(ORDER LIST: 562 U.S.)

MONDAY, DECEMBER 6, 2010

ORDERS IN PENDING CASES

10M42 WANZER, JERRY V. TX DCJ, ET AL.

10M43 WANZER, JERRY V. HERNANDEZ, CHRISTINA, ET AL.

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

10M49 RHOADES, PAUL E., ET AL. V. IDAHO

The motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner is granted.

10M50 SETHUNYA, VICTORIA V. WEBER STATE UNIVERSITY, ET AL.

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

10M51 MOHAMMED, FARHI S., ET AL. V. OBAMA, PRESIDENT OF U.S., ET AL.

The motion for leave to file a petition for a writ of certiorari under seal is granted. Justice Kagan took no part in the consideration or decision of this motion.

10M52 PARTHEMORE, IRA D. V. CALIFORNIA

10M53 DYER, FELICIA V. STOVALL, WARDEN

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

09-987) AZ CHRISTIAN SCH. TUITION ORG. V. WINN, KATHLEEN M., ET AL.
)
09-991) GARRIOTT, GALE V. WINN, KATHLEEN M., ET AL.

The motion of petitioner Arizona Christian School Tuition Organization to file a supplemental brief after argument is

granted.

09-1156 MATRIXX INITIATIVES, ET AL. V. SIRACUSANO, JAMES, ET AL.

The motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted.

10-5624 MITCHELL, STEPHEN M. V. CASTILLO, WARDEN

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

10-6799 HAMMOND, ROY C. V. TUFAMERICA, INC.

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until December 27, 2010, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court. Justice Sotomayor took no part in the consideration or decision of this motion.

CERTIORARI GRANTED

10-174 AM. ELECTRIC POWER CO., ET AL. V. CONNECTICUT, ET AL.

The petition for a writ of certiorari is granted. Justice Sotomayor took no part in the consideration or decision of this petition.

10-277 WAL-MART STORES, INC. V. DUKES, BETTY, ET AL.

The petition for a writ of certiorari is granted limited to Question I presented by the petition. In addition to Question I, the parties are directed to brief and argue the following question: "Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)."

CERTIORARI DENIED

09-11245 DEL CARMEN, ALEJANDRO G. V. UNITED STATES

10-150	WEBSTER, BRUCE C. V. UNITED STATES
10-220	STEPHEN, SEAN, ET AL. V. HANLEY, JOHN, ET AL.
10-438	GOOD, CHARLENE J., ET VIR V. SUNBURY, PA
10-440	KRAMER, MANUEL V. ZONING BD. OF APPEALS, ET AL.
10-442	McKINLEY, RICHARD V. WHITE, THEODORE W.
10-445	FLORANCE, RICHARD J. V. TEXAS
10-448	E-L ENTERPRISES, INC. V. MILWAUKEE METRO. SEWERAGE DIST.
10-450	TIG SPECIALTY INSURANCE COMPANY V. USDC OR
10-455	WALSH, RORY M. V. KRANTZ, ROBERT, ET AL.
10-519	IRWIN, CRAIG A. V. NORTH DAKOTA
10-531	COURTNEY, KRISTOPHER V. OHIO
10-585	PUERTO, ARIADNA V. UNITED STATES
10-588	WOLF, ROGER V. UNITED STATES
10-593	WILLIAMS, ADAM V. UNITED STATES
10-5082	MARTIN, McAARON V. OHIO
10-5183	STEWART, KELVIN V. McNEIL, SEC., FL DOC
10-5482	BARRINGTON, MANCER L. V. UNITED STATES
10-5767	GORHAM BEY, EDNA V. UNITED STATES
10-6205	THYKKUTTATHIL, JOB, ET UX. V. UNITED STATES
10-6243	BOROWY, CHARLES A. V. UNITED STATES
10-6328	PUGH, VERNON L. V. MINNESOTA
10-6746	COOPERSMITH, RADINE S. V. DOWNEY, RICHARD E.
10-6755	HART, JOHN H. V. HILL, SUPT., POWDER RIVER
10-6758	WATERS, TERESA A. V. THALER, DIR., TX DCJ
10-6770	BELL, JESSE L. V. WOODS, JULIA, ET AL.
10-6771	JOSEPH, SHAHKENE V. NEW YORK
10-6772	TA, VINH QUOC V. WALKER, WARDEN
10-6781	PARKS, EDWARD F. V. EDGEWATER CASINO, ET AL.

10-6784 SULLIVAN, JIMMY D. V. NOOTH, SUPT., SNAKE RIVER

10-6791 CORMIER, IAN L. V. CALIFORNIA

10-6796 WILSON, MARION V. TERRY, WARDEN

10-6800 CASILLA, BIENVENIDO V. RICCI, ADM'R, NJ, ET AL.

10-6802 EDWARDS, BRANDON D. V. MICHIGAN

10-6809 WELLS, ALBERT J. V. FLORIDA

10-6812 VELA, OSCAR S. V. TEXAS

10-6813 WANZER, JERRY V. VELASQUEZ, ROBERT, ET AL.

10-6817 McCURRY, JAMES L. V. MILLS, WARDEN

10-6820 BARRIOS, JOSE A. V. GIURBINO, WARDEN

10-6821 WALTERS, MARTIN E. V. SISTO, WARDEN

10-6829 BLACK, ROBERT V. SADLER, WILLIAM L.

10-6830 BURKETT, DELBERT L. V. THALER, DIR., TX DCJ

10-6841 CLINKSCALE, ERIC V. FLORIDA

10-6872 LEWIS, JOHN L. V. JACKSON, SUPT., BROWN CREEK

10-6883 SHELTON, MONTY M. V. FOX, WARDEN, ET AL.

10-6885 ROKER, WILLIAM V. FLORIDA

10-6897 LOWERY, QUINCY A. V. STEVENSON, WARDEN

10-6907 IFENATUORAH, CALS C. V. HOLDER, ATT'Y GEN.

10-6941 MARANIAN, JOHN A. V. MICHIGAN

10-7002 EMERUWA, KELECHI V. MARYLAND

10-7003 DYE, JOHN L. V. BARTOW, BRIAN, ET AL.

10-7051 O'DONNELL, ALICE V. NEW JERSEY

10-7083 SVEUM, MICHAEL A. V. WISCONSIN

10-7098 CASTILLO, MICHAEL V. CONNECTICUT

10-7118 CENTENO, AILEEN V. WINSTEAD, SUPT., CAMBRIDGE

10-7149 GILLARD, LISA J. V. PROVEN METHOD SEMINARS, LLC

10-7150 HALL, RASHAAN A. V. MARYLAND

10-7165 KOVACIC, NANCY V. CUYAHOGA CTY. DEPT. OF CHILDREN

10-7183 RAYBORN, JERRY L. V. MISSISSIPPI

10-7228 ROMAN, PEDRO V. PENNSYLVANIA

10-7247 MARTINEZ, RICHARD L. V. MILYARD, WARDEN, ET AL.

10-7302 DE LA CRUZ-ALEJO, RAMON V. UNITED STATES

10-7303 CAMPBELL, JAMESELL J. V. UNITED STATES

10-7309 DANIELS, ANDREW V. UNITED STATES

10-7318 NICHERIE, DANIEL V. UNITED STATES

10-7323 VANDEMARK, JOSHUA V. UNITED STATES

10-7324 MIRANDA-REYES, DELFINO V. UNITED STATES

10-7330 HEIN, STEVE V. UNITED STATES

10-7333 VARDARO, JESSE LEE V. UNITED STATES

10-7335 TAYLOR, RECO V. UNITED STATES, ET AL.

