

No. 10-9995

IN THE SUPREME COURT OF THE UNITED STATES

Patrick Wood,

Petitioner,

vs.

*Kevin Milyard, Sterling Correctional Facility, and
The Attorney General of the State of Colorado,*

Respondents.

On Petition for Writ of Certiorari to
United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

JOHN W. SUTHERS
Attorney General

DANIEL D. DOMENICO
Solicitor General

JOHN J. FUERST III, 16862*
Senior Assistant Attorney General
Appellate Division
Criminal Justice Section
Attorneys for Respondent

1525 Sherman Street, 7th Floor
Denver, Colorado 80203

Telephone: (303) 866-5785

E-Mail: john.fuerst@state.co.us

*Counsel of Record

TABLE OF CONTENTS

	PAGE
ISSUES PRESENTED	1
STATEMENT OF THE CASE AND FACTS	1
REASONS WHY THE PETITION SHOULD BE DENIED	18
1. Certiorari is not appropriate to review the Tenth Circuit' proper exercise of its discretion to affirm the district court on a different ground adequately supported by the record.	19
2. Revisiting <i>Day</i> 's rejection of an inflexible rule of forfeiture is premature.	28
CONCLUSION	29

TABLE OF AUTHORITIES

PAGE

CASES

Anderson v. Harless, 459 U.S. 4 (1982)	23
Barnett v. Roper, 541 F.3d 804 (5th Cir. 2008)	26
Bennett v. Spear, 520 U.S. 154 (1997)	19
California v. Carney, 471 U.S. 386 (1985)	25
Coleman v. Thompson, 501 U.S. 722 (1991)	10
Day v. McDonough, 547 U.S. 198 (2006)	1, 20, 22, 27, 29
Eberhart v. United States, 546 U.S. 12 (2006)	28
Estelle v. McGuire, 502 U.S. 62 (1991)	5
Gibson v. Klinger, 232 F.3d 799 (10th Cir. 2000)	16
Kontrick v. Ryan, 540 U.S. 443 (2004)	28
Mayle v. Felix, 545 U.S. 644 (2005)	21
Pennsylvania v. Finley, 481 U.S. 551 (1987)	5
People v. Czemerynski, 786 P.2d 1100 (Colo. 1990)	23
People v. Mamula, 847 P.2d 1135 (Colo. 1993)	9
People v. Versteeg, 165 P.3d 760 (Colo. App. 2006)	5
People v. Wenzinger, 155 P.3d 415 (Colo. App. 2006)	5
Picard v. Connor, 404 U.S. 270 (1971)	23
Ponte v. Real, 471 U.S. 491 (1985)	19
Sasser v. Norris, 553 F.3d 1121 (5th Cir. 2009)	26
Welch v. Carey, 350 F.3d 1079 (9th Cir. 2003)	16

RULES

Colo. R. Crim. P. 35(c)	5
-------------------------------	---

OTHER AUTHORITIES

B. Cardozo, The Nature of the Judicial Process 179 (1921)	25
---	----

ISSUES PRESENTED

1. Whether it was appropriate for the Tenth Circuit to affirm the district court's denial of petitioner's §2254 application on a ground different from the ground relied on by the district court and adequately supported by the record.

2. Whether *Day v. McDonough*, 547 U.S. 198 (2006), should be effectively overruled to the extent *Day* rejected a rule treating a party's failure initially to plead the one-year time bar as an absolute waiver.

STATEMENT OF THE CASE AND FACTS

Petitioner's convictions arose out of an incident that occurred in January 1986 when he "attempted an armed robbery of a pizza delivery store in Westminster, [Colorado] during which he shot and killed the assistant manager. [Petitioner] was subdued by two employees after a scuffle" (doc.#15-1).¹ *People v. Wood*, (Colo. App. No. 87CA0273, May 4, 1989) (not selected for publication) (*Wood I*).

¹ All citations in the form "doc.#__" are to the district court docket number.

