NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK WOOD, *Petitioner*,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent*.

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

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, Patrick Wood, by his court-appointed counsel, Kathleen A. Lord, Assistant Federal Public Defender for the District of Colorado, respectfully asks this Court for leave to proceed *in forma pauperis* in filing the attached Petition for Writ of Certiorari. In support of this request, Petitioner states that undersigned counsel was appointed pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, by the United States Court of Appeals for the Tenth Circuit, and he is unable to retain counsel and pay for the costs attendant to the proceedings before this Court.

WHEREFORE, the Petitioner Patrick Wood requests that he be granted leave to proceed *in forma pauperis*.

Respectfully submitted,

RAYMOND P. MOORE
Federal Public Defender

KATHLEEN A. LORD*
Assistant Federal Public Defender
633 17th Street, Suite 1000
Denver, Colorado 80202
tel: (303) 294-7002
fax: (303) 294-1192
e-mail: kathleen_lord@fd.org

**Counsel of Record for Petitioner*

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Federal Public Defender

KATHLEEN A. LORD*
Assistant Federal Public Defender
633 17th Street, Suite 1000
Denver, Colorado 80202
tel: (303) 294-7002
fax: (303) 294-1192
e-mail: kathleen_lord@fd.org

**Counsel of Record for Petitioner*

QUESTIONS PRESENTED

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

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

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IN THE SUPREME COURT OF THE UNITED STATES

Patrick Wood, *Petitioner*,

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KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent*.

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

OPINION BELOW

The United States Court of Appeals for the Tenth Circuit affirmed the district court's order denying Mr. Wood's 28 U.S.C. § 2254 petition for writ of habeas corpus in an order and judgment dated November 26, 2010. This opinion is attached as Appendix A to this petition.

STATEMENT OF JURISDICTION

As permitted by the circuit court, Mr. Wood filed a petition for rehearing on January 3, 2011, which the court denied on January 7, 2011. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. As required by Supreme Court Rule 13, this petition has been filed within ninety days of the order denying rehearing, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

28 U.S.C. Section 2244(d)(2)

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.

Rules Governing Section 2254 Cases in the United States District Courts

> **Rule 12**: The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

Federal Rules of Civil Procedure

FRCP Rule 8(c). General Rules of Pleading ...

(c) Affirmative Defenses.

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: ....

- laches;
- statute of limitations; and
- waiver.

FRCP Rule 12(b). Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing ....

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

FRCP Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

STATEMENT OF THE CASE AND FACTS[1]

Patrick Wood filed a petition for writ of habeas corpus in the United States District Court for the District of Colorado, challenging his state conviction for first degree murder (Doc.1, p5). Mr. Wood raised five constitutional claims, three of which were ultimately dismissed for non-exhaustion and two of which, involving constitutional claims that Mr. Wood's right to trial by jury had been violated and that his two convictions for murder of a single person violated double jeopardy, were ruled on by the district court on the merits. *See* App. B.

The district court denied Mr. Wood a certificate of appealability ("COA"), but the Tenth Circuit granted him one. *See* App. D. The circuit court appointed counsel for Mr. Wood, authorized the appeal of two substantive claims, but also ordered the parties to brief the timeliness of Mr. Wood's § 2254 petition and any state procedural rules that might bar consideration of Mr. Wood's claims. *See* App. C at 18. Timeliness had not been challenged by the government in the district court (Doc.15,p3-4; Doc.22,p4-6). Specifically, the state asserted "Respondents are not challenging, but do not concede, the timeliness of the petition." (Doc.15,p4; Doc.22p4).

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[1] The record on appeal consists of one volume of federal district court pleadings and orders, and the state court record consisting of one pleadings volume and a compact disc containing volumes 2-7, which are transcripts of pre-trial and trial proceedings. Counsel for Mr. Wood will cite to the federal court record on appeal by Document number and page number of the record (*e.g.*, Doc.1,p5); counsel will cite to the state court proceedings by volume and page number of the proceedings (*e.g.*, v1p8). Citations to matters contained in Appendices to this petition with be to the Appendix and page number (e.g., App.A-p1).

1. Conviction, trial and sentence [Case No. 86CR123]

Mr. Wood was charged in 1986 with two counts of first degree murder, in violation of § 18-3-102(1)(a) and (b), Colorado Revised Statutes (1985) (first degree murder-after deliberation and first degree murder-felony murder), attempted aggravated robbery, two counts of menacing, and one count of aggravated robbery in violation of § 18-4-302 (v1p2-11,154).

