's office to show cause why the petition should not be granted. [Pet. App. D] The State affirmatively addressed the issue of procedural default when they explicitly waived the issue in response to the court's August 7, 2018 show cause order. In the order, the court raised the issue and explicitly *invited* the State to raise procedural default. [Pet. App. D]

In paragraph 4 of the order, Judge Porcelli specifically informed Respondent(s) as to the requirements alleging a time-bar defense and *invited the State* to raise any procedural default stating;

> "If Respondent alleges that the petition is an unauthorized second or successive petition or *time-barred,* Respondent is not required to respond to all grounds raised until the court addresses those [procedural] issues." [Pet. App. D] (Emphasis added)

Respondent(s) submitted their Response on December 10, 2018, addressing the timeliness issue stating;

> "[P]ursuant to Burton and Ferreira, Heiser's federal limitations period would have started on March 5, 2018, *making the current petition, constructively filed June 1, 2018, timely.*" [Pet. App. E] (Emphasis added)

On March 11, 2019, Heiser timely filed his Reply in which he addressed only the merits. Heiser did not address any procedural matter in his Reply because despite the court's invitation to raise procedural default, the State instead affirmatively addressed the timeliness of Heiser's petition in their response to the show cause order. [Pet. App. E]

On August 9, 2019, Heiser's case was reassigned to District Court Judge Thomas P. Barber. After more than two years from Judge Barber's assignment, and greater than a three 3-year lapse from the initial filing, Heiser's habeas application was dismissed as time-barred on September 21, 2021 [Pet. App. G] without providing Mr. Heiser fair notice and a chance to present his position. Such action directly conflicts with the U.S. Supreme Court and 11th Circuit decisions.

On December 15, 2021, Heiser submitted His notice of appeal, however, because of extenuating circumstances unknown to the court, the appeal was dismissed for want of prosecution as the court determined that Heiser failed to pay the filing and docketing fee. [Pet. App. H]

On February 14, 2022, Heiser filed a Motion to Reinstate Appeal therein explaining the situation. [Pet. App. H].

On April 5, 2022, the Eleventh Circuit Court granted Heiser's Motion to Reinstate His appeal. [Pet. App. H]

On August 10, 2022, the Eleventh Circuit denied Heiser's notice of appeal/Certificate of Appealability. [Pet. App. I]

On August 30, 2022, Heiser filed a Motion for Reconsideration asking the court to reconsider his notice of appeal treated as his request for COA because the court overlooked controlling points of fact and law. Heiser also showed the court that after a general assessment of the record on appeal that jurist of reason would find it debatable whether the district court was correct in its procedural ruling where He was not provided with notice and opportunity to be heard; Whether there was an affirmative and intelligent waiver submitted by Respondent; and Whether Heiser was affected by the prejudicial delay in dismissing His 28 U.S.C. § 2254 habeas application. Finally, a general assessment would have also demonstrated that he was indeed denied his constitutional rights as predicated in His 2254 habeas application.

On September 23, 2022, the Eleventh Circuit denied Heiser's Motion for Reconsideration.

This Petition for Writ of Certiorari ensues.

REASONS FOR GRANTING THE PETITION

Mr. Heiser respectfully requests the Court invoke its judicial discretion and consider granting certiorari review because He is being unlawfully detained in the Florida Department of Corrections in contravention of the Constitution, Laws, or Treaties of the United States and in seeking relief, shows as follows:

In its September 21, 2021, order, United States District Court Judge Thomas Barber directed the clerk of court to enter judgment against Heiser and to close the case, also denying a Certificate of Appealability. [Pet. App. G] The Eleventh Circuit decision denying Heiser's application for a Certificate of Appealability / Notice of Appeal [Pet. App. I] conflicts with this Court's decision in *Day v. McDonough*, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) and consideration by this Court is an apparent reason for granting this petition and therefore necessary to secure and maintain uniformity of this Court's precedent decisions.

To be certain, in *Day v. McDonough*, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006), the Supreme Court held that a district court's discretion is confined within these limits, so that should a state intelligently choose to waive a statute-of-limitations defense, the court would not be at liberty to disregard that choice. (Ginsburg, J., joined by Roberts, Ch. J., and Kennedy, Souter and Alito, JJ.)

To be certain, two years later the Supreme Court clarified that a federal court does not have *carte blanche* to depart from the principle of party presentation. Accord; *Greenlaw v. United States*, 554 U.S. 237, 243-244, 128 S.Ct. 2559, 171 L. Ed. 2d 399 (2008). It would be "an abuse of discretion" for a court "to override a state's deliberate waiver of a limitations defense." *Day*, 547 U.S., at 202, 126 S. Ct. 1675, 164 L. Ed. 2d 376. In *Day* itself, the state's timeliness concession resulted from "inadvertent error," *id.*, at 211, 126 S. Ct. 1675, 164 L. Ed. 2d 376, not a deliberate decision to proceed on the merits.