10-7337 THOMAS, DAMEON V. UNITED STATES

10-7339 LOPEZ, REFUGIO V. UNITED STATES

10-7344 GORDON, NOAH C. V. UNITED STATES

10-7345 FERNANDEZ, JOSE D. V. UNITED STATES

10-7352 ROSAS-HERNANDEZ, MANUEL V. UNITED STATES

10-7353 RANDALL, NAPOLEON L. V. UNITED STATES

10-7354 COOPER, LOUIS E. V. UNITED STATES

10-7358 PARKER, LAMONT D. V. UNITED STATES

10-7360 GAMBOA, VINCENT V. UNITED STATES

10-7361 FROOK, AYMAN V. UNITED STATES

10-7363 VENKATARAM, NATARAJAN V. UNITED STATES

10-7369 SHORTER, RAMON L. V. UNITED STATES

10-7372 ANFIELD, JIMMY V. UNITED STATES

10-7376 LOWE, OMARR V. UNITED STATES

10-7379 MASSENBURG, DERRICK L. V. UNITED STATES

10-7383 HUFF, ENOCH V. UNITED STATES

10-7389 MOBLEY, STEPHEN M. V. UNITED STATES

10-7391 SIERRA, OMAR V. UNITED STATES

10-7392 SMITH, SOLOMON V. UNITED STATES

The petitions for writs of certiorari are denied.

10-409 HOLMES, WILLIAM K., ET AL. V. GRUBMAN, JACK, ET AL.

10-435 CHENKIN, MICHAEL, ET UX. V. 808 COLUMBUS LLC, ET AL.

The petitions for writs of certiorari are denied. Justice Sotomayor took no part in the consideration or decision of these petitions.

10-443 DOBSON-DAVIS, WARDEN, ET AL. V. LUNBERY, KRISTI L.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

10-449 RICHARDS, EDWARD F. V. HEWLETT-PACKARD CORP., ET AL.

The petition for a writ of certiorari is denied. The Chief Justice took no part in the consideration or decision of this petition.

10-461 UNITED STATES, EX REL. EBEID V. LUNGWITZ, THERESA A., ET AL.

10-592 GOODSON, MICHAEL D. V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Kagan took no part in the consideration or decision of these petitions.

10-6751 JACOBS, CHRIS J. V. WISCONSIN

10-6765 WILLIAMS, THELMA V. CLINE, PAIGE, ET AL.

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8.

10-7297 ZALESKI, ALAN V. BURNS, ELLEN B., ET AL.

The petition for writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

10-7341 HORN, GREGORY S. V. UNITED STATES

The petition for writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

10-7382 ROMAN, MANUEL V. UNITED STATES

The petition for writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

10-7396 BURKE, ROBERT B. V. USDC ED PA

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

HABEAS CORPUS DENIED

10-606 IN RE SCOTT A. HEIMERMANN

10-7450 IN RE CARLOS SHAARBAY

The petitions for writs of habeas corpus are denied.

REHEARINGS DENIED

09-9515 PITRE, ANTHONY C. V. CAIN, NATHAN, ET AL.

09-10814 GOODEN, CLIFFORD A. V. IOWA

09-10886 ROONEY, JOHN V. GEORGIA

09-11074 LaRUE, JODENE V. DENSO MANUFACTURING AR, INC.

09-11076 BANKS, HERBERT V. FLORIDA

09-11325 EARHART, ERIK V. KONTEH, WARDEN

09-11355 PENDLETON, SAMMY V. U. S. MED. CENTER, ET AL.

09-11473 RICHARDSON, JOHNNY D. V. McHUGH, SEC. OF ARMY

10-183 SAMSON, FRED V. MANLEY, JAMES, ET AL.

10-295 VEASAW, JAMES B. V. UNITED STATES, ET AL.

10-5121 CAMPOS, GENARO V. CONWAY, SUPT., ATTICA

10-5151 BITTAN, GWEN V. HI DEPARTMENT OF HUMAN SERVICES

10-5200 HOGAN, BRYAN K. V. FLORIDA

10-5212 JONES, MARLIN E. V. BURNS, TERRY L.