As stated by the Colorado Court of Appeals:

Defendant was charged with first degree murder after deliberation, felony murder, aggravated robbery, and two counts of felony menacing. A jury found defendant guilty of aggravated robbery and felony menacing but was unable to reach a verdict on the murder charges. In exchange for withdrawing the death penalty from consideration, defendant waived his right to a jury trial on the murder counts. Thereafter, at a bench trial, the court found defendant guilty of felony murder and second degree murder.

During sentencing, the trial court merged the murder and aggravated robbery counts. The court sentenced defendant to life in the Department of Corrections on the merged counts and to four years each for the two felony menacing counts.

(Doc.#15-10).

Petitioner directly appealed his convictions challenging only the trial court's suppression ruling. The Colorado Court of Appeals affirmed his convictions in an unpublished opinion (doc.#15-1). *Wood I*. The Colorado Supreme Court denied certiorari review on October 23, 1989.

In 1994, petitioner filed an application under 28 U.S.C. §2254 in *Wood v. Furlong*, 94-cv-00219-JLK-RMB. The magistrate judge

recommended that the petition be dismissed for failure to exhaust state remedies, finding that petitioner had a remedy in state court because a collateral attack would not be subject to any period of limitation under Colorado law (doc.#15-2). The district judge accepted the recommendation and dismissed the case.

In June 1995, petitioner filed motions for appointment of counsel and to vacate his convictions and sentence. As relevant here, he claimed trial counsel was ineffective by advising him to testify,² and that his convictions for first degree felony murder and second degree murder violated double jeopardy (doc.#15-3). Four months later, petitioner filed a motion requesting a ruling on his motions. The court responded by appointing counsel (doc.#15-4).

The state court register of actions indicates petitioner took no further action until eight years and four months later in April 2004 when he filed a letter with the court (doc.#15-4). As the letter is not in

² Petitioner incorrectly maintains that his 1995 motion included a claim challenging trial counsel's advice as to his jury trial waiver.

the record, something petitioner conceded below in his Tenth Circuit brief, the contents of the letter is unknown.

In August 2004, petitioner filed a second motion for postconviction relief. Petitioner stated in the motion that “[n]o other postconviction proceedings were filed” (doc.#15-5).

The motion asserted a number of claims. As relevant here, petitioner again alleged that his murder convictions violated double jeopardy. Petitioner also asserted a claim of ineffective assistance of trial counsel. However, the ground was different from the ground asserted in the 1995 motion. Instead of challenging counsel’s advice about testifying, this time petitioner alleged that counsel was ineffective “because he waived the defendant’s right to trial by jury without the consent of defendant.” Petitioner also raised a free-standing claim that his jury trial waiver was invalid because his waiver was through counsel and not by petitioner himself (doc.#15-5).³

³ The motion raised additional claims, and conceded that the waiver was in exchange for the prosecution’s not seeking the death penalty.

The trial court summarily denied the motion. The court ruled that claims going to the second degree murder conviction were time barred, and that all but the ineffective assistance claim could have been raised on direct appeal.⁴ And as to the ineffective assistance claim, the court found the minute orders reflected that petitioner had filed a written waiver of jury trial. From this the court concluded that petitioner's factual allegations were untrue (doc.#15-6).

Petitioner appealed the trial court's order. His arguments in his opening brief were consistent with the claims presented in his postconviction motion (doc.#15-7). However, for the first time in his

⁴ Colo. R. Crim. P. 35(c)(3) was amended effective July 1, 2004, to specifically provide for this procedural bar. The amended rule applies to motions filed after the effective date. *See People v. Versteeg*, 165 P.3d 760, 763 (Colo. App. 2006); *People v. Wenzinger*, 155 P.3d 415, 418 (Colo. App. 2006). As such, petitioner incorrectly asserts that the state courts erred in applying Colo. R. Crim. P. 35(c)(3)(VII). In any event, petitioner's challenge to the state courts' postconviction ruling is not cognizable for at least three reasons: (1) he did not challenge the application of Crim. P. 35(c)(3)(VII) in state court; (2) any errors occurring during collateral review are not of constitutional magnitude, *see, e.g., Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); and (3) federal habeas relief is not available for errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). The same is true for petitioner's claim that the state trial erred in refusing to consider his motion for reconsideration.

reply brief he added a new ground supporting his ineffective assistance claim, namely, that his signed waiver was based solely on counsel's statement that he was friends with the judge and promised petitioner the judge would be lenient (doc.#15-9).

