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IN THE SUPREME COURT OF THE UNITED STATES

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PATRICK WOOD, :

Petitioner : No. 10-9995

v. :

KEVIN MILYARD, WARDEN, ET AL. :

- - - - - x

Washington, D.C.

Monday, February 27, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

KATHLEEN A. LORD, ESQ., Assistant Federal Public Defender, Denver, Colorado; for Petitioner.

DANIEL D. DOMENICO, ESQ., Solicitor General, Denver, Colorado; for Respondents.

MELISSA ARBUS SHERRY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting Respondents.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 10-9995, Wood v. Milyard.

Ms. Lord.

ORAL ARGUMENT OF KATHLEEN A. LORD

ON BEHALF OF THE PETITIONER

MS. LORD: Mr. Chief Justice, and may it please the Court:

The Tenth Circuit, after finding that Mr. Wood's petition presented two substantial constitutional claims, denied him habeas relief solely on the ground that his petition was untimely. It did this even though the State had done three things that should have precluded this result: First, the State deliberately relinquished a known statute of limitations defense.

Second, in doing so, the State acted strategically, not inadvertently.

And, third, in doing so, the State induced the district court to expend substantial resources in deciding claims of exhaustion and -- and deciding claims on the merits.

JUSTICE SOTOMAYOR: Counsel, we asked for two questions presented. The first was: Do court of

1 appeals have the power sua sponte to raise issues? And
2 in your reply brief, you appear to say, yes, they do in
3 some circumstances. So, are you conceding that that
4 power exists or that there is no power whatsoever?

5 MS. LORD: I'm proposing a clear line that
6 would divide situations in which the court of appeals
7 would have power and those in which it absolutely has no
8 power.

9 JUSTICE SOTOMAYOR: Is that a question of
10 power or a question of exercise of discretion?

11 MS. LORD: I would say it's a question of
12 power, and this is why: I --

13 JUSTICE SOTOMAYOR: That seems sort of
14 strange. Both rely on a factual situation. Either you
15 can do something or you can't. That's power. If you
16 can do it sometimes, that's still power, and then the
17 question is, did you do it when you couldn't do it?

18 MS. LORD: Well, what I'm proposing is that
19 there are situations when it is never a proper exercise
20 of the appellate court's jurisdiction to consider sua
21 sponte a statute of limitations defense even in the
22 habeas context. And now --

23 CHIEF JUSTICE ROBERTS: And that's what we
24 said in Day, isn't it?

25 MS. LORD: Correct, that in Day the Court

1 said that courts -- "courts" -- it wasn't directed at
2 appellate courts, but no court would be free to
3 disregard a deliberate waiver of a statute of
4 limitations defense.

5 JUSTICE SOTOMAYOR: So, all this fight is
6 about is whether there was a deliberate waiver or not?

7 MS. LORD: Well, that's --

8 JUSTICE SOTOMAYOR: As opposed to power?

9 MS. LORD: That's our primary -- our primary
10 argument is that there was a deliberate waiver in this
11 case, and, given what this Court said in Day, the case
12 could be resolved on that narrow ground.

13 JUSTICE GINSBURG: Well, it is -- it is what
14 the -- swords are crossed over here because you say this
15 is a deliberate waiver, and the government says, no,
16 it's -- it's a forfeiture, and forfeiture -- if it's
17 forfeiture, then the court of appeals has discretion to
18 take it up. If it's a waiver, then Day makes clear --
19 so, it's a question of which box this case fits into:
20 Is it forfeiture or is it waiver? And your position is
21 it's waiver.

22 MS. LORD: That's correct, and my position
23 also is that there is an overlap between those boxes and
24 that when the statute of limitations defense is
25 forfeited in the sense of not being preserved in a

1 timely manner because of a deliberate choice, I mean --
2 and in this instance --

3 JUSTICE SCALIA: Are there a lot of cases
4 raising the -- you know, the ambiguity that exists in
5 this case? I mean, if you tell me that's all this case
6 is about, I think we ought to dismiss this -- dismiss it
7 as improvidently granted.

8 MS. LORD: Well --

9 JUSTICE SCALIA: We don't sit here to decide
10 whether when the government says, you know, we do not
11 concede it but we're not arguing it, or whatever the
12 language was -- we don't sit to decide factual questions
13 like that, that come up in a particular case.

14 I thought we took this case to decide the
15 more significant issue, on which there is a division in
16 the lower courts, as to whether there is, as you say,
17 power of the court to disregard the fact that a statute
18 of limitations defense has not been raised. We all
19 agree it wasn't raised. Now, whether it was forfeited
20 or not is another question. If that's all you want us
21 to decide, I don't want to decide that.

22 MS. LORD: Well, I clearly want a decision
23 that would favor my client. This --

24 (Laughter.)

25 MS. LORD: This Court granted cert on two

1 issues, and certainly this case presents the first
2 issue, which is whether a court of appeals, once the
3 State has had an opportunity to raise the statute of
4 limitations defense and chooses not to, whether the
5 court --

6 JUSTICE SOTOMAYOR: Only the opportunity or
7 when it acknowledges -- in Day, we faulted the district
8 court for not telling the State, essentially, which we may --
9 not telling the State that it had a potential statute of
10 limitations defense.

11 Is it your position that if the State had
12 just been silent about the statute of limitations
13 defense and not raised it, that the court of appeals
14 wouldn't have power? Or is it your position that
15 because they knew they had the defense and didn't raise
16 it that the court of appeals didn't have power to sua
17 sponte raise it.

18 MS. LORD: Well, both -- the district court
19 ordered the State to announce --

20 JUSTICE SOTOMAYOR: You're not answering my
21 question.

22 MS. LORD: I'm sorry.

23 JUSTICE SOTOMAYOR: Does the court of
24 appeals have the power to sua sponte raise it if the
25 State -- neither the court or the State addressed the

1 issue?

2 MS. LORD: Probably yes. Probably yes.

3 JUSTICE SOTOMAYOR: All right. So, it
4 doesn't have the power if the issue has been raised? Is
5 that your position?

6 MS. LORD: That's correct. If the stage of
7 the proceedings is after it was in Day, because in Day
8 when the issue arose under the Rules of Civil Procedure
9 and under traditional treatment of statute of
10 limitations defense, there was still time for the State
11 to announce we -- there was still time for the State to
12 change or to raise the statute of limitations defense.
13 Here --

14 JUSTICE ALITO: It sounds to me that what
15 you're -- what you're arguing is that the court of
16 appeals abused its discretion in viewing this as a plain
17 forfeiture, which you've just said would permit the
18 court of appeals to raise the issue sua sponte, instead
19 of a deliberate waiver. Is that what it comes down to?

20 MS. LORD: Or a purposeful forfeiture. I
21 mean, there are forfeitures by --

22 JUSTICE ALITO: They put it in the wrong --
23 they -- they abused their discretion by putting it in
24 the wrong box. They didn't put it in the forfeiture
25 box; they put it in the deliberate waiver box.