The charges arose from an incident in January of 1986 in which Mr. Wood was accused of entering a pizza store, attempting to rob it and killing the assistant store manager (v1p17-18). Two other employees disarmed Mr. Wood when he attempted to flee and restrained him until the police arrived (*id.*).

The prosecution initially sought the death penalty against Mr. Wood (v1p23-24). A single lawyer represented him at the capital trial, and the same lawyer represented him on appeal (v1p34,38,281-82). The jury deadlocked on count one (after deliberation first degree murder), but signed verdict forms on all other counts, and the court declared a mistrial (v1p183-185; 273, 281).

After the mistrial, Mr. Wood signed a jury trial waiver, the constitutional validity of which he raised in his petition. The court acquitted Mr. Wood of first degree murder (after deliberation) and convicted him of the lesser included offense of second degree murder and of all other charges (v1p190-194,274). The court sentenced Mr. Wood to life in prison for murder, merging the felony murder, second degree murder and aggravated robbery counts, and to concurrent 4-year terms for menacing (v1p196).

2. *Direct appeal [Case No. 87CA0273]*

Mr. Wood was represented on direct appeal by the same lawyer who represented him in the trial court. On appeal, this lawyer challenged only the district court's denial of Mr. Wood's motion to suppress his statements (v1p197-202).

The court of appeals affirmed Mr. Wood's conviction in an unpublished decision issued May 4, 1989 (v1p197-202; Doc.15[#10], p207-215). The Colorado Supreme Court denied certiorari on December 10, 1989 (v1p260; Doc.15[#12], p220).

3. *1994 federal habeas proceeding [Case No. 94-K-219]*

In 1994, prior to the adoption of AEDPA, Mr. Wood filed a *pro se* habeas petition pursuant to 28 U.S.C. § 2254. This petition raised eight claims, five of which the magistrate determined, and Mr. Wood conceded, had never been raised in state court. The district court accordingly dismissed the petition on March 21, 1995 (*id.*, p125).

4. *State court postconviction proceedings in the district court*

a. 1995 Colorado Rule of Criminal Procedure 35(c) ["Rule 35(c)"] motion to vacate judgment

On June 29, 1995, a few months after Mr. Wood's federal habeas petition was denied for failure to exhaust state court remedies, he filed a Motion to Vacate Judgment of Conviction and Sentence, pursuant to Crim.P. 35(c), in state court, along with a motion for appointment of counsel (v1p204-212). In his motion, Mr. Wood challenged only his class one felony conviction for first degree murder.[2]

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[2] Under Colorado law, there is no time limit for filing a postconviction challenge to a class one felony conviction. *See* § 16-5-402(1), C.R.S.

This motion raised the following claims:

1. Mr. Wood received ineffective assistance of counsel in violation of the Fourteenth Amendment. (In support of this claim, Mr. Wood asserted that his trial counsel had given him bad legal advice concerning the offenses with which he was charged, the possible penalties and whether to testify at both his trials and whether to waive his right to jury at the second trial). (Doc.15[#3], p133-140; v1p204-212,¶ ¶ 6-12).

2. Mr. Wood's conviction for both second degree murder and felony murder violated the Double Jeopardy Clause. (*Id.* at ¶ ¶ 15-19).

3. Mr. Wood's conviction was unconstitutionally obtained through the use of an involuntary statement elicited when the defendant was physically and mentally impaired after being severely beaten. (*Id.* at ¶ ¶ 20-29).

After approximately three months passed with no activity on his motions, Mr. Wood filed a Motion to Request a Ruling on Previously Filed Motions (v1p213-214). On December 1, 1995, the district court appointed postconviction counsel for Mr. Wood (v1p215). To date, the record reflects this motion has not been ruled upon.

b. 2004 Rule 35(c) Motion to Vacate Judgment

On August 30, 2004, Mr. Wood filed a pro se Petition for Postconviction Relief Pursuant to Crim.P. 35(c) (v1p217-226). Mr. Wood claimed in this motion that:

1. His convictions for both second degree murder and first degree murder (felony murder) violated the Double Jeopardy Clause.

2. His constitutional right to trial by jury was violated when trial by jury was waived without the defendant's consent and without the trial court adequately inquiring into defendant's understanding of his rights; and due process of law; and

3. Defense counsel, who represented Mr. Wood at trial and on direct appeal, provided constitutionally ineffective assistance of counsel by waiving defendant's right to jury trial without his consent.

On September 3, 2004, four days after the motion was filed, the district court denied it without a hearing (Doc.15[#6] p167; v1p228-230: Order). The state court ruled that all claims, other than ineffective assistance of counsel, were procedurally barred by Mr. Wood's failure to raise the claims on direct appeal.[3] The court reached this conclusion even though it acknowledged that "[t]he Court does not have available the appellate record or the appellate decision issued by the Colorado Court of Appeals. The Court finds, however, that with each and every one of the grounds asserted could have been asserted could have been presented by the Defendant after his conviction." (Doc.15[#6] p168; v1p229).

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[3] The district court's procedural default ruling, although affirmed by the Colorado Court of Appeals, is patently wrong. Both state courts relied on Colorado Rule of Criminal Procedure 35(c)(3)(VII), which creates a procedural bar to claims that could have been raised on direct appeal but were not. This Rule, however, was adopted in 2004. When Mr. Wood filed his appeal in 1987, state law permitted individuals to bring claims in postconviction proceedings even if the claims could have been raised on direct appeal. *See* Colo.Crim.P. 35(c)(2) (1984); *see also People v. Rodriguez,* 914 P.2d 230, 254 (Colo. 1996) (rejecting government's contention that claims available on direct appeal may not be brought in a postconviction proceeding absent special circumstances); *People v. Bradley,* 169 Colo. 262, 455 P.2d 199, 200 (1969) (one may raise constitutional issues in a postconviction motion "although the same issues could have been effectively raised on [appeal]").

As a matter of due process, Mr. Wood could not lawfully be barred from asserting claims under § 2254 by virtue of a state procedural default rule that did not exist when the rule would have required him to act to preserve his claim. "[I]f a petitioner could not reasonably have been aware that a procedural rule would prevent the court from addressing the merits of his claim, his violation of that rule cannot bar federal review." *Osborn v. Shillinger,* 861 F.2d 612, 618 -621 (10th Cir. 1988).

The state court also denied the ineffective assistance of counsel claim, ruling:

> The Court has reviewed the minutes of the file regarding the criminal proceedings after the mistrial was declared and found that on January 5, 1987 the minute orders reflect that the Defendant's written waiver of right to jury trial and order was filed. Therefore the Court finds that the files and records show to the satisfaction of the Court that the factual allegation made by the Defendant is untrue and the Defendant's motion for relief on this ground is denied without hearing.

The record strongly suggests that the court did not review the actual file or even a majority of the minutes before ruling, since both the Colorado Court of Appeals decision and a written jury waiver can be easily found in the court's file (v1p187-188, 197-203). Moreover, both the court's minute orders and its file reflect that the Rule 35(c) motion which was filed in 1995 was still pending and that counsel had been appointed to represent Mr. Wood on that earlier motion.

c. 2004 Motion to Re-Examine Defendant's [Rule 35(c) Motion to Vacate]

On October 7, 2004, Mr. Wood filed a motion asking the state district court to re-examine his petition for postconviction relief (Doc.15[#6] p170-171; v1p231-232: Motion to Re-examine). Mr. Wood asked that, if the court were correct and the failure to raise issues on appeal created a procedural default, he be allowed to add a claim of appellate ineffective assistance against his trial lawyer who had also represented him on direct appeal (*Id.*).

Although Colorado courts do recognize the viability of timely motions to reconsider in criminal cases,[4] the district court denied this motion without considering his request, ruling that "no statutory right" to seek reconsideration existed. (v1p234-5).[5]

5. ***State postconviction appeal [Case No. 04CA2252]***

The district court denied Mr. Wood's request for appointment of counsel on appeal and he was *pro se* in the state appellate courts (v1p256-259).

On August 3, 2006, the court of appeals affirmed the district court's order denying postconviction relief (Doc.15[#10] p207; v1p262-269). Like the district court, the state court of appeals rejected all of Mr. Wood's challenges, except the ineffective assistance of counsel claim, because of a purported procedural default based on the defendant's failure to raise issues on direct appeal, a procedural default that did not exist at the time of defendant's direct appeal (Doc.15[#10] p211-212; v1p266-67). [*See* fn. 3, *supra* at p.8]

The Colorado Supreme Court denied Mr. Wood's petition for writ of certiorari on February 5, 2007 (v1p260).

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[4] *See, e.g., People v. Albaugh,* 949 P.2d 115, 116 (Colo.App. 1995); *Stone v. People,* 895 P.2d 1154 (Colo. App. 1995); *People v. Janke,* 852 P.2d 1271 (Colo. App. 1992).

[5] The district court's ruling was patently wrong as Mr. Wood's motion to re-examine (or reconsider) was filed before the 45-day deadline for the notice of appeal. *See* cases cited in fn. 4, above. Although there is no "statutory right" to seek reconsideration of final orders in criminal cases, Colorado courts recognize that reconsideration motions may be filed and ruled on so long as they are ruled on while the district court still has jurisdiction, i.e. before the 45-day deadline for a notice of appeal expires. *See, e.g., People v. Albaugh,* 949 P.2d 115, 117 (Colo. App.1997); *see also* Colorado Appellate Rule 4.

6. *Federal habeas proceedings [Case No. 08-cv-00247-WYD]*

Mr. Wood filed his 28 U.S.C. § 2254 habeas petition on February 5, 2008, within a year of the state supreme court's order denying certiorari (Doc.1,p5-37). The district court dismissed all but two of Mr. Wood's claims for failure to exhaust and denied the two remaining claims on their merits (Doc.25p434). *See* App.B.

7. *Certificate of Appealability*

The district court denied Mr. Wood a certificate of appealability (Doc.31 p574). The Tenth Circuit Court of Appeals, however, appointed counsel for Mr. Wood and granted a certificate of appealability on two substantive issues.[6] In addition, the court of appeals asked that the procedural issues of timeliness and procedural default based on the state courts' reliance on Crim.P. 35(c)(3)(VII) be briefed for the court. *See* App.D.

8. *The Tenth Circuit's Decision*

Having ordered briefing on the timeliness of Mr. Wood's petition, and notwithstanding the state's decision not to challenge timeliness in the district circuit court, the circuit court affirmed the district court's decision, solely on the ground the petition was untimely under 28 U.S.C. § 2244. *See* App.A.

The Tenth Circuit ruled that Mr. Wood had abandoned his 1995 Rule 35(c) motion and, thus, the tolling allowed under § 2244(d) had stopped at some point before his

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[6] A COA was granted on "(1) Wood's claim that his simultaneous convictions for felony murder and second degree murder violate his right against double jeopardy under the Fifth and Fourteenth Amendments to the Constitution, and (2) Wood's claim that his decision to waive a jury trial was not 'knowing, intelligent, and voluntary.'" (App.D, p2).

habeas petition was filed in 2008 resulting in the expiration of the one-year statutory limitations period.

The Tenth Circuit noted that it could not "override a State's deliberate waiver of a limitations defense" and *sua sponte* dismiss a petition. App.A, p5, fn.2, quoting *Day*, 547 U.S. at 202. However, the court failed to recognize that the government's statements in the district court that it was "not challenging the timeliness" of Mr. Wood's petition constitute a waiver and/or forfeiture of the defense. Instead, the appellate court wrote that it could not understand what the government meant when it said it was not challenging the defense, but whatever it meant was something not akin to a deliberate waiver:

> In their habeas answer, the Respondents provided a cryptic response to the timeliness question. They first incorporated an argument from their pre-answer response about the statute of limitations expiring before Wood filed his habeas petition, and then stated that they were "not challenging, but do not concede, the timeliness of [Wood's][habeas] petition." R., Vol. 1 at 273. While 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. *Cf. Day*, 547 U.S. at 209 (holding that state's erroneous concession of habeas petition's timeliness did not preclude the district court from sua sponte dismissing the petition as untimely).

App.A-p5, fn.2.

Mr. Wood filed a timely petition for rehearing in which he challenged the circuit court's authority to raise the timeliness defense sua sponte when the government itself had chosen to forego the defense in the district court. (*See* 1.5.11 Petition for Rehearing

at p3-9). In the alternative, Mr. Wood challenged the court's finding that his 1995 state court postconviction motion was no longer pending, as a matter of state law and as a matter of fact. (*See id.* at 10).

REASONS FOR GRANTING THE WRIT

First, the tenth circuit's decision to *sua sponte* raise the affirmative defense of timeliness and deny Mr. Wood habeas relief solely on that ground, after the government had affirmatively chosen not to challenge the timeliness of the petition i and the district court had ruled on the merits, clearly conflicts with this Court's precedent. *See Kontrick v. Ryan,* 540 U.S. 443 (2004) (non-jurisdictional timeliness defense is forfeited if not raised before district court rules on merits of claim); *Eberhart v. United States,* 546 U.S. 12 (2006) (same).

Wood v. Milyard also illustrates a serious misunderstanding of the reach of *Day v. McDonough,* 547 U.S. 198 (2006), which: (1) authorized district courts, not appellate courts, to *sua sponte* raise a timeliness defense under certain circumstances; and (2) made clear that a district court would abuse its discretion if it failed to accept the government's deliberate waiver of the defense.

In addition, 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. *Compare Sasser v. Norris,* 553 F.3d 1121, 1128 (5th Cir. 2009) ("The discretion to consider the statute of limitations defense *sua sponte* does not extend to the appellate level"), citing *Barnett v. Roper,* 541 F.3d 804, 807 (5th Cir. 2008).

The tenth circuit's decision in *Wood* has so far departed from the accepted and usual course of judicial proceedings that this Court should exercise its supervisory authority and, at a minimum, grant the writ, vacate the order and judgment, and remand Mr. Wood's case with instructions that the circuit court not consider the timeliness of Mr. Wood's petition since it is contrary to established federal law for an appellate court to raise a non-jurisdictional statutory limitations defense *sua sponte* when, as here, the government has chosen not to raise the defense in the district court.

In addition, this case presents an excellent factual backdrop for this Court to consider an important federal question and avoid further misapplication of the law concerning forfeiture and waiver of non-jurisdictional statutory defenses in habeas cases. A fair reading of *Day, supra,* and *Kontrick v. Ryan, supra,* establishes that the § 2244(d) time bar defense should be deemed forfeited when, as here, the respondent is afforded an opportunity in the district court to raise the defense and declines to assert it.

Day, however, does not consider the contours of what the majority meant by a "deliberate waiver" of a timeliness defense such that the district court would lack discretion to disregard the waiver by the state. Moreover, the *Day* Court was not presented with the precise issue here of whether (and, if so, under what circumstances) an appellate court may *sua sponte* inject a timeliness defense into a case when the state failed to raise it below. Nor did the Court address forfeiture of the statutory timeliness defense, although it has done so in analogous contexts. *See Kontrick, supra* (timeliness

defense to creditor's objection to discharge in bankruptcy); *Eberhart, supra* (timeliness objection to motion for new trial).

The respondent here affirmatively chose not to assert the affirmative defense of timeliness in the district court. Although the government was aware that a timeliness argument could be made and explained it to the court, it chose not to assert the affirmative defense. Under these circumstances, this Court's decision in *Day v. McDonough* would forbid a district court from dismissing a petition as untimely.

The rationale underlying this Court's decision in *Day,* which allows a district court to *sua sponte* dismiss a habeas petition on timeliness grounds despite the government's erroneous calculation of the limitations period, clearly does not allow an appellate court to *sua sponte* reject a petitioner's claims solely on timeliness grounds when, as here, the state has made a strategic decision not to assert the defense in the district court and the district court has ruled on the merits.

One additional matter. The circuit court's decision to *sua sponte* raise a defense on behalf of the government for the first time on appeal, a defense that should have been deemed forfeited by the government's decision "not to challenge" timeliness when expressly offered the opportunity to do so in the district court, crosses a line toward judicial advocacy, a line over which both the majority and dissent expressed concern in *Day.* As noted by the majority, if, as the Court has held, district courts have no obligation to act as counsel for a pro se litigant, "then, by the same token, they surely have no obligation to assist attorneys representing the State." 547 U.S. at 210. And, as

noted by the dissent: "Requiring the State to take the affirmative step of amending its own pleading at least observes the formalities of our adversary system, which is a nontrivial value in itself." *Day*, 547 U.S. at 217, n.2 (Scalia, J. dissenting).

Here, the circuit court appeared to act as an advocate for the state. The tenth circuit also failed to recognize that this Court's decision in *Day v. McDonough* does not authorize an appellate court to sua sponte raise a timeliness challenge to a habeas petition after the state makes a decision not to challenge the timeliness of the petition in the district court. This Court should take certiorari to recognize that, like all non-jurisdictional affirmative defenses, the one-year limitations period in 28 U.S.C. § 2244(d) is forfeited if not raised in a timely manner.

The tenth circuit's decision that an appellate court may *sua sponte* raise the affirmative defense of timeliness, pursuant to 28 U.S.C. § 2244(d), on behalf of the government stands alone and conflicts with the decisions of other circuits that reject timeliness challenges to habeas review when made by the government for the first time on appeal.

There is, in fact, a circuit split on the question of whether an appellate court may sua sponte raise a § 2244(d) timeliness defense for the first time on appeal. The Tenth Circuit's decision in Mr. Wood's case plainly approves of an appellate court raising a statute of limitations defense *sua sponte*, after the merits of the petition have been ruled on in the district court. Upon information and belief no other circuit court appears to have done so.

In the wake of *Day v. McDonough*, only two other circuits appear to have considered a timeliness challenge to a habeas petition made for the first time on appeal. *See Sasser v. Norris*, 553 F.3d 1121, 1128 (5th Cir. 2009); *Barnett v. Roper*, 541 F.3d 804, 807 (5th Cir. 2008); *Grisby v. Cotton*, 456 F.3d 727, 731 (7th Cir. 2006). Notably, the timeliness challenges in these cases, unlike Mr. Wood's, were made by the government for the first time on appeal and not by the circuit court acting sua sponte.

The circuits are not in agreement as to the approach to be taken when a timeliness defense to a habeas petition is raised for the first time on appeal.

The Fifth Circuit acknowledges that this Court, in *Day v. McDonough*, carved out an exception to the general rule that limitations defenses are forfeited unless pled by the government. *See Barnett v. Roper*, 541 F.3d at 807. However, the Fifth Circuit has held unequivocally that the *Day* exception, which permits a district court to raise the timeliness of a state prisoner's habeas petition *sua sponte*, does not extend to appellate courts. *See id.; accord Sasser v. Norris*, 553 F.3d at 1128.

In part, the *Barnett* Court refused to extend *Day* to the appellate level because of this Court's general holding that a timeliness objection cannot be raised after the case has been decided. *Barnett, supra*, citing, *Kontrick v. Ryan*, 540 U.S. 443 (2004). In *Kontrick*, a unanimous decision authored by Justice Ginsburg, who also wrote the majority opinion in *Day*, this Court held that a debtor forfeits its right to rely on the time limit for a creditor to file objections to discharge if the debtor does not raise the issue before the bankruptcy court reaches merits of creditor's objection. In *Kontricik*, this Court

distinguished between a court's subject matter jurisdiction, which cannot be expanded to account for the parties' litigation conduct and "a claim-processing rule [that], even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." 540 U.S. 916. Clearly, § 2244's time bar is not jurisdictional and falls more properly in the category of a claim-processing rule that is subject to forfeiture or waiver.

In *Barnett,* the petitioner conceded that his application was twenty-five days late. *See id.,* 541 F.3d at 807. Nevertheless, the appellate court determined that by not raising timeliness in the district court, the government had forfeited the claim and could not raise it for the first time on appeal. *See id.* at 807-808.

In *Sasser,* the court expressed no opinion on the timeliness of the petition. Instead, the court plainly held that the discretion to consider the limitations defense *sua sponte* did not extend to the appellate level. "Because the government did not timely assert the statute of limitations defense, the statute of limitations defense is forfeited...." *Sasser,* 553 F.3d at 1128.

The Seventh Circuit has also declined to consider the timeliness of a state prisoner's habeas petition when raised for the first time on appeal, but has treated the issue differently than the Eighth Circuit. *See Grisby v. Cotton,* 456 F.3d 727, 731 (7th Cir. 2006). In *Grigsby,* the court treated timeliness and procedural default claims in a similar fashion and stated with respect to each that:

> [the court is] under no obligation to strictly enforce a state's forfeiture or a petitioner's procedural failings. Rather, we must decide whether the interests of justice" require a resolution of the merits of a petition despite procedural defenses raised for the first time on appeal. *Granberry v. Greer*, 481 U.S. 129, 136 (1987); see Day v. McDonough [citation omitted]; *Jones v. Hulick*, 449 F.3d 784, 787-88 (7th Cir. 2006).[7]

Grrigsby, 456 F.3d at 731.

The *Grigsby* Court ruled that it would be "inappropriate" for it to reach the timeliness argument when it was not raised by the state in its response, and it did not provide a basis for the district court's decision. *See id.* It is not clear from the seventh circuit's decision whether, under these facts, it would always find forfeiture or whether it believes that, under *Day*, appellate courts retain discretionary authority to consider timeliness challenges by the government for the first time on appeal even when the government chooses not to assert the defense in the district court. Instead, after finding review of the timeliness argument would be inappropriate under the circumstances, the seventh circuit compares the holding in *Day* to the holding in *Eberhardt v. United States*, 546 U.S. 12 (2005), a case in which the government was held to have forfeited the right to

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[7] In *Jones*, the habeas petition was dismissed in the district court before the government filed a response. Thus, the government's first opportunity to raise the defense was on appeal. Under these circumstances, the court agreed to decide the timeliness issue since "the issue is not difficult. The facts are established. And, the issue is for the most part, legal. Finally, another significant factor is that the State raised the defense at its first realistic opportunity...." 449 F.3d at 787.

challenge the timeliness of the defendant's Rule 33(b) motion for new trial by waiting until after the district court had ruled on the merits before raising the timeliness of the motion.

In reaching this result, the Seventh Circuit compared this Court's decision in *Day*, which it viewed as one allowing the district court to raise timeliness *sua sponte* despite the state's erroneous concession that the habeas petition was timely, with this Court's decision in *Eberhart v. United States*, 546 U.S.12 (2005) where the government forfeited any timeliness challenge to defendant's Rule 33(b) motion for new trial by raising it only after the district court had ruled on the merits.

And finally, the facts of this case would permit this court both to: (a) confirm that the limited exception to the traditional rule that a litigant forfeits any right to assert an affirmative defense if the defense is not raised applies only at the district court level; and (b) provide guidance as to what constitutes a "deliberate waiver" of a timeliness defense such that a court would abuse its discretion were it to dismiss a claim on timeliness grounds.

CONCLUSION

For the reasons set forth above, this Court should grant a writ of certiorari and review the decision of the United States Court of Appeals for the Tenth Circuit or, in the alternative, this Court should grant the requested writ, vacate the Tenth Circuit's decision and remand the cause with appropriate instructions to the court .

Respectfully submitted,

RAYMOND P. MOORE
Federal Public Defender

KATHLEEN A. LORD*
Assistant Federal Public Defender
633 Seventeenth St., Suite 1000
Denver, Colorado 80202
tel: (303) 294-7002
fax: (303) 294-1192
e-mail: kathleen_lord@fd.org

**Counsel of Record for Petitioner*

APPENDIX A

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK WOOD, *Petitioner*,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent*.

Westlaw

Slip Copy, 2010 WL 4813580 (C.A.10 (Colo.))
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Only the Westlaw citation is currently available.This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,
Tenth Circuit.
Patrick WOOD, Petitioner-Appellant,
v.
Kevin MILYARD, Warden, Sterling Correctional Facility; The Attorney General of the State of Colorado, Respondents-Appellees.

No. 09-1348.
Nov. 26, 2010.

Background: Defendant convicted of felony murder, second-degree murder, aggravated robbery and felony menacing petitioned pro se for a writ of habeas corpus. The United States District Court for the District of Colorado, 2009 WL 1973531, denied relief, and defendant appealed.

Holding: The Court of Appeals, Wade Brorby, Senior Circuit Judge, held that defendant's habeas petition was time-barred.

Affirmed

West Headnotes

Habeas Corpus 197 ⇐603.9

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Limitations, Laches or Delay
197k603.9 k. Pursuit of other remedies. Most Cited Cases

Defendant's inaction and subsequent statements indicated that he had stopped attempting to exhaust state court remedies and had abandoned a 1995 state postconviction application, such that the habeas statute's tolling provision deactivated and the limitations period ran, rendering his habeas petition time-barred; after the last action on the 1995 application, defendant made no attempt to communicate with the court for any reason for over eight years, he represented in a 2004 postconviction application that "[n]o other postconviction proceedings [had been] filed," and even when the district court threatened to dismiss his federal petition as untimely, defendant never claimed an interest in the 1995 motion. 28 U.S.C.A. § 2244(d)(2).

Kathleen A. Lord, Office of the Federal Public Defender, Denver, CO, for Petitioner-Appellant.

Patricia Rae Van Horn, Attorney General for the State of Colorado, Denver, CO, for Respondents-Appellees.

Before HARTZ, Circuit Judge, PORFILIO and BRORBY, Senior Circuit Judges.

ORDER AND JUDGMENT[FN*]

WADE BRORBY, Senior Circuit Judge.

***1** State prisoner Patrick Wood appeals from a district court order that denied his pro se 28 U.S.C. § 2254 petition for habeas relief. This court granted Wood a certificate of appealability (COA) on two issues: (1) whether his convictions for felony murder and second-degree murder violated

double jeopardy; and (2) whether his waiver of a jury trial was valid. This court also appointed counsel for Wood and directed the parties to address the timeliness of Wood's petition and other procedural barriers to considering the merits. For the reasons expressed below, we conclude that Wood's habeas petition was untimely, and therefore, we AFFIRM.

BACKGROUND

In January 1986, Wood robbed a pizza delivery store in Westminster, Colorado. While doing so, he shot the store's assistant manager in the head, killing him. Other store employees then subdued Wood until police arrived.

Wood was charged with first-degree murder after deliberation, first-degree felony murder, aggravated robbery, and two counts of felony menacing. A jury deadlocked on the murder counts, prompting the court to declare a mistrial. Thereafter, Wood agreed to a bench trial in exchange for the prosecution's agreement to not seek the death penalty.[FN1] Following the bench trial, the court found Wood guilty on the felony-murder, robbery, and menacing counts, but guilty of only second-degree murder on the deliberate-murder count. Dist. Ct. R. at 190-94. At sentencing, the court "merged" the robbery and murder counts, and imposed a life sentence plus two four-year terms for the menacing counts, all running concurrently. *Id.* at 196. The Colorado Court of Appeals affirmed Wood's convictions, and the Colorado Supreme Court denied certiorari in 1989.

In 1994, Wood sought federal habeas relief. But since he had not exhausted his state court remedies, the district court dismissed the petition.

Consequently, in June 1995, Wood filed a pro se motion in Colorado state court to vacate his conviction and sentence under Colo. R. of Crim. P. 35(c). He argued that double jeopardy barred his convictions for both felony murder and second-degree murder, that his trial counsel was ineffective in advising him to testify, and that his interrogation statements should have been suppressed. Wood also sought appointment of postconviction counsel. Four months later, when there had been no action on his filings, Wood filed a motion seeking a ruling. In December 1995, the state court responded by appointing the Colorado Public Defender's Office to represent Wood in the postconviction proceedings.

Eight years and four months passed with nothing occurring in the case. The state court docket indicates that in April 2004, Wood wrote a letter to the court. But as his appellate counsel indicates, "inexplicably no letter is in the state court file." Aplt. Supp. Opening Br. at 21 n. 8.

On August 30, 2004, Wood filed a pro se petition, again seeking Rule 35(c) relief in state court. He again raised the double-jeopardy issue, but changed the focus of his ineffective-assistance claim to his waiver of a jury trial, and he added an equal-protection claim. On the petition's first page, Wood prominently stated that "[n]o other postconviction proceedings [had been] filed." Dist. Ct. R. at 217. The state postconviction court denied the petition. The Colorado Court of Appeals affirmed, and the Colorado Supreme Court denied certiorari on February 5, 2007.

***2** One year later, on February 5, 2008, Wood filed a petition for habeas relief in federal district court. The form used by Wood requested information about "each

postconviction proceeding" he had initiated. R. Vol. 1 at 8. Wood listed only his 2004 state postconviction application. Accordingly, the district court ordered Wood to show cause why his petition should not be denied as time barred, given that his 2004 postconviction application tolled the Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period from only 2004 to 2007. Wood filed a lengthy response, but he never mentioned his first attempt at obtaining state postconviction relief. The district court denied Wood's habeas petition as time barred.

Wood then moved for reconsideration, and again failed to mention the 1995 postconviction motion. The district court granted reconsideration, apparently to obtain the state's view of the timeliness issue. In its pre-answer response, the state informed the district court that Wood had filed a postconviction motion in 1995, and that it was never ruled upon. Instead of revisiting the timeliness issue, the district court ordered Wood to address exhaustion issues. Ultimately, Wood dismissed his unexhausted claims, and the district court denied Wood habeas relief on the merits of his remaining claims, which raised double-jeopardy and jury-waiver issues. Wood appealed, and this court issued a COA to consider those issues, as well as issues of timeliness and exhaustion.

DISCUSSION

I. Statute of Limitations [FN2]

AEDPA imposes a one-year limitations period for filing a federal habeas petition. 28 U.S.C. § 2244(d)(1). Where, as here, a petitioner's conviction became final before the date of AEDPA's enactment, April 24, 1996, the limitations period is viewed as running for a year from that date, i.e., until April 24, 1997. *Serrano v. Williams,* 383 F.3d 1181, 1183 (10th Cir.2004). But "[t]his one-year period is tolled for the time 'during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.' " *Id.* (citing 28 U.S.C. § 2244(d)(2)). Thus, the issue we confront is whether Wood's 1995 motion remained pending, thereby tolling the limitations period, from April 24, 1996, until August 30, 2004, the day he filed his second postconviction application.

"[T]he pendency of a state postconviction application ... encompass[es] all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies." *Id.* at 1184 (quotation omitted). "Although the interpretation of the term 'pending' is a matter of federal law, our definition does require some inquiry into relevant state procedural laws...." *Gibson v. Klinger,* 232 F.3d 799, 806 (10th Cir.2000) . Under Colorado law, a motion for postconviction relief not resolved within a reasonable time may be deemed abandoned if the defendant "fails to take reasonable efforts to secure an expeditious ruling on the motion." *People v. Fuqua,* 764 P.2d 56, 58 (Colo.1988); *see also People v. Abeyta,* 923 P.2d 318, 321-22 (Colo.App.1996) (holding that defendant's unresolved postconviction claims from an earlier Rule 35(c) motion had been abandoned where "he was fully able to pursue them in a timely manner, [but] he failed to have them considered before the expiration of the limitation period" for seeking postconviction relief), *superceded by rule on other grounds as stated in People v. Roy,* 2010 WL 2305894, at *2 (Colo.App. June 10, 2010). This is consistent with "Congress's intent to encourage exhaustion of state court remedies without allowing prisoners

to toll the limitations period indefinitely." *Gibson,* 232 F.3d at 807. Indeed, