10-9995 WOOD V. MILYARD

DECISION BELOW: 403 Fed. Appx. 335

LOWER COURT CASE NUMBER: 09-1348

QUESTION PRESENTED:

I. Given the plain directive in *Day v. McDonough*, 547 U.S. 198 (2006), that "[this Court] would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense," and the general rule that an affirmative defense is forfeited when not asserted, did the circuit court reversibly err when it *sua sponte* raised a statutory limitations defense for the first time on appeal, even though the government had repeatedly represented in the district court that it was "not challenging" the timeliness of Mr. Wood's 28 U.S.C. § 2254 petition and the district court court ruled on the merits of petitioner's claims?

II. Do the principles set forth by this Court in its unanimous decision in *Kontrick v. Ryan*, 540 U.S. 443 (2004) and it per curium decision in *Eberhart v. United States*, 546 U.S. 12 (2006), which hold that statutory limitations defenses are forfeited if not raised before the district court rules on the merits of the claim, apply with equal force to habeas proceedings?

LIMITED TO THE FOLLOWING QUESTIONS: 1) DOES AN APPELLATE COURT HAVE THE AUTHORITY TO RAISE SUA SPONTE A 28 U.S.C. §2244(d) STATUTE OF LIMITATIONS DEFENSE? 2) DOES THE STATE'S DECLARATION BEFORE THE DISTRICT COURT THAT IT "WILL NOT CHALLENGE, BUT [IS] NOT CONCEDING, THE TIMELINESS OF WOOD'S HABEAS PETITION," AMOUNT TO A DELIBERATE WAIVER OF ANY STATUTE OF LIMITATIONS DEFENSE THE STATE MAY HAVE HAD?

CERT. GRANTED 9/27/2011