1 MS. LORD: Well, the way the court of
2 appeals handled it will create problems if it's approved
3 by this Court because --

4 JUSTICE ALITO: Well, this is what -- this
5 is what troubles me about your argument that the court
6 of appeals abused its discretion. Is it correct that
7 you did not raise the issue of the court of appeals'
8 lack of authority to raise this sua sponte until
9 rehearing?

10 MS. LORD: What happened, Your Honor, is
11 that we were appointed at the certificate of
12 appealability stage, and we were ordered to brief
13 timeliness. Perhaps I took the order too literally. I
14 briefed timeliness, but I also set out exactly what
15 happened, which is in the briefs and which sets forth
16 the State's position.

17 The court itself raised Day and raised its
18 limited authority under Day to consider a statute of
19 limitations defense. They found, rather than a
20 deliberate waiver, which I believe the record supports,
21 that the State's comments were cryptic, and I will
22 stress --

23 JUSTICE ALITO: But you're -- but you're arguing
24 that the court of appeals abused its discretion by
25 failing to rule in your favor on an argument that you

1 didn't make?

2 MS. LORD: No. I -- the court was aware of
3 Day, and the court analyzed what it was doing under Day,
4 and it determined whether there was a deliberate waiver.
5 Once the court found there was a deliberate waiver, I
6 definitely challenged that finding. I -- there's a very
7 strong argument not included within the -- the -- the
8 questions presented, that this is a totally timely
9 petition. And it's only a -- it's a very difficult
10 argument, which is one of the reasons why it shows how
11 much the State's actions in the district court were
12 strategic.

13 JUSTICE GINSBURG: But you had two
14 opportunities at least to make the argument based on the
15 original postconviction motion, the 1995 postconviction
16 motion. You -- you did not raise that. You were silent
17 twice.

18 MS. LORD: Silent on the impact of the 19 --
19 we were not silent on the impact of the 1995 motion.
20 We've always said, and in fact the State has never
21 disputed, that that was a properly filed motion, and the
22 only issue was whether it was tolled -- whether it
23 tolled the statute of limitations period until 2004.
24 And the State realized that that issue -- if they were
25 to prevail on the timeliness issue, it was a very, very

1 difficult issue.

2 JUSTICE GINSBURG: Well, then, I'm confused
3 because I thought that there was -- it was conceded that
4 the question was asked, did you file another
5 postconviction motion? Answer: No.

6 MS. LORD: I understand your question now.
7 When Mr. Wood was pro se, he filled out pro se motions,
8 and in those pro se motions, he did say that there --
9 and I'm talking about the 2004 motion -- he said there
10 was no prior postconviction motion.

11 And I believe he was confused because if you
12 look at the forms, both the Federal forms and the State
13 forms that show what a -- a defendant should check, it
14 makes it sound like a motion has to have been ruled on.
15 And Mr. Wood was pro se and simply confused. And no one
16 else was confused once the State entered their
17 appearance. They knew that the 1995 motion was still
18 pending. All they had to do was sit at a computer and
19 bring up the minute orders from the State, and they
20 could learn that.

21 So, the courts in making their rulings
22 always from the time -- and, you know, one of the
23 reasons why what happened was so strategic and so clear
24 is that the district court had initially dismissed
25 Mr. Wood's petition as untimely. And --

1 JUSTICE KAGAN: Ms. Lord, could I ask you
2 about the first question presented?

3 MS. LORD: Yes.

4 JUSTICE KAGAN: As I understand the opposing
5 argument, it goes sort of like this: It says, in Day,
6 we said it's fine to do this in the district court.
7 Even if the party hasn't raised it, the court can raise
8 it on this exact issue. In Granberry, we said with
9 respect to a different issue that the appellate court
10 could raise it. And, in Day, we said that those two
11 issues were really the same.

12 So, that seems sort of like a logical
13 argument that just gets you to a place where you lose on
14 the first question, unless perhaps there's a difference
15 between a court raising a question sua sponte and a
16 court allowing a party to raise it later than the party
17 ought to have raised it. Are you relying on that
18 distinction, or are you questioning the logic of the
19 basic argument that Granberry and Day decided this?

20 MS. LORD: Both. And with respect to the
21 first argument about there being a difference between a
22 party presenting an issue and a court sua sponte raising
23 the issue, there is a difference. And the courts -- the
24 circuit courts do not always make that distinction and
25 do not always focus on that. For example, in Granberry,

1 it actually was a case where the party presented -- the
2 State presented on appeal the exhaustion issue, and the
3 court agreed to hear it even though the State hadn't
4 raised it below.

5 Here, you know, at least five times in our
6 joint appendix, you'll see the court saying that they
7 can't act as an advocate for Petitioner. And in,
8 fact, when the Petitioner, Mr. Wood, tried to raise an
9 -- the exhaustion issue again, the Tenth Circuit in its
10 certificate of appealability said he is bound by his
11 decision to dismiss these unexhausted claims,
12 notwithstanding his pro se status. And in the same
13 breath, the court of appeals resurrected the at least
14 concededly forfeited statute of limitations defense on
15 behalf of the State.

16 But I'd also like to --

17 JUSTICE SOTOMAYOR: I'm a little confused.
18 You seem to be arguing that because the court of appeals
19 raised it before the party did, that that's worse than a
20 party raising it first. Is that your position? That
21 that -- that the court of appeals has more power after a
22 party who has forfeited below or waived below now tries
23 to come up on appeal and assert a defense that they
24 didn't assert below? Now the court of appeals has more
25 power?

1 MS. LORD: It raises different concerns. My
2 concern is not the relative power. It's that when a
3 court is raising something sua sponte, it defeats the
4 party presentation principle. That's one concern.

5 When the court is -- when the party raises
6 it after having forfeited, everyone concedes here that
7 they wouldn't be allowed to. So, in essence, what
8 happens is the court is acting as a super-advocate
9 for --

10 JUSTICE SOTOMAYOR: But those arguments were
11 rejected in Granberry and Day.

12 MS. LORD: Well, that --

13 JUSTICE SOTOMAYOR: Why should they win now?

14 MS. LORD: Well, and that was -- I was going
15 to -- I had a second part of my answer to Justice Kagan,
16 which is there's something really different going on in
17 Granberry and in Day, and you can't add the two and come
18 up with a neat package such as what's suggested by the
19 State.

20 And, in Granberry, of course, as the Court
21 all knows, the Court was dealing with exhaustion, and it
22 was dealing with exhaustion, which goes to the heart of
23 habeas and comity and all those concerns, at a time when
24 dismissing a case to exhaust claims -- all that would do
25 is delay Federal relief. It wouldn't eliminate Federal

1 relief.

2 And this Court in Rhines v. Weber recognizes
3 that when AEDPA -- AEDPA was passed, it transformed the
4 landscape, and it really made some changes. And whether
5 the -- the notion in Granberry that exhaustion can be
6 raised for the first time on appeal transfers to the
7 statute of limitations -- I think there's real doubt
8 about that, and I think that goes to an important
9 question and the question that the Court granted cert
10 on.