10-5273 CLARK, SEAN A. V. ASTRUE, COMM'R, SOCIAL SEC.

10-5326 MOORE, JOSEPH J. V. UNITED STATES

10-5505 BROWN, MICHAEL L. V. NORTH CHICAGO, IL, ET AL.

10-5528 SOENTGEN, VIRGINIA V. PENNSYLVANIA

10-5682 ELAM, DARIUS D. V. TEXAS

10-5748 SHEEHAN, TERRENCE V. THALER, DIR., TX DCJ

10-5915 IN RE JACK LUCIOUS, JR.

10-6102 SETTLE, MIKE V. BELL, WARDEN

10-6368 COULOMBE, JACKIE L. V. OXNARD, CA, ET AL.

The petitions for rehearing are denied.

10-5109 KUMVACHIRAPITAG, SUKIT N. V. MICROSOFT CORPORATION, ET AL.

The petition for rehearing is denied. The Chief Justice and Justice Breyer took no part in the consideration or decision of this petition.

10-5385 STEVENS, MICHAEL V. UNITED STATES

The petition for rehearing is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

10-5786 FALLS, LAMONT G. V. UNITED STATES

The petition for rehearing is denied. Justice Kagan took no part in the consideration or decision of this petition.

ATTORNEY DISCIPLINE

D-2522 IN THE MATTER OF HERBERT ALDON CALLIHAN, JR.

It having been reported that Herbert Aldon Callihan, Jr., of Bethesda, Maryland, had died, the Rule to Show Cause, issued on October 4, 2010, is discharged.

SUPREME COURT OF THE UNITED STATES

MARCEL WAYNE WILLIAMS *v.* RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION

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

No. 09–10382. Decided December 6, 2010

The motion of Scholars of Habeas Corpus Law for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting from denial of certiorari.

Today the Court refuses to review the Eighth Circuit's conclusion that a State may withhold an objection to a federal habeas evidentiary hearing until after the hearing is complete, the constitutional violation established, and habeas relief granted. Because I believe such a rule enables, and even invites, States to manipulate federal habeas proceedings to their own strategic advantage at an unacceptable cost to justice, I respectfully dissent.

Petitioner Marcel Wayne Williams was charged with capital murder, kidnapping, rape, and aggravated robbery. At trial, his attorneys conceded guilt in the opening statement, apparently hoping to establish credibility with the jury and ultimately to convince the jury to recommend a sentence of life without parole. Despite adopting this strategy, however, Williams' attorneys called only one witness at the penalty phase, an inmate who had no personal relationship with Williams and who testified from his own experience that life was more pleasant on death row than in the general prison population. Not surprisingly, the jury unanimously recommended a death sentence. The trial court sentenced Williams to death by lethal injection, and the Arkansas Supreme Court af-

firmed the conviction and sentence on direct appeal. *Williams* v. *State*, 338 Ark. 97, 991 S. W. 2d 565 (1999).

After the Arkansas courts denied his petition for collateral relief, Williams filed a federal habeas petition under 28 U. S. C. §2254. Williams alleged that he received ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U. S. 668 (1984), due to his attorneys' failure to develop and present mitigating social history evidence to the jury. As to *Strickland*'s performance prong, the District Court held that the state-court decision denying Williams' ineffective-assistance claim was "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Williams* v. *Norris*, No. 5:02CV00450, 2006 WL 1699835, *8 (ED Ark., June 19, 2006). As to prejudice, the court concluded that the record was inconclusive and ordered an evidentiary hearing. The testimony at the hearing established that Williams had been "subject to every category of traumatic experience that is generally used to describe childhood trauma": sexual abuse by multiple perpetrators; physical and psychological abuse by his mother and stepfather; gross medical, nutritional, and educational neglect; exposure to violence in the childhood home and neighborhood; and a violent gang-rape while in prison as an adolescent. 2007 WL 1100417, *2 (Apr. 11, 2007). On the basis of that testimony, the District Court found that Williams had been prejudiced by counsel's ineffective assistance, granted habeas relief, and ordered the State to afford Williams a new trial at the penalty phase or to reduce his sentence to life without parole. *Id.*, at *2–*3.