In the instant case, *both* the court and the State raised the procedural default issue. Magistrate Judge Anthony E. Porcelli issued an order to show cause why the petition should not be granted. [Pet. App. D] The State addressed the issue of procedural default in their traverse explicitly waiving the issue in response to the court's August 7, 2018 show cause order. In the court's order, the court raised the issue and explicitly *invited* the State to raise procedural default.

In paragraph 4 of the order, Judge Porcelli specifically informed Respondent(s) as to the requirements alleging a time-bar defense and *invited the State* to raise any procedural default stating;

> "If Respondent alleges that the petition is an unauthorized second or successive petition or *time-barred,* Respondent is not required to respond to all grounds raised until the court addresses those [procedural] issues." [Pet. App. D] (Emphasis added)

Respondent(s) submitted their Response on December 10, 2018, addressing the timeliness issue stating;

> "[P]ursuant to Burton and Ferreira, Heiser's federal limitations period would have started on March 5, 2018, *making the current petition, constructively filed June 1, 2018, timely.*" [Pet. App. E] (Emphasis added)

On March 11, 2019, Heiser timely filed his Reply in which he addressed only the merits. Heiser did *not* address any procedural matter, despite the court's invitation to raise procedural default, the State instead affirmatively conceded the timeliness in their response to the show cause order. [Pet. App. F]

On August 9, 2019, Heiser's case was reassigned to District Court Judge Thomas P. Barber. After more than two years from Judge Barber's assignment, *and greater than a three 3-year lapse from the initial filing*, Heiser's habeas application was dismissed as time-barred on September 23, 2021 [Pet. App. G] *without providing Mr. Heiser fair notice and a chance to present his position* in conflict with the U.S. Supreme Court and 11th Circuit decisions. (Emphasis in italics)

With regard to the instant case, the question turns on whether the District Court was in fact confronted with an intelligent waiver on the State's part? The answer is found in the State's response [Pet. App. E] to Heiser's petition where the State set forth its comprehension of the statute of limitation issue as follows:

> "[A]lthough Heiser's conviction became final more than twenty years ago, his petition appears to be timely because his sentence was corrected in December 2016 to include a required three-year minimum mandatory term. Although the addition of a three-year minimum mandatory term to Heiser's life sentence will have no effect on the amount of time he will serve in prison, and although Heiser filed his motion to correct sentence for the express purpose of restarting the federal limitations period, the controlling case law appears to require that Heiser now be permitted to challenge his 1992 armed robbery conviction. See

> Ferreira (holding that the resentencing judgment is the relevant judgment for determining the timeliness of a federal habeas petition even if the petition challenges only the conviction.) Heiser appealed from the December 2016 resentencing proceedings and the appellate mandate issued on March 5, 2018. Thus, pursuant to Burton and Ferreira, Heiser's federal limitations period would have started on March 5, 2018, making the current petition, constructively filed June 1, 2018, timely."

[Pet. App. E]

While Heiser does agree with Respondent's comprehensive findings of fact and conclusions of law in reasoning the timeliness of the federal limitation period in relation to his current petition application, he does however point out that Respondent has inadvertently overlooked the fact that the 1-year limitation period actually started on November 15, 2017, when the appellate court affirmed his 2016 resentencing hearing. [Pet. App. N] See *Heiser v. State*, 239 So. 3d 669 (Fla. 2d DCA 2017); Accord; *Chavers v. Dep't of Corr.*, 486 F. 3d 1273;2006 U.S. App. LEXIS 26990 (11th Cir. 2006)

Nonetheless, even after recalculating the 1-year limitation period from November 15, 2017, and incorporating the additional 90 days allotted pursuant to *Bond v. Moore*, 309 F. 3d 770 (11th Cir. 2002) only 107 days of un-tolled time elapsed when Heiser filed his current habeas petition on June 1, 2018, therefore his habeas application is still timely.

Heiser avers that Respondent(s) expressly conceded the timeliness issue and deliberately steered the District Court away from the question of whether the petition was indeed untimely and towards the merits of Heiser's petition. So, again, reasonable jurists would find it debatable as to whether Respondent(s) have

affirmatively waived the statute of limitations defense from consideration by the court under the clearly established federal law of *United States v. Frady*, 456 U.S. 152, 162 167-68, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). See *Wood v. Milyard*, 566 U.S. 463, 132 S. Ct. 1826, 1833 n.5, 1835, 182 L. Ed. 2d 733 (2012).

In *Wood*, the Supreme Court held that a district court abuses its discretion by considering a statute of limitations defense that has been affirmatively waived, as opposed to merely forfeited. (id.) See also *In Re Jackson*, 826 F. 3d 1343, 1347 (11th Cir. 2016) (citing *Day v. McDonough*, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006)).