The Colorado Court of Appeals affirmed the trial court's order in all aspects. With regard to the ineffective assistance claim, the court found the record clearly established that petitioner signed a written waiver of right to jury trial (doc.#15-10). The Colorado Supreme Court denied certiorari review on February 5, 2007 (doc.#15-12).

Exactly one year later, petitioner filed the federal habeas application that is the subject of this appeal. Where the preprinted form directed him to identify state postconviction proceedings that he had initiated, he identified only the 2004 proceeding.

The application raised five numbered claims, with Claim 1 raising two distinct claims: (a) the same double jeopardy claim raised in state court, and (b) a separate challenge to his aggravated robbery conviction. Claim 2 raised petitioner's invalid jury trial waiver claim, but supported the claim on different grounds than he made in his state

appellate opening brief. Instead of arguing that the waiver was invalid because it was through counsel and not a personal waiver, petitioner reasserted the claim he made for the first time in his state appellate reply brief, namely, that counsel had failed to adequately inform petitioner that a bench trial was likely to result in a conviction of felony murder, and improperly advised petitioner that the judge would be lenient based on counsel's friendship with the judge. Claim 4 conclusorily asserted various grounds supporting a claim of ineffective assistance of trial and appellate counsel, including and without explanation that "[c]ounsel was ineffective in advising petitioner to waive his right to a second jury trial"⁵

A magistrate judge issued an order to show cause why the petition should not be denied as time barred (doc.#2). The order stated that "in the absence of any reason to toll the limitations period, Mr. Wood should have initiated this action prior to April 24, 1997"

⁵ Claims 3 and 5 are unrelated to the present appeal and were never presented to the state courts.

In his response, petitioner asserted that Colorado law provided no time limit to collaterally attack his felony murder conviction, and that the order denying his 1994 federal habeas petition had stated “that there is no time limit for [petitioner] to appeal” (doc.#4). He stated he “diligently exhausted his claims through the State courts, which failed to hear his claims on the merits,” but did not mention the 1995 motion. Petitioner provided various reasons why he did not initiate a state postconviction proceeding before 2004, including various transfers between facilities, including a transfer out of state, and recovery from back surgery, after which “he once again began researching his claims and filed a C.R.C.P. 35(c) motion for post-conviction relief in August of 2004” (*id.*). Again, petitioner did not mention his 1995 motion.

The district court dismissed the petition as time barred. The court found that petitioner’s response did not contest the magistrate judge’s calculations, and provided no explanation for his lack of diligence to pursue his claims prior to his 1997 transfer (doc.#5).

Petitioner filed a motion for reconsideration, primarily relying on the magistrate judge’s statement in the 1994 federal habeas proceeding

that there was no time limit to exhaust his claims (doc.#9). The motion did not mention the 1995 motion. The district court granted the motion without explanation, and ordered the Respondents to file a pre-answer response addressing the issues of timeliness and exhaustion (doc.#11,12).⁶

Respondent's response made the following argument with regard to timeliness:

As previously noted, Wood filed postconviction motions in the state district court in 1995 and 2004. It is clear that if Wood had filed only the 2004 motion his habeas petition would be untimely because the motion was filed long after his time for filing a habeas petition had passed. But it is unclear how the 1995 postconviction motion, which apparently was never ruled upon, affects the timeliness of Wood's habeas petition. While it is certainly arguable that the 1995 postconviction motion was abandoned before 1997 and thus did not toll the AEDPA statute of limitations at all, see *People v. Mamula*, 847 P.2d 1135 (Colo. 1993) (Crim. P. 35(b) motion for reduction of sentence deemed abandoned as a matter of law where circumstances were such that 20-month delay in seeking a ruling was

⁶ The Tenth Circuit surmised that "[t]he district court granted reconsideration, apparently to obtain the state's view of the timeliness issue."

unreasonable), Respondents will not challenge, *but are not conceding*, the timeliness of Wood's habeas petition in this pre-answer response.

(Doc.#15) (emphasis added).