11 JUSTICE KAGAN: But didn't Day say that
12 those two issues were functionally identical for this
13 purpose?

14 MS. LORD: Not for this purpose. And by
15 "this purpose" I mean the court of appeals' authority to
16 raise sua sponte the defense. In Day, this Court --
17 there were two prongs to Day. In the context of Day,
18 which was, you know, where the State had filed a Rule 5
19 response and patently erroneously calculated the -- the
20 limitations period, and the court noticed it, and
21 there's no law that required, as this Court held, the
22 court to muzzle itself and not mention you've
23 miscalculated these days.

24 We're in a totally different situation. And
25 the Rules of Civil Procedure allowed what happened in

1 Day. They don't allow what happened in our case.

2 And --

3 JUSTICE ALITO: What Rule of Civil Procedure
4 applies here? You're talking about appellate procedure
5 here. Is there a rule of appellate procedure that
6 governs this?

7 MS. LORD: I'm referring to Civil Rule of
8 Procedure 8(b) and 12.

9 JUSTICE ALITO: Well, they refer to what
10 happens in the district court, and Day dealt with that.
11 Now you're in the court of appeals. What rule is there
12 that addresses the situation in the court of appeals?

13 MS. LORD: Well, there's the traditional
14 rule that if you don't raise it, you lose it, when we're
15 talking about a statute of limitations defense. And
16 it's really key here because when AEDPA engrafted this
17 1-year statute of limitations into the habeas
18 proceedings, it knew how 1-year statute of limitations
19 were treated. And, yes, in Day, quite correctly the
20 Court held that in that context you're going to treat
21 those defenses the same, especially with respect to Rule
22 4, which would allow a court to dismiss a petition just
23 on its face.

24 JUSTICE ALITO: You made an argument in your
25 brief that I found a little difficult to follow, but --

1 so, maybe you can explain it. You seemed to suggest
2 that the State's position on timeliness in the district
3 court somehow induced your client to dismiss the claims
4 that were arguably not exhausted. And I found it
5 difficult to understand why the -- why your client's
6 strategy as to whether he wanted to dismiss those claims
7 or not would be affected by the State's position on
8 timeliness.

9 MS. LORD: Well, if the State had challenged
10 timeliness at the stage that AEDPA contemplates it
11 would, it would have created a real complicated issue on
12 abandonment, and I think the briefs suggest just how
13 complicated that is under Colorado law. And if that had
14 happened, the court very well could have, district
15 court, could have appointed counsel for Mr. Wood, I
16 mean, if there had been an evidentiary hearing, if, as
17 the Tenth Circuit found, the issue was so complex that
18 counsel was necessary.

19 So, once you had counsel, in the State's
20 reply or in its answer, they indicated that several of
21 Mr. Wood's claims were not exhausted. And some of those
22 claims were in that 1995 motion that was pending. With
23 counsel, there could have been a request for a stay and
24 abey. There could have been so much that was done.
25 Mr. -- but because the State chose to simplify the

1 proceedings -- that's what they did, and it was not
2 inadvertent; and it wasn't a mistake. They chose to make it
3 simple and to focus on exhaustion. So, they got four
4 claims dismissed on exhaustion grounds, and then they
5 dealt with the other two claims on the merits.

6 They also had a procedural default issue
7 which was totally unconstitutional. They were relying
8 on a procedural default that didn't exist at the time
9 you had to raise it.

10 But that simplified the proceedings, made it
11 more a question of law. Mr. --

12 JUSTICE SOTOMAYOR: So, what's wrong with
13 that? Why should we be penalizing the State for trying
14 to simplify an action and make it move more
15 expeditiously?

16 MS. LORD: Absolutely we should not. But we
17 also should hold them to that strategic choice, which is
18 what Day says you do. And we have to hold them to that
19 choice because there were consequences, and there were
20 changes of positions. And they got the benefit of going
21 forward and just looking at exhaustion. They eliminated
22 the risk of an evidentiary hearing. They eliminated the
23 risk of a lawyer. They induced Mr. -- and I -- they
24 induced Mr. Wood to dismiss four claims because -- oh,
25 sorry. Because -- I'm sorry. I didn't see you.

1 CHIEF JUSTICE ROBERTS: No, no. Keep going
2 with your --

3 MS. LORD: No -- because he was assured that
4 he could go forward on two substantial constitutional
5 claims without worrying about time bar, because the
6 State said that. They said twice we are not
7 challenging, we will not challenge, timeliness.

8 JUSTICE ALITO: That's what I don't
9 understand. I -- why -- you have two situations. One
10 situation, the State's raising timeliness. So, he says,
11 okay, they're raising timeliness; I'm not going to
12 dismiss my -- the claims that they say are not
13 exhausted. The other situation, they -- they don't say
14 anything about timeliness. And he said now I'm going to
15 dismiss the claims that are -- that they say are
16 unexhausted.

17 I don't understand the connection.

18 MS. LORD: Well, the connection is the State
19 guaranteed that they would not challenge timeliness, and
20 that allowed Mr. Wood to go forward on two
21 constitutional claims without ever having to worry that
22 they would be subject to time bar.

23 And when the court --

24 JUSTICE ALITO: Yes, I understand why that's
25 a benefit to him, but what is the connection between
26 that and the dismissal of the unexhausted claims?

1 MS. LORD: Oh. Because if they had -- if
2 they had challenged timeliness, they would have raised
3 this very complicated issue, because the only way they
4 can win on timeliness is to win on this newfangled
5 notion of abandonment under Colorado law, which under
6 Colorado law requires a hearing and requires factual
7 development.

8 And once they pursued in the district court
9 that claim of abandonment, it was very likely that a
10 lawyer would be appointed. That lawyer could see that
11 there were claims still pending in the 1995 motion and
12 could possibly have sought a stay and abey, could have
13 gone and tried to exhaust those claims, serious
14 constitutional claims that were in the 1995 motion.

15 And -- and maybe a better way of putting it
16 is if they had raised timeliness in the district court,
17 abandonment would have been front and center. And even
18 though the court of appeals ultimately resolved this
19 issue without an evidentiary hearing, that was an abuse
20 of discretion itself, too. It was totally contrary to
21 Colorado law, analyzing that issue.

22 It is no small thing that the position that
23 they took in the district court allowed Mr. Wood to go
24 forward on two claims, two constitutional claims that
25 are substantial that the court has granted a certificate

1 of appealability on.

2 This is -- this case is so unlike Day in the
3 sense -- if an appellate court can raise sua sponte the
4 statute of limitations in a case like this, it can raise
5 it in any case. It invites the State to take a position
6 in the district court which would be totally contrary to
7 AEDPA's desire for streamlined proceedings. It would --

8 JUSTICE SCALIA: Ms. Lord, an amicus brief
9 filed on behalf of 15 States contends that the Civil --
10 the Rules of Civil Procedure are not what should be
11 consulted here, because they govern only to the extent
12 that they're not inconsistent with habeas rules, and
13 asserts that the -- the habeas rules should rather apply
14 and that they -- that they cut against your case.