Based on the foregoing, Heiser submits that reasonable jurists could debate whether his habeas application should have been resolved in a different manner as opposed to the unreasonable and prejudicial procedural dismissal now in dispute. *See, United States v. Campbell*, 26 F. 4th 860, 2022 U.S. App. Lexis 4317 (11th Cir. 2022)

The Supreme Court recently and unanimously reiterated the elemental truth that "[i]n our adversarial system, we follow the principle of party presentation," pursuant to which "'we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'" *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579, 206 L. Ed. 2d 866 (2020) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008)). Accordingly, the Court emphasized, lower courts should be "passive" and "modest." *Id.* The district court order and the Eleventh Circuit COA decision is

anything but "passive and "modest" as it contravenes foundational commitments of the adversarial system and its constituent party-presentation principle, obscures the critical distinction between the oft-confused concepts of "waiver" and "forfeiture," and fails to meaningfully limit the circumstances in which appellate courts can engage in what commentators have called "judicial issue creation."

Mr. Heiser argues the delay was unreasonable and prejudicial because the timeliness issue was clear from the face of the petition itself at the time when Mr. Heiser initially filed it on June 1, 2018. The prejudice becomes more apparent and extreme as Judge Barber took over Heiser's case August 9th of 2019, and Had the District Court *sua sponte* dismissed Heiser's habeas petition application on or before the judicial reassignment of August 9, 2019, or otherwise timely dismissed the petition, Heiser would have had until March 4, 2020 to pursue his available state postconviction remedies.

FAIR NOTICE AND OPPORTUNITY TO BE HEARD

The panel's decision denying Heiser's application for a Certificate of Appealability / Notice of Appeal also conflicts with the decision of the United States Supreme Court in *Day v. McDonough*, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) and 11th Circuit decisions including *Paez v. Sec'y, Florida Dep't of Corrs.*, 947 F.3d 649, 653-54 (2020) on the due process issue of the *Notice and opportunity to be heard.* As such, consideration is therefore necessary to secure and maintain uniformity of the courts decisions.

The United States Supreme Court in *Day* concluded, "[T]hat a district court may dismiss a habeas petition as untimely even when the state has not contested timeliness in its answer *so long as the district court provides fair notice to the parties, a chance for them to present their positions...*" (Emphasis added). The 11th Circuit's interpretation in *Paez* accorded with the Supreme Court's decision in *Day* and cited the same. Heiser does not contest that a procedural bar could lead a district court to conclude that the petitioner is not entitled to relief. Rather, Heiser avers that to reach such a decision without fair notice to the parties and a chance for them to present their positions is in conflict with United States Supreme Court and 11th Circuit decisions and a clear violation of due process.

The Eleventh Circuit in *Howard v. United States*, 374 F.3d 1068, 1073 (11th Cir. 2004), the Circuit remarked that "[t]he government failed to raise the defense of procedural default in the district court, *and the court did not bring it up either.*" (Emphasis added). In these circumstances *Gray v. Netherland*, 518 U.S. 152, 165-66, 116 S. Ct. 2074, 2082, 135 L. Ed. 2d 457 (1996), prevents the government from benefitting now from a defense it did not raise then." The Eleventh Circuit reiterated this position in *Hartge v. McDonough*, 210 F. App'x 940, 944 n.3 (11th Cir. 2006), when it determined that the state had waived the defense of procedural default because "[t]his theory of *procedural default was neither raised by the state nor considered by the district court.*" (Emphasis added)

Mr. Heiser claims that the District Court entered judgment against him without ever affording him any notice that a procedural time-bar was a potentially

dispositive issue or the opportunity to show cause why the limitation period ought not to yield dismissal of the petition.[1] Therefore, reasonable jurists would find it "debatable" whether the District Court erred by *sua sponte* dismissing Heiser's habeas corpus petition as time barred without due notice or opportunity to respond; furthermore, without assuring itself that Heiser was not significantly prejudiced by the delayed focus on the limitations issue; and finally, without determining whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time barred.

CONCLUSION

The petition for writ of certiorari should be granted, and the Orders of the Eleventh Circuit and Middle District Court should be reversed.

Respectfully submitted,

Steven C. Heiser

Steven C. Heiser

Date: December 22, 2022

[1] The district court did provide Heiser 28 days to move under Rule 59(e), Fed. R. Civ. P., to alter or amend the judgment. However, Heiser was entitled to fair notice and the opportunity to respond prior to judgment being entered against him. *Greco v. evans*, 467 Fed. Appx. 718 (9th Cir. 2012); *Day v. McDonough*, 19 Fla. L. Weekly Fed. S 153 (2006), reh'g denied, 549 U.S. 1261, 127 S. Ct. 1394, 167 L. Ed. 2d 175 (2007)