With regard to exhaustion, Respondents maintained that Claim 1(a) had been presented in the 2004 motion, but that the references to federal law were merely to “‘the Double Jeopardy Clause of the United States’ and ‘U.S.C.A. AMENDMENT V,’ without discussion, except to discuss his convictions in relation to Colorado state law”

Respondents further maintained that a claim similar to Claim 2 had been presented in a different form in the 2004 motion, and that the other claims either had never been asserted or presented in the 1995 motion that had not been ruled on (doc.#15). The response concluded that the petition “is subject to being dismissed, either as a complete failure to exhaust or as mixed petition.” The response then asserted that the unexhausted claims would be procedurally defaulted under *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The response did not assert that the state courts’ rejection of all but the ineffective assistance

claim as successive constituted an independent and adequate state ground constituting a procedural default.

After petitioner filed his reply (doc.#16), a magistrate judge issued an order to show cause why the petition should not be dismissed as a mixed petition, finding Claims 1(a) and 2 to be exhausted and the other claims unexhausted. Alternatively, the order gave petitioner the option to voluntarily dismiss the unexhausted claims and proceed with the exhausted claims (doc.#17). The order contained no discussion concerning timeliness.⁷

Petitioner objected to the magistrate judge's finding of unexhaustion, but also moved to dismiss the unexhausted claims (doc.#18).

The district court overruled petitioner's objections, dismissed the unexhausted claims, and drew the remaining claims to a district judge and a magistrate judge (doc.#19). Like the magistrate judge's order, the

⁷ In the statement of the case, the order acknowledged the filing of the 1995 motions and found that "the trial court apparently only ruled on the motion for appointment of counsel"

district court's order noted in passing that the 1995 motion had not been ruled on.

The district court ordered Respondents to file a full answer to the petition (doc.#21). With regard to timeliness, the answer stated: "As noted in the pre-answer response, the Respondents are not challenging, but do not concede, the timeliness of the petition. Respondents hereby incorporate the arguments raised in the pre-answer response into this answer" (doc.#22).

With regard to exhaustion, the answer stated that "[t]he Respondents incorporate by reference those arguments as to exhaustion made in the pre-answer response regarding claim 2" (*id.*). The answer also argued Claim 1(a) was procedurally defaulted because the state courts had rejected it on the independent and adequate state ground that it had not been raised on direct appeal (*id.*). The answer also maintained that the claims failed on the merits.

After obtaining the state court records (doc.#23,24), the district court issued an order denying the petition (doc.#25). The district court found that "[u]pon current briefing, it appears that claim 1(a) may be

procedurally defaulted,” but elected “in the interest of fairness to Mr. Wood, to address claim 1(a) on the merits.” The court then rejected both claims on the merits (*id.*).

Petitioner appealed the district court’s order, both as to exhaustion and merits determination. The Tenth Circuit directed Respondents to file a brief responding to petitioner’s opening brief, which essentially reasserted the arguments made in its answer to the application.

After petitioner filed a reply, the Tenth Circuit granted a certificate of appealability on the two claims resolved on the merits. In addition, the Tenth Circuit recognized that petitioner’s claims “may be subject to dismissal for various procedural reasons.” Observing that petitioner’s “apparently dilatory behavior [between 1995 and 2004] calls into question his eligibility for the tolling provision of §2244(d)(2) and his eligibility for equitable tolling,” the Tenth Circuit indicated it would analyze the matter further and directed the parties to address

timeliness.⁸ The Tenth Circuit appointed counsel for petitioner and directed counsel to file a supplemental brief discussing the merits, timeliness, and procedural default.

With regard to timeliness, counsel's supplemental brief conceded "that the state court record . . . reflects no activity in Mr. Wood's case from the time the state court appointed counsel for Mr. Wood in December 1995 until August of 2004 when Mr. Wood filed his motion to vacate." Nevertheless, the brief asserted that because the 1995 motion was properly filed but never resolved, it remained pending during the entire eight-plus years of inactivity. The brief stated that equitable tolling was not an issue because the application was timely.

Respondent's answer brief maintained the 1995 motion was abandoned because petitioner failed to make reasonable efforts to secure a ruling, and no special circumstances existed to excuse petitioner's dilatoriness. Petitioner's reply brief asserted that not until December 2007 did a Colorado appellate court first recognize that a

⁸ The Tenth Circuit also directed the parties to discuss whether Claim 1(a) was procedurally defaulted.

postconviction motion could be abandoned. Petitioner did not cite *Day*, or assert that respondents had deliberately waived the issue.

The Tenth Circuit ordered Respondents to file a copy of all state court postconviction dockets and records regarding the 1995 motion, finding that the record on appeal was silent as to what happened to the motion. Respondents responded that the state trial court had sent all documents to the federal habeas court and had no additional documents related to the 1995 motion.

In an unpublished order, the Tenth Circuit affirmed the district court's order, but on a different ground. The court first found that it had discretion to affirm on any ground adequately supported by the record. Next, it acknowledged this Court's admonition in *Day* that a federal court cannot override a State's deliberate waiver of a limitations defense and sua sponte dismiss a habeas petition, but found that Respondents had made no such waiver. The court characterized as cryptic Respondents' statement that they were not challenging — and simultaneously not conceding — timeliness, but concluded that “[w]hile the precise import of this quotation eludes us, we conclude it is not a

deliberate waiver, given that it follows an argument as to why Wood's habeas petition would be untimely, and concludes with a refusal to concede that the petition is timely." The court noted that considering the timeliness issue is "particularly apt in this case, given that the issue was raised in the district court and addressed by Wood, the parties have briefed the issue on appeal, and the interests of justice would be served in reaching the timeliness issue given the extensive time period involved."

Turning to the substance of the issue, the Tenth Circuit looked to relevant state law in resolving the federal question of whether the 1995 motion was pending. The court found that Colorado's judge-made rule that a motion may be deemed abandoned if a defendant failed to secure an expeditious ruling "is consistent with 'Congress's intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely.'" Slip op. at 7 (Quoting *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000)). Next, quoting *Welch v. Carey*, 350 F.3d 1079, 1083 (9th Cir. 2003) (emphasis added), the court said that "Congress and the courts appropriately built slack into the

process by providing a *reasonable* grace period for pending applications, not for open-ended and unjustified delay in pursuing claims and relief. Tolling accommodates effort, not inaction.” Slip op. at 7.

Turning to the facts, the court found that petitioner made no attempt to communicate with the court for any reason over eight years. The court found it significant that on several occasions — in petitioner’s 2004 application, his federal habeas petition, his response to the district court’s order to show cause why his petition should not be dismissed as time barred, and his motion to reconsider the dismissal of his petition — petitioner never once mentioned his 1995 motion, but stated that *no* other postconviction proceedings had been filed prior to his 2004 application.

The court concluded that “[u]nder these unique circumstances, . . . Wood abandoned his 1995 motion before filing his 2004 petition.” The court found it unnecessary to decide when the abandonment occurred, as the entire one-year limitation period had run, and “any break in the pendency of the 1995 motion after AEDPA’s enactment renders Wood’s 2008 federal habeas petition untimely.” The court found that

petitioner's position that the 1995 motion was still pending under these circumstances was inconsistent with Congress's intent in establishing a one-year limitations period.

Counsel for petitioner filed a petition for panel rehearing challenging the Tenth Circuit's determination that respondent's cryptic statement neither challenging nor conceding timeliness was not a deliberate waiver. Alternatively, counsel asked the court to remand the case for an evidentiary hearing on the issue of abandonment. Petitioner made no proffer concerning what evidence would be presented that the Tenth Circuit had not already considered.

REASONS WHY THE PETITION SHOULD BE DENIED

This case stands for the unremarkable proposition that an appellate court has discretion to affirm a district court's ruling on any ground adequately supported by the record. The Tenth Circuit considered the entire context of respondents' pleading — not an isolated phrase as petitioner does — in determining that respondents had not deliberately waived a time bar defense. Then based on its review of the

entire state court record, the Tenth Circuit properly concluded that petitioner's dilatory conduct and admissions in his pleadings demonstrated he had abandoned his 1995 motion. Review under these unique circumstances is unwarranted.

1. **Certiorari is not appropriate to review the Tenth Circuit's proper exercise of its discretion to affirm the district court on a different ground adequately supported by the record.**

This Court has recognized that a respondent in *this* Court may defend a judgment on any ground supported by the record, where the asserted grounds were raised below and fully briefed and argued in this Court. *Bennett v. Spear*, 520 U.S. 154, 166-67 (1997); *see also Ponte v. Real*, 471 U.S. 491, 500 & n.3 (1985) (recognizing that respondent was entitled to urge affirmance of state court judgment on a ground not adopted by that court, but rejecting the argument where the record was exceedingly thin and demonstrated confusion as to the proceedings below).

Here, the issue is not even whether *this* Court should consider timeliness for the first time, but whether the Tenth Circuit properly did

so. Whereas this Court handpicks the cases it reviews, the circuit courts are decisional courts that must review all properly filed appeals. Where a court of appeals determines the interests of justice are served by affirming the district court's ruling on a different ground adequately supported by the record, and in the absence of a deliberate waiver of that ground, the court properly exercises its discretion to do so.

In *Day*, this Court held that a federal district court has discretion on its own initiative to dismiss a habeas petition as untimely where the State answered the petition without contesting its timeliness but without deliberately waiving the defense. 547 U.S. at 202. The same principle should permit a court of appeals in the interests of justice and in the exercise of its discretion to proceed in the same manner where the record adequately supports the alternative ground. This is nothing more than affirming the district court's ruling on a different ground.

Indeed, if an appellate court is not permitted to consider a procedural bar for the first time on appeal that is supported by the record and is dispositive of the case, the interests of justice would be thwarted in a case such as this where the application is obviously time

barred. In creating the time limitation period, Congress intended to advance finality and prevent stale claims, and in so doing to protect the State's important interest in preserving a conviction. *See Mayle v. Felix*, 545 U.S. 644, 662 (2005).

Here, the obviousness of the application's untimeliness is well supported by the record that the Tenth Circuit had before it. First, the state district court has provided the entire record. Second, Wood's failure to assert the 1995 proceeding as a prior proceeding despite numerous opportunities starting in 2004 is strong evidence that he himself considered the motion abandoned. Third, Wood has never made any proffer concerning additional evidence he believes should be considered.⁹

Importantly, timeliness of petitioner's federal habeas application has been an issue since the inception of the case. The district court initially dismissed the case when petitioner failed to provide any basis for tolling. Moreover, respondents at their first opportunity raised the

⁹ Of course, any such proffer for the first time in his certiorari reply brief would be wholly improper.

very argument of abandonment that the Tenth Circuit ultimately relied on. In light of a record that shows over eight years of inactivity and petitioner's repeated failures to acknowledge the 1995 motion, it was obviously a mistake for respondent not to affirmatively challenge timeliness. *Cf. Day*, 547 U.S. at 210 (district court properly considered timeliness sua sponte where the state's failure to assert time bar was an inadvertent error and not a deliberate waiver). If Respondents' response had been only that they were not challenging timeliness, the question of deliberate waiver would be closer. However, and as the Tenth Circuit reasonably concluded, the context of what the court charitably characterized as cryptic showed that the response was "not a deliberate waiver, given that it follows an argument as to why Wood's habeas petition would be untimely, and concludes with a refusal to concede that the petition is timely." Rather, the response demonstrates the haste in which the pleading was prepared in order to deal with an overloaded docket.

That respondents' treatment of the timeliness issue was a mistake and not a deliberate waiver is further demonstrated by respondents'

failure to raise an obvious procedural bar. Wood's challenge to the validity of his jury trial waiver in his 2004 motion was based on the allegation that it had been made through counsel and not personally made by Wood. It was only in his state appellate reply brief that he first asserted that counsel's bad advice rendered the waiver invalid, the ground that made its way into his federal habeas application. Under Colorado law, this new allegation was not cognizable. *See People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990) (Colorado Supreme Court would not consider issue raised for first time in reply brief).

Importantly, this was a new allegation and not merely supplemental evidence that petitioner presented for the first time in his appellate reply brief then in his habeas application. To exhaust a claim, an applicant must fairly present to the state courts every claim he subsequently presents on habeas. To do this, the applicant must present the same claim he urges upon the federal courts. *Picard v. Connor*, 404 U.S. 270, 276 (1971). This requires an applicant to present the same factual allegations, and not merely the same theory. *Id.*; see also *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (§2254 requires federal

habeas petitioner to provide state courts with fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim).

The new factual allegation presented for the first time in his appellate reply brief fundamentally altered his claim. The claim that was fairly presented was that the jury trial waiver was not personal. As the state courts found, petitioner's signed waiver and docket entries rebutted this claim and rendered petitioner's factual allegation untrue. However, by challenging counsel's advice, he asserted a claim that involved evidence not in the record. To have such a claim considered, it was necessary to present the claim to the state trial court in the first instance to determine whether an evidentiary hearing was appropriate. As a result, Wood never fairly presented this claim in state court.

Notwithstanding this obvious anticipatory default under *Coleman, supra*, respondents mistakenly conceded that the jury trial waiver claim in his federal habeas claim was similar to the claim raised in his 2004 motion. This oversight further reflects the haste in which the pleadings were prepared to cope with a heavy caseload.

Further, it is not necessary for this Court to use this case to consider the boundaries of what constitutes a deliberate waiver. Respondents could find no appellate cases determining the factors that make a waiver deliberate. The dearth of cases is significant for at least two reasons.

First, it suggests that the issue has not often arisen. Second, it shows that the issue has not had sufficient time to percolate through the lower courts. “To identify rules that will endure, [this Court] must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law.” *California v. Carney*, 471 U.S. 386, 400 (1985). “Deliberation on the question over time winnows out the unnecessary and discordant elements of doctrine and preserves ‘whatever is pure and sound and fine.’” *Id.* at 400-01 (quoting B. Cardozo, *The Nature of the Judicial Process* 179 (1921)). Determining the factors that make a waiver deliberate is better left to the lower courts before this Court intervenes.

Petitioner asserts “the circuit’s decision in *Wood* that *Day* permits an appellate court to raise a timeliness defense *sua sponte* for the first time on appeal conflicts with the only other circuit to have decided the issue,” citing *Sasser v. Norris*, 553 F.3d 1121, 1128 (5th Cir. 2009), and *Barnett v. Roper*, 541 F.3d 804, 808 (5th Cir. 2008). For several reasons this assertion is unavailing.

First, the Tenth Circuit did *not* rely on *Day* to raise a timeliness defense *sua sponte* for the first time on appeal. Rather, the court simply exercised its discretion to affirm the district court on a different ground. The court relied on *Day* only to the extent of determining that respondents had not deliberately waived the defense.

The crux of the issue before this Court is one relating to the amount of discretion a particular circuit elects to take. By definition, discretion means the authority to make one choice to the exclusion of another. If a particular circuit chooses to limit its discretion, that is a matter that is more appropriately left to the circuits and not a matter requiring this Court’s intervention. Because the question involves the

independent judgment of the appellate court, a bright-line rule limiting that independence and discretion would not be desirable.

Second, although the Tenth Circuit's procedure for dealing with grounds not employed by the district court may differ from two other circuits, the panel's opinion created no split for the simple reason that it is unpublished. It reflects the opinion of a single panel in the circuit, and does not speak for the Tenth Circuit as a whole. Thus, it does not create a split between circuits.

Third, *Sasser* and *Norris* are distinguishable. In both cases, the respondent raised the issue for the first time on appeal. Here, the issue was raised in the district court, first by the court itself, then by respondents. Importantly, the district court did not characterize respondent's "cryptic" comment as a deliberate waiver. Given the ambiguity of respondents' "not challenging/not conceding comment," the district court probably should have inquired further into whether respondents were waiving the issue. *See Day, supra*. Indeed, respondents' raising of the issue in their initial pleading no doubt prompted the Tenth Circuit to request briefing by the parties.

Fourth, whether to address an issue sua sponte is fact specific, as it necessarily depends on the adequacy of the record before the court. Here, and as found by the Tenth Circuit, the facts are particularly unique. As such, this case involves a situation that is unlikely to arise often.

2. Revisiting *Day*'s rejection of an inflexible rule of forfeiture is premature.

Wood asks this court to extend to federal habeas cases the principle set forth in *Kontrick v. Ryan*, 540 U.S. 443 (2004), and *Eberhart v. United States*, 546 U.S. 12 (2006), that statutory limitations defenses are forfeited if not raised before the district court rules on the merits of a claim. The short answer is that this Court rejected such an approach in *Day*.

There, the petitioner took the position consistent with *Kontrick* that a defendant forfeits a statute of limitations defense not asserted in its answer. In lieu of such an inflexible rule, the State advocated for an intermediate approach to permit the court to exercise discretion in each case in the interests of justice. This Court agreed with the State, and

held “that district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition.” *Day*, 547 U.S. at 207-09.

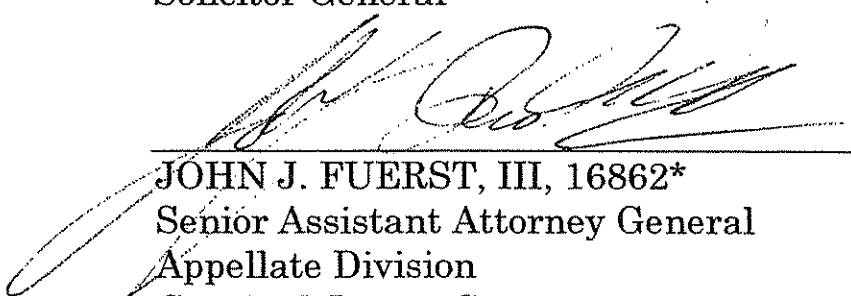
As argued above, there is no principled reason to deprive a court of appeals of the same discretion that a district court is authorized to exercise where the record supports the appellate court's decision. And as barely five years have elapsed since *Day*, the issue is not postured for this Court to revisit.

CONCLUSION

Nothing about this case warrants review. The Tenth Circuit properly exercised its discretion in electing to affirm the district court on a different ground. The court's decision was particularly appropriate given that the record on appeal included the complete state court record. To the extent petitioner seeks to revisit *Day*, the timing of his request is as premature as his application was untimely. This Court should deny the petition.

JOHN W. SUTHERS
Attorney General

DANIEL D. DOMENICO
Solicitor General

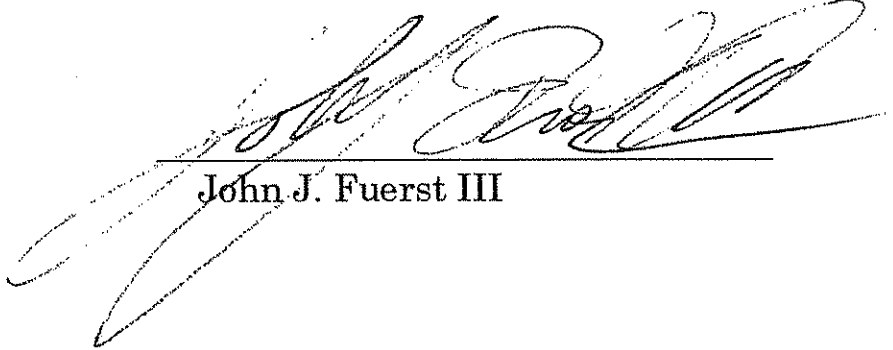


JOHN J. FUERST, III, 16862*
Senior Assistant Attorney General
Appellate Division
Criminal Justice Section
Attorneys for Respondent
1525 Sherman Street, 7th Floor
Denver, Colorado 80203
Telephone: (303) 866-5785
FAX: (303) 866-3955
E-Mail: matt.holman@state.co.us
*Counsel of Record

CERTIFICATE OF SERVICE

I certify that on this 6th day of July 2011, I served the foregoing upon counsel for petitioner herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, addressed as follows:

Kathleen A. Lord
Assistant Federal Public
Defender
633 17th St, Ste 1000
Denver, CO 80202



John J. Fuerst III