15 Do you have a response to that? Was it --
16 was it in your reply brief or --

17 MS. LORD: It may be. I believe in some of
18 the briefs what I've said is there is no inconsistency
19 between Rule 5's requirement that the defense be set
20 forth and the traditional recognition that statute of
21 limitations is lost if not raised. And I cited the
22 Court to Jones v. Bock, which stresses that, for mere
23 policy reasons, we shouldn't deviate from the rules that
24 would otherwise apply. And I think --

25 JUSTICE ALITO: Isn't the screening function

1 that the -- that a district court performs in the habeas
2 case inconsistent with the traditional rule about
3 raising affirmative defenses?

4 MS. LORD: Well, that's the district court,
5 and that's one of the key differences between the
6 district court and the appellate court. The appellate
7 court can issue a certificate of appealability. The
8 district court has that prescreening function, which is
9 just like the prescreening function in the PLRA, where
10 this Court looked at a circuit's attempt to create rules
11 that would address policy concerns and deviated and put
12 an enhanced pleading requirement on prisoners and said,
13 I believe unanimously, that that shouldn't be done.

14 There's a real virtue in having a
15 predictable rule. There's a real virtue in letting the
16 States or -- letting the States know in the context of
17 this Court's Federal timing rules that they have to
18 raise it, the statute of limitations defense, when
19 they're ordered to and when Rule 5 requires them to.

20 You should not adopt the State's position
21 when it will just invite the sort of sandbagging that
22 this Court has taken care to avoid. You don't want
23 straddling by the State on something as important to
24 judicial efficiency as asserting the statute of
25 limitations in a timely manner.

1 I'll reserve the rest of my time.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Domenico.

4 ORAL ARGUMENT OF DANIEL D. DOMENICO

5 ON BEHALF OF THE RESPONDENTS

6 MR. DOMENICO: Mr. Chief Justice, and may it
7 please the Court:

8 In contrast to the new and fairly
9 complicated set of doctrines my friend asked the Court
10 to adopt today, this Court can resolve this case by
11 applying two straightforward longstanding rules.

12 First, in *Granberry v. Greer*, the Court
13 recognized that courts are not bound by a State's
14 failure to properly argue and preserve a procedural bar
15 to a habeas claim.

16 And, second, to the extent there is an
17 exception to that rule for deliberate waivers, the Court
18 should apply the common rule that a waiver must be
19 unequivocal.

20 By applying --

21 JUSTICE BREYER: Where --

22 MR. DOMENICO: Please.

23 JUSTICE BREYER: Where? What's the case
24 that supports you the most on that?

25 MR. DOMENICO: On the -- on the second

1 question? Well, that's a common rule. From
2 statutory rights such as in Olano --

3 JUSTICE BREYER: No, just give me a citation.

4 MR. DOMENICO: College Savings Bank is one,
5 probably the clearest case.

6 JUSTICE BREYER: Has to -- has to be what?
7 What's the word? "Unequivocal"?

8 MR. DOMENICO: Unequivocal is a common --
9 for waiver of everything --

10 JUSTICE BREYER: Because I'll look at the statute.
11 Now, I did look at Black's Law Dictionary, and Black's
12 Law Dictionary, looking up forfeiture and waiver, it
13 seems like you lose.

14 My analysis would be this: Forfeiture is
15 the "loss of a right" -- that's what's at issue --
16 "because of a crime." That doesn't apply. "Because of
17 a breach of obligation." That doesn't apply. "Neglect
18 of duty." Now, that does because you didn't file the
19 answer. Okay? So, that's forfeited.

20 Now you look over to waiver and, as you say,
21 it says "voluntary relinquishment of a legal right."
22 Okay, what's the legal right? The legal right is to get
23 the case dismissed.

24 So, I'm the judge. I say, State, do you
25 want to get the case dismissed? I just gave your

1 answer. Okay. I say you voluntarily relinquish your
2 legal right. Your legal right was to get the case
3 dismissed, and you relinquished it. You didn't assert
4 it.

5 That said, that would be the difference.
6 And she's saying that. She's saying that makes a lot of
7 sense. When you read Day, they're worried about the
8 State doing something inadvertently, making a mistake.
9 So, what the judge says is: State, you know you have a
10 pretty good claim here on statute of limitations,
11 but you didn't assert it. So, I'm going to give you the
12 right to assert it. Go ahead, assert it even though
13 it's late. You overcome the forfeiture.

14 Now you say: I assert it, Your Honor.
15 Okay, you haven't waived it. Now you say: I don't
16 really care.

17 MR. DOMENICO: Justice Breyer, what the
18 State was doing here was not strategically trying to --

19 JUSTICE BREYER: Oh, no. I assume they
20 didn't do anything mean -- strategic; it wasn't a trick.
21 It was just what is it that they did? And what they did
22 is they were given the opportunity to overcome the
23 forfeiture, to assert the statute of limitations claim,
24 and they didn't do it. They didn't want to do it. I
25 don't know why they didn't want to do it, because there

1 was a lot of trouble raising other issues, dah, dah,
2 dah. But that's their business. The fact is they
3 didn't do it.

4 MR. DOMENICO: Justice Breyer, the -- the
5 Court has been clear that a State's failure -- normally,
6 that's true. The normal rule under the Rules of Civil
7 Procedure is a forfeiture of that sort, failure to raise
8 an argument, is deemed essentially to be a waiver under
9 those definitions.

10 JUSTICE GINSBURG: But this wasn't failure
11 to raise an argument; this was representing to the court
12 we will not challenge timeliness. That was the
13 representation made to the court. That was not
14 negligent oversight in not raising the question. It was
15 an affirmative representation to the court that,
16 although we might have done it, we will not challenge
17 timeliness.

18 MR. DOMENICO: Justice Ginsburg, there --
19 there was an element of mistake, of negligence, as you
20 say, but -- but it also was --

21 JUSTICE SCALIA: Didn't the State adhere to
22 that?

23 MR. DOMENICO: That's right, Justice Scalia.

24 JUSTICE SCALIA: It kept its word, didn't
25 it?

1 MR. DOMENICO: What the State was trying to
2 do, I think, is slightly different than would make sense
3 in any other context. Because of the special procedures
4 we're under in a habeas -- a pre-answer response, what
5 we were telling the court was we will not assert this
6 argument unless there's further inquiry from the court.
7 Now, normally in court there would be --

8 JUSTICE BREYER: Wait, wait, wait. When you
9 say "further," I want to be very precise about the
10 distinction. You have to put it in your answer. You
11 didn't. Okay. So, that's a forfeiture. So, now the
12 judge says you didn't put it in your answer, but I'll
13 raise it. So, now you have the right to have the case
14 dismissed for statute of limitations. Do you want to
15 exercise that right? The answer to that question was
16 you didn't.

17 MR. DOMENICO: That is --

18 JUSTICE BREYER: You said you didn't care.

19 MR. DOMENICO: That's -- I don't think
20 that's quite an accurate characterization of what the
21 State --

22 JUSTICE BREYER: All right. Well, but, one,
23 do the characterization, but please don't forget my
24 first question, because so far I'm just stuck on Black's
25 Law Dictionary. And I would like you to have better

1 authorities for your -- you know, the supporting --

2 MR. DOMENICO: Well, the Black's Law
3 Dictionary, of course, applies a usual rule. This Court
4 has made clear in Granberry and Day that the usual rule
5 that a forfeiture of a legal right means that it's not
6 to be brought up again, that it doesn't apply to bind
7 the court's hands. Granberry and Day make that quite
8 clear. What happened in Granberry would have been a
9 forfeiture --

10 JUSTICE KAGAN: But, Mr. Domenico, you're
11 saying something considerably more. You're saying that
12 when a State gets up -- after inquiry by the district
13 court, when a State gets up and says we do not want to
14 press this argument; now we're not saying the
15 argument is wrong, because after all we're a repeat
16 player and we're going to hear that argument again, and
17 we are not saying that argument is wrong, but in this
18 case we do not want to press that argument. That's --
19 that's unequivocal to me.

20 MR. DOMENICO: It's unequivocal that we were
21 not going to press it again, though I think the
22 implication -- there would have been no reason to have
23 raised it initially. There would have been no reason to
24 include this caveat about refusing to concede, if that
25 was all we were trying to say. There are easy ways for

1 a State to take the issue off the table.

2 JUSTICE SOTOMAYOR: Can I -- can I ask you,
3 do you mean to tell me that, using your own words in
4 your brief, that a waiver is the intentional abandonment
5 of a known right? I think you're equating intentional
6 abandonment of a known right to be I have to admit I
7 could win and I'm giving up that argument.

8 MR. DOMENICO: Well, in this case --

9 JUSTICE SOTOMAYOR: Is that what you're
10 saying -- deliberate?

11 MR. DOMENICO: Well, you have to know what
12 it is you're giving up.

13 JUSTICE SOTOMAYOR: Well, you knew you had a
14 defense under the statute of limitations.

15 MR. DOMENICO: Sure.

16 JUSTICE SOTOMAYOR: You thought, because you
17 conceded, that you weren't conceding that it was
18 untimely. So, you were conceding you thought it was
19 untimely, and despite admitting that you knew you had a
20 defense, that you knew it could win, you were choosing
21 not to assert it. So, tell me why that's not either an
22 intentional waiver, a deliberate waiver, or an
23 abandonment of a known right?

24 MR. DOMENICO: The -- what we were
25 abandoning, to the extent we were abandoning anything,

1 it was our ability to force the court to address the
2 issue. In any other context, I agree that maybe --
3 there may be a distinction with no difference, but in
4 this case because there is discrete --

5 JUSTICE SOTOMAYOR: You were protecting the
6 court's right to do whatever it wanted.

7 MR. DOMENICO: There was a screening --
8 there is a screening function. We were raising the
9 issue precisely to put it on the court's table for
10 consideration. In a habeas --

11 JUSTICE SOTOMAYOR: So, why isn't it an
12 abuse of discretion for an appellate court, when there
13 has been an intentional abandonment of a known right, to
14 sua sponte raise that defense?

15 MR. DOMENICO: Well, we did not take off the
16 table the court's right to consider the issue.

17 JUSTICE SCALIA: You say you didn't abandon
18 the right. Isn't that your position? You did not
19 abandon it? You just --

20 MR. DOMENICO: We did not abandon --

21 JUSTICE SCALIA: You just gave up the -- the
22 opportunity to raise it yourself.

23 MR. DOMENICO: I think it's confusion
24 between what we are calling a right or the issue or the
25 defense. We, that's right, gave up our right in the

1 district court, unless asked, to argue the issue.

2 JUSTICE ALITO: Well, let me give you this
3 example of -- of a regular civil case: There -- there
4 are two defendants and the same claim against two
5 defendants. One defendant files an answer and raises a
6 statute of limitations defense; the other one doesn't.
7 The judge asks the second defendant, are you going to
8 amend your complaint? And the defendant says no. Now,
9 is that a waiver or is that a forfeiture?

10 MR. DOMENICO: Well, I think in your typical
11 case, it doesn't matter because forfeitures generally
12 are deemed to be waivers, I think, in your typical case.
13 That's not true under Granberry and Day. The court has
14 made clear that a forfeiture is different than a
15 deliberate waiver.

16 JUSTICE ALITO: Well, under the terminology
17 that we're using, wouldn't that be a forfeiture?

18 MR. DOMENICO: I think it's better
19 understood as a forfeiture. Simply you're not going to
20 argue the issue, but the issue doesn't necessarily need
21 to be taken off the --

22 JUSTICE BREYER: Well, that's why your
23 colleague on the other side -- why she made this point
24 the way she made it. I think there's no disagreement,
25 at least as far as I hear Justice Scalia. Look, he did

1 abandon his right, the State, to push the matter.
2 That's abandonment. He didn't abandon the right to get
3 the case dismissed if the judge pursues it.

4 So, your colleague says -- or as she says, a
5 court of appeals does have the power on its own to
6 overcome a forfeiture. That's Day. But they don't have
7 the power on its own to overcome the waiver. And that's
8 what they're doing. They don't have the power, in other
9 words, to decide it themselves. They only have the
10 power to overcome a forfeiture.

11 MR. DOMENICO: Well, if the Court looks at
12 the -- where this deliberate waiver exception to the
13 Granberry and Day rule comes from, it comes from Day,
14 and the concern there is with a court overriding a
15 State's decision to waive, to take the issue off the
16 table. There are examples of States doing that. And
17 when they do it, they are clear about it, and you can
18 tell when it would be overridden.

19 JUSTICE GINSBURG: But the consequence of
20 that was the district court then had to deal with the
21 case on the merits, had to take up the two exhausted
22 claims and rule on them, after having told the district
23 court you don't need -- we're not raising the statute of
24 limitations, we will not challenge timeliness. So, you
25 put the district court to the necessity of deciding the

1 case on the merits. It does. It takes up the two
2 unexhausted claims and deals with them on the merits.

3 In -- in Day, absolutely nothing transpired
4 between the State saying the claim was timely and the
5 magistrate's detection of the computation error. The
6 district court wasn't put to what was unnecessary work.
7 If the -- it was the consequence of saying we won't
8 challenge it that forced the district judge to deal with
9 them on the merits.

10 In Day, the counsel didn't bring up the
11 question because counsel thought that it was timely. He
12 had miscalculated and made a mathematical error. And
13 the judge then said, you know, I see that the number of
14 days that's required by statute, they have run. And as
15 Day pointed out, at that point, the trial judge could
16 have said: Now, you know, you miscalculated; wouldn't
17 you like to amend your complaint and put it in a
18 defense?

19 So, the two cases, the two situations are --
20 are so different. The district judge wasn't -- nobody
21 was made to do anything extra. But in -- here, because
22 the attorney said we won't challenge it, the judge had
23 to deal with the case on the merits.