The Court of Appeals reversed, reinstating the sentence of death by lethal injection. *Williams* v. *Norris*, 576 F. 3d 850 (CA8 2009). Concluding that Williams was not entitled to a federal evidentiary hearing in the first place and entirely disregarding the evidence introduced at the hearing as a result, the court held that Williams had failed to

prove prejudice "on the factual record he developed in state court." *Id.*, at 863. Thus, although the District Court found that the State never "object[ed] to [the court's decision] to conduct an evidentiary hearing" nor "argued that [it] should not consider that evidence" in ruling on Williams' petition, 2007 WL 1100417, *2, n. 1; see also *id.*, at *3, the Court of Appeals held that the State had in fact objected to the hearing. In the alternative, the Court of Appeals concluded that it would "exercise [its] discretion to review the district court's non-compliance with §2254(e)(2)" even if the State had not objected. 576 F. 3d, at 860.

To be sure, under §2254(e)(2), if a habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim" unless certain conditions are met. Had the State invoked this section in the District Court, the hearing may have been barred for the reasons given by the Court of Appeals. But whether §2254(e)(2) barred the hearing is a separate question from whether the State's §2254(e)(2) objection was properly before the Court of Appeals in the first place. As to that threshold question, neither of the holdings adopted by the court below withstands scrutiny.

First, the Eighth Circuit's conclusion that the State objected in the District Court to the evidentiary hearing is patently wrong. As proof of an objection, the Court of Appeals found one sentence in the record where the State asserted that a federal habeas court "is prevented from retrying a state criminal case." 576 F. 3d, at 860 (internal quotation marks omitted). According to the Court of Appeals, this statement amounted to an objection to the hearing because it "incorporated the fundamental purpose behind the restrictions on evidentiary hearings in §2254(e)(2)." *Ibid.* As a general matter, however, a party wishing to raise an objection and preserve an issue for

appeal must "pu[t] the court on notice as to [its] concern," *Beech Aircraft Corp.* v. *Rainey*, 488 U. S. 153, 174 (1988). Absolutely nothing in the State's general statement—or any other part of the record, for that matter—put the District Court, or Williams, on notice that the State contested Williams' entitlement to an evidentiary hearing. Even if a State need not spell out its opposition to an evidentiary hearing in precise terms, I cannot fathom how this statement of a general principle of law—a principle that is no less true even when a federal evidentiary hearing *is* proper—could suffice.

Indeed, rather than reveal an objection to the hearing, the record indicates that the State affirmatively consented to the hearing and sought to use the hearing to its own strategic advantage. Williams made multiple straightforward requests for an evidentiary hearing in no unclear terms. And, the District Court clearly informed the State of its intent to grant that request, giving the State every opportunity to object that a hearing was improper because Williams had "failed to develop the factual basis of [his] claim" in state court, §2254(e)(2). Rather than protest, the State requested that the court narrow the issues on which evidence would be heard and that the hearing be rescheduled due to the unavailability of its own witness. The State then relied on new evidence *developed at the hearing* to contest the court's prior conclusion, *on the state-court record*, that defense counsel's performance had been deficient. The State presented the same evidence on appeal, although there it also argued—inconsistently and for the very first time—that the hearing had been improper. I simply cannot see how this record suggests anything other than a deliberate strategy by the State to use the hearing to fortify the record in support of the state-court decision and to object to the hearing only if and when that strategy failed.

Second, with respect to the Eighth Circuit's alternative

holding that it would, in any event, "exercise [its] discretion to review the district court's non-compliance with §2254(e)(2)," 576 F. 3d, at 860, the Court of Appeals seriously misapplied our precedent. The court assumed that it possessed discretion to consider an objection to an evidentiary hearing that is asserted only after the hearing has been conducted, the constitutional violation established, and habeas relief granted, relying on this Court's decision in *Day* v. *McDonough*, 547 U. S. 198 (2006). In that case, we held that "district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." *Id.*, at 209. Even assuming that same discretion applies in these circumstances,* *Day* makes clear that the court must "'determine whether the interests of justice would be better served'" by allowing the State's unasserted defense to expire without court intervention. *Id.*, at 210 (quoting *Granberry* v. *Greer*, 481 U. S. 129, 136 (1987)). In particular, and of critical significance to this case, the court must evaluate whether anything "in the record suggests that the State 'strategically' withheld the defense or chose to relinquish it." *Day*, 547 U. S., at 211. If so, the court "would not be at liberty to disregard that choice." *Id.*, at 210, n. 11. Thus, even assuming *Day* applied here, it required the Court of Appeals to search the record for a suggestion of strategic forfeiture. Yet, despite the record described

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*Although we have never decided whether the courts of appeals possess discretion to consider after-the-fact objections of the kind here, we have at least left open the possibility that a State might forfeit such an objection if the State fails to raise it properly. See *Bradshaw* v. *Richey*, 546 U. S. 74, 79–80 (2005) *(per curiam)* (remanding for the Sixth Circuit to address the argument that the State "failed to preserve its objection to the [court's] reliance on evidence not presented in state court by failing to raise this argument properly"); *Holland* v. *Jackson*, 542 U. S. 649, 653, n. (2004) *(per curiam)* (rejecting the contention that the State had failed to preserve its objection on the record present there).

above, which at the very least raises the possibility of a deliberate decision by the State, the Court of Appeals failed to consider the question at all.

Day also would require the Court of Appeals to "assure itself" that Williams would not be "significantly prejudiced by the delayed focus" on his entitlement to a federal evidentiary hearing. *Id.*, at 210. Williams raised just this point in the Court of Appeals, arguing that the State's untimely objection to the evidentiary hearing had "deprived [him] of any opportunity to present facts that would show his entitlement to a hearing under the applicable standard." Brief for Appellee/Cross-Appellant and Addendum in No. 07–1984 etc. (CA8), p. 8. This, too, the court failed to address.

In fact, the Court of Appeals made no mention of—and apparently gave no consideration to—*any* countervailing interests weighing against review of the State's untimely §2254(e)(2) challenge. Such interests are certainly significant where, as here, the evidence at the hearing led the District Court to conclude that a constitutional violation had occurred and that a capital sentence must be set aside. Indeed, the relevant interests to be considered include not only interests of finality and comity (the singular focus of the Court of Appeals), but also the interest of remedying a "miscarriage of justice" that is evident after "a full trial has been held in the district court." *Granberry*, 481 U. S., at 135.

In my opinion, the interests of justice are poorly served by a rule that allows a State to object to an evidentiary hearing only after the hearing has been completed and the State has lost. Cf. *Puckett* v. *United States*, 556 U. S. —, — (2009) (slip op., at 5) ("[T]he contemporaneous-objection rule prevents a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor"). It is true, as the Court of Appeals emphasized, that the

policy against evidentiary hearings in federal habeas promotes principles of comity and federalism. See *Williams* v. *Taylor*, 529 U. S. 420, 436–437 (2000). But when the State voluntarily participates in a federal evidentiary hearing—without objection, with an apparent intent of supplementing the record for its own purposes, and at a significant cost and expenditure of judicial resources—these interests are significantly diminished if not altogether absent. We have refused to adopt rules that "would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding [a] defense in reserve for use on appeal if necessary." *Granberry,* 481 U. S., at 132. Because I believe the opinion below does just that, at an unacceptable cost to the interests of justice generally and in this particular case, I would grant the petition for writ of certiorari and vacate the judgment below.