24 MR. DOMENICO: That's right, Justice
25 Ginsburg. We failed in our -- in our duty and our

1 obligation to protect the district court from having to
2 engage in what, had we properly argued this, would have
3 been unnecessary effort.

4 JUSTICE SCALIA: Those are sunk costs,
5 aren't they, Mr. Domenico?

6 MR. DOMENICO: They are, Justice --

7 JUSTICE SCALIA: It's water over the dam,
8 and the issue is whether the court of appeals will then
9 have to repeat the district court's excursus into the
10 merits.

11 MR. DOMENICO: That's exact --

12 JUSTICE SCALIA: Right?

13 MR. DOMENICO: That's exactly right. The --
14 we have already spent that time. The question now is
15 if -- if Mr. Wood prevails now, the court of appeals
16 will have to proceed to resolving the case on the
17 merits. Instead, in this case, they applied the very
18 common principle that a court of appeals will affirm for
19 any basis supported by the record in order precisely to
20 avoid -- that happens fairly often. They avoid having
21 to address a constitutional problem. They save having
22 to engage in those efforts again.

23 CHIEF JUSTICE ROBERTS: That's a matter of
24 discretion with the court of appeals?

25 MR. DOMENICO: Absolutely. We recognize

1 that this is in that middle ground where the court of
2 appeals was certainly under no obligation to do this.
3 Had the court of appeals refused to do it, we wouldn't
4 be here demanding that they be forced to consider this
5 issue.

6 JUSTICE SCALIA: And the court of appeals
7 could have gotten mad at the fact that the district
8 court was compelled to go through the merits, right?

9 MR. DOMENICO: Absolutely.

10 JUSTICE SCALIA: And for that reason could
11 have denied it. But it didn't get mad, I guess. I
12 don't know why.

13 MR. DOMENICO: Well, it didn't get mad
14 partly, I think, perhaps because Mr. Wood never argued
15 that the issue was forfeited or waived at all until
16 after -- after the court of appeals had already resolved
17 the question.

18 JUSTICE ALITO: Well, why do you say that
19 the position that the State took in the district court
20 prevented the district court from considering the
21 timeliness issue? If it wasn't a deliberate waiver,
22 then the district court under Day wasn't prohibited from
23 -- from deciding the case untimely.

24 MR. DOMENICO: Absolutely. I do not think
25 that the district court was prohibited from considering

1 it. The only reason for us to have raised this sort of
2 skeletal outline of the argument was precisely so the
3 court of appeals would have the opportunity to consider
4 it.

5 Remember, this was raised initially in the
6 pre-answer response stage where the -- which is
7 specifically part of the district court's preliminary
8 consideration of the issue. So, it was certainly ex
9 ante quite possible that the response of the district
10 court would not be to simply ignore the issue as it did
11 but to either ask for additional briefing, as happens
12 with some regularity, to issue a show-cause order as it
13 had already done, or perhaps to dismiss the case again
14 as it had already done so.

15 So, the issue was not off the table. The
16 district court very much could have addressed the
17 question.

18 JUSTICE KAGAN: Mr. Domenico, do I
19 understand your argument correctly to think that if you
20 had not said, or if the lawyer for the State had not
21 said we're not conceding, if all that the lawyer for the
22 State had said is we're not challenging this, Your
23 Honor, would that count as a deliberate waiver under
24 Day?

25 MR. DOMENICO: I think that's a harder case.

1 The lead-up to that, I think, undermines the -- at
2 least, the unequivocal nature of -- of that statement
3 because there would have been no reason to have laid out
4 the potential argument if what we were really trying to
5 do was waive the -- waive the entire issue as Day uses
6 that language. If that's what we were trying to do,
7 there would have been no reason to do that either.

8 JUSTICE SOTOMAYOR: The new --

9 JUSTICE KAGAN: But this is --

10 JUSTICE SOTOMAYOR: I'm sorry. The new case
11 law is what I said. When you say I won't raise this
12 defense, I waive it, everything you said except saying I
13 don't admit it, today, before a circuit court abuses its
14 discretion, you also have to say I am waiving the right
15 of the court of appeals to raise this sua sponte.
16 That's -- that's -- you want that to be what you need to
17 do for us to find a waiver.

18 MR. DOMENICO: I don't think you need to say
19 that. I don't think there necessarily need to be any
20 magic words at all, but it needs to be unequivocal and
21 clear, not ambiguous language that we're going to spend
22 an hour here today trying to debate what it was that we
23 meant. That's the only rule we're asking for today.

24 And the contrary rule really provides some
25 perverse incentives to States. I mean, here the State

1 was trying to be candid with the court. It discovered
2 this 1995 motion on its own. Mr. Wood had never
3 mentioned it in his filings. He had already briefed the
4 timeliness issue twice in the district court without
5 mentioning it, let alone raising it in any of his
6 petitions.

7 The State found this and tried to be candid,
8 that we weren't entirely clear about how the argument
9 played out. The alternative is that States will be
10 forced into something more than scorched earth, throw
11 everything at the court, see what sticks, and that's not
12 in anybody's interest, let alone the Federal courts' or
13 habeas petitioners'.

14 JUSTICE GINSBURG: There is something about
15 the principle of party presentation. The party raises
16 the issue. The court of appeals is the court of review,
17 not first view. Here -- in Day, the -- the lawyer did
18 not know that he had a statute of limitations defense,
19 that -- did not know because he had miscalculated the
20 time. Here the State knew very well that it did have a
21 statute of limitations argument, but it says we're not
22 challenging it.

23 And then the ordinary thing is that a court
24 of appeals reviews decisions of the district court;
25 doesn't decide questions in the first instance. But

1 here you are saying the attorney can tell district judge
2 don't decide this; go on to the merits. Then the court
3 of appeals, which is supposed to be reviewing what the
4 district court does, instead deals with that question in
5 the first instance. That seems like an odd inversion of
6 the role of the -- of the district court and court of
7 appeals.

8 MR. DOMENICO: Justice Ginsburg, again, I
9 don't think it's quite accurate to say that we told the
10 district court not to address the issue. We told the
11 district court there was an issue that we were going to
12 refrain from presenting our full argument on it.

13 JUSTICE GINSBURG: You didn't say we're
14 going to refrain from it. You said, District Judge,
15 Your Honor, we will not challenge timeliness.

16 MR. DOMENICO: Right.

17 JUSTICE GINSBURG: Didn't have any
18 qualifications.

19 MR. DOMENICO: Well, I -- I do think we
20 qualified it. The only reason to include the language
21 about not conceding was to qualify that. The only
22 reason to lay out the argument was to make sure that the
23 court was able to consider it in its screening
24 procedures and --

25 JUSTICE KAGAN: But isn't the concession

1 language really going to a different point? The
2 concession language is going to the point of why it is
3 that you're not raising it, that you're not challenging
4 it.

5 MR. DOMENICO: I don't think it is.

6 If I may, Mr. Chief Justice, finish.

7 CHIEF JUSTICE ROBERTS: Please.

8 MR. DOMENICO: I don't think that there is
9 any reason for us to have been concerned about how -- if
10 we had simply stated we are not challenging it, there
11 would have been no concern about this affecting any
12 other case whatsoever. The only case in which to be
13 concerned that what we said would be misconstrued as a
14 waiver was this case.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 We will hear from Ms. Sherry first.

17 MS. LORD: Oh, I'm sorry.

18 CHIEF JUSTICE ROBERTS: Ms. Sherry.

19 ORAL ARGUMENT OF MELISSA ARBUS SHERRY

20 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

21 SUPPORTING THE RESPONDENTS

22 MS. ARBUS SHERRY: Mr. Chief Justice, and
23 may it please the Court:

24 This Court's decisions in Granberry and Day
25 answer the first question presented. I think Petitioner

1 no longer contests that, and the Court can simply
2 decide the first question presented on that basis and
3 reaffirm what it said in Granberry.

4 JUSTICE KAGAN: Ms. Sherry, there is one
5 difference. If you put Granberry and Day together, it
6 gets you most of the way there. The one difference is
7 that here there was a sua sponte decision by the court;
8 whereas, in even the combination of Granberry and Day,
9 it was a party that raised it, although the party raised
10 it late.

11 So, why should that difference not matter?
12 If you think that party presentation has some
13 consequence in this area, you might think that that
14 difference does matter, that once you get to the court
15 of appeals and even then the party doesn't raise it,
16 sort of enough is enough.

17 MS. ARBUS SHERRY: A couple of responses to
18 that. Number one, I think it's significant that Day
19 itself was a case in which the court raised it. It
20 raised it on its own.

21 JUSTICE KAGAN: But at the trial court
22 level.

23 MS. ARBUS SHERRY: At the trial level.

24 JUSTICE KAGAN: Of course, the habeas court
25 has a significant screening function.

1 MS. ARBUS SHERRY: No, that's certainly
2 true. I think the procedural default cases are another
3 good example. This Court in Day cited a number of them,
4 a number of them of which were cases in which the court
5 of appeals was raising the issue sua sponte.

6 On page 12 of our brief, we cite a number of
7 procedural default cases. A lot of them come up in the
8 sua sponte context. And the courts of appeals have not
9 made a distinction between the two.

10 I think they certainly implicate different
11 concerns. For example, to the extent this Court has
12 been worried about sandbagging or strategic behavior, I
13 think that's largely absent in circumstances where the
14 court is raising it on its own motions as opposed to the
15 party belatedly raising the issue on appeal.

16 So, I do think if you look at Granberry, you
17 look at Day, you look at Caspari, you look at Schiro,
18 and you look at the procedural default cases, I think
19 that really does resolve the first question presented.
20 And, again, I don't think Petitioner really argues
21 otherwise at this point.

22 JUSTICE ALITO: Well, I may have forgotten
23 the procedural complications of this case, but here, did
24 the State have any opportunity before the court of
25 appeals to raise the timeliness issue prior to the time

1 when the court of appeals issued its certificate of
2 appealability? And if the court of appeals had not
3 issued a certificate of appealability on the issue of
4 timeliness, would the issue have come up at all?

5 MS. ARBUS SHERRY: The State did have an
6 opportunity in the court of appeals because, after the
7 application for a certificate of appealability was
8 filed, the court did order the State to file a response,
9 and the State didn't argue timeliness in that response.
10 But when the court of appeals did ask for briefing on
11 this issue in the certificate of appealability process,
12 the State, of course, did have an opportunity to respond
13 there, and it did argue that the petition was untimely,
14 and it strongly argued that.

15 And so, I guess, turning to the second
16 question presented, of deliberate waiver, I don't think
17 there has been a deliberate waiver in the way that Day
18 spoke about that term here for two primary reasons.
19 Number one, when Day spoke of deliberate waiver, it
20 spoke of overriding a State's deliberate waiver, and I
21 think if you look, when the court of appeals decided the
22 timeliness question, there's no way to look at that as
23 the State -- as a court, rather, actually overriding the
24 State's deliberate waiver. At that point, the State had
25 argued that the petition was untimely.

1 Petitioner never argued that the court
2 shouldn't decide the issue, never argued that that --
3 that the State had waived that issue below. And I think
4 at that time, it's really difficult to characterize that
5 as overriding the State's deliberate waiver.

6 The other point I would make is in the
7 district court --

8 JUSTICE GINSBURG: And the difference is
9 that in Day counsel didn't know that he had a statute of
10 limitations defense. So -- but the court suggested it.
11 In this case, the defendant -- I mean, the -- the
12 attorney knew, the State's attorney knew, they had a
13 statute of limitations defense and nonetheless told the
14 court we won't challenge timeliness.

15 It seems a big difference between the
16 factual background of Day, where the lawyer didn't know
17 there was a statute of limitations defense, and this
18 one, where the lawyer knew very well there was and
19 decided to tell the district court not to -- not to deal
20 with that issue.

21 MS. ARBUS SHERRY: I -- I think that
22 certainly is true, but I think it's important, in
23 deciding whether or not this should be treated as a
24 deliberate waiver, to look at what the consequences of
25 treating it as such would be. The consequences of

1 treating it as a deliberate waiver under the language of
2 Day is that the court's hands would be bound; the court
3 would be unable to decide the timeliness question. And
4 it's not just the court of appeals; it's the district
5 court as well. So, if this were a clear deliberate
6 waiver in district court when the State filed its
7 pre-answer response, the district court would have been
8 without any authority to consider --

9 JUSTICE BREYER: So, why is that -- why is
10 that a bad result? The -- I -- imagine the facts are
11 these: The State forgets to waive the issue, to raise
12 the issue in the defense. All right? Forgets.

13 Judge: State you haven't raised a statute
14 of limitations.

15 State -- one possible answer -- thank you,
16 Your Honor. We overlooked our forfeiture. We want to
17 raise it.

18 That's one.

19 Number two: They say we don't care.

20 Number three: We don't want to. Okay?

21 MS. ARBUS SHERRY: Well --

22 JUSTICE BREYER: Now, in two and three, you
23 can say this: You could say the reason that we depart
24 from the normal rule that you have to actually assert it
25 in your defense is we're trying to protect the State

1 because of habeas. So, we protect the State at least by
2 giving them a chance to make the argument when they
3 forget or some other reason. Now we gave them the
4 chance. Now they say: Huh? Who cares?

5 All right? If that's their attitude, why is
6 it the habeas court's business to protect the State from
7 themselves?

8 MS. ARBUS SHERRY: Because it's not just
9 about the State. Because it's -- because of the
10 institutional interests that are at stake. And that's
11 why Granberry and Schiro and Caspari and Day allowed
12 there to be consideration of these issues despite
13 forfeiture. It's because of the institutional
14 interest --

15 JUSTICE BREYER: Despite forfeiture?

16 MS. ARBUS SHERRY: Despite forfeiture.
17 Right.

18 JUSTICE BREYER: And --

19 MS. ARBUS SHERRY: And -- and that's the
20 very question here, whether it should be treated like
21 forfeiture or whether it would be treated like waiver.
22 And the reason why I think it would be a bad result to
23 treat it as waiver here and why it would be bad to have
24 bound the district court's hands in this case, if you
25 look at what happened here, the district court on its

1 own motion initially dismissed this as untimely. It
2 came back and it went to the State and said, you know, I
3 need more information. And the State provided that
4 additional information.

5 It would be a somewhat odd system for --
6 when the district court now had this information in
7 front of it, now knew about the 1995 motion, for it not
8 to have been able to do anything further with respect to
9 timeliness on -- on that point. The fact that the State
10 for whatever reason decided to press other issues
11 shouldn't bind the district court's hands except in the
12 rarest of circumstances.

13 JUSTICE GINSBURG: Except we have a system
14 where the court doesn't raise issue on its own. The
15 ordinary rule is the party presents it, and when the
16 party says to the court we will not challenge
17 timeliness, it seems to me that's quite a different
18 thing from just having an answer that doesn't raise the
19 defense. It's affirmatively representing to the court
20 that we -- we are not making this an issue.

21 MS. ARBUS SHERRY: And -- and to be clear, I
22 think that's certainly a factor that the courts can and
23 do consider in deciding whether to exercise their
24 discretion to consider a timeliness issue. The question
25 here is whether or not the court should lose any

1 discretion to consider that issue.

2 JUSTICE GINSBURG: But Day did say that
3 if -- if a party knowingly waives a limitations defense,
4 then no court can bring it up. The party has made the
5 choice.

6 MS. ARBUS SHERRY: That's -- that's what
7 this Court said in Day, and I guess the question is --
8 is how strictly that should be construed. And our
9 position would be that it should be strictly construed
10 because of the consequences of that waiver. And, again,
11 I think it's significant that the Court in Day did talk
12 about overriding a State's deliberate waiver.

13 In the dissent, Justice Scalia, you
14 mentioned the example of a court amending a party's
15 pleading over that party's objections. And I think that
16 really is a narrow circumstance in which the waiver rule
17 should operate.

18 It's not that the State's behavior is
19 irrelevant to the question before the court as to
20 whether the court should exercise its discretion; it's
21 actually quite relevant, and it's something that courts
22 of appeals can and do look at. The question is whether
23 or not the courts lack any authority to consider a
24 limitations defense or other procedural defense --

25 CHIEF JUSTICE ROBERTS: So, you're saying

1 that if the court of -- court says, you know, you have a
2 good state -- limitations defense, you would clearly win
3 on that, but I'm going to ignore it, even though you
4 didn't raise it?

5 MS. ARBUS SHERRY: I'm sorry, Your Honor.

6 CHIEF JUSTICE ROBERTS: Would it be an abuse
7 of discretion for the court not to accept a valid,
8 evident statute of limitations defense on the ground
9 that the State didn't raise it?

10 MS. ARBUS SHERRY: I think under Day -- the
11 question is whether it's a deliberate waiver, and I
12 think, under Day, the Court said quite plainly that it
13 would be an abuse of discretion in those circumstances.
14 And I think there are a limited number of circumstances
15 where -- where that makes sense, and I think the Court
16 has seen examples of that recently this term, for
17 example.

18 The Court denied cert in a case, Buck v.
19 Thaler, earlier this term, where -- a predecessor case
20 that is an example of the State expressly waiving a
21 procedural default defense because it wanted the court
22 to reach the merits. In that case, the State said quite
23 plainly -- in the predecessor case, I should say, the
24 State said quite plainly because the use of race in the
25 punishment phase seriously undermined the fairness and

1 integrity of the judicial process, the director
2 expressly waives any procedural bar with respect to that
3 claim.

4 Now, that is the quintessential deliberate
5 waiver. And it took it off table, unlike what happened
6 in this case.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Ms. Lord, you have 3 minutes remaining.

9 REBUTTAL ARGUMENT OF KATHLEEN A. LORD

10 ON BEHALF OF THE PETITIONER

11 MS. LORD: The problems with the rulings
12 urged by the amicus and by the State are severalfold.
13 One, it's not contemplated at all by AEDPA that the
14 1-year Federal timing statute of limitations would be
15 subject to such a wide latitude in the court of appeals
16 to resurrect defenses.

17 JUSTICE ALITO: If a State knows that it has
18 a potential statute of limitations defense and says
19 nothing, is that a forfeiture or a waiver?

20 MS. LORD: It would be a violation of
21 Rule 5, which requires them to assert a time bar if they
22 are required to file a response. In our case, it also
23 would have been a violation of the court's order.

24 JUSTICE ALITO: So, simply saying nothing
25 can be a waiver, in your view.

1 MS. LORD: Probably not. But if you are --

2 JUSTICE ALITO: If the answer to that is
3 not, then what is the difference between saying nothing,
4 knowing that you have a defense, and saying we're not
5 challenging but we're not conceding?

6 What is the difference?

7 MS. LORD: Well, by not conceding, that
8 doesn't undercut the deliberateness of the waiver. It
9 actually establishes it. It establishes that they know
10 that there's a defense, and they're not agreeing that
11 the petition is timely, but they're deliberately
12 choosing not to assert the statute of limitations.

13 JUSTICE ALITO: Well, let me just ask it one
14 more way, and then I'll --

15 MS. LORD: I'm sorry.

16 JUSTICE ALITO: Back in the office, they're
17 considering -- in the State's office, they're
18 considering what they're going to do. And they say,
19 well, what we're going to do is we're not going to
20 challenge it, but we're not going to concede it. And,
21 therefore, they say nothing.

22 MS. LORD: In the face of Rule 5's
23 requirement, it could very well be a waiver. And I'd
24 cite the court to Hill v. New York, which also addresses
25 one of the State's lawyers' points, which was a

1 waiver -- for the State to waive a statute of
2 limitations defense, its waiver has to be unequivocal
3 and clear. I don't know if they're suggesting that
4 there also has to be an advisement by the court. I
5 don't think they're going that far.

6 But the fact is, you look at the nature of
7 the waiver or the right being waived. And this Court
8 recognized in Hill v. New York and other cases that if
9 the right being waived is, for example, the right to be
10 tried in a timely fashion under IAD, it can be waived
11 just by a lawyer accepting a date.

12 And the statute of limitations issue here is
13 a typical strategic decision. And when AEDPA brought
14 this in, it didn't bring it in as it brought in comity.
15 It is something to move the case along from the Federal
16 point of view. And for this Court to adopt what --

17 CHIEF JUSTICE ROBERTS: Finish your
18 sentence, please.

19 MS. LORD: -- the State is suggesting will
20 just take away all the efficiencies that -- that that 1
21 year brought to bear.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 The case is submitted.

24 (Whereupon, at 12:05 p.m., the case in the
25 above-entitled matter was submitted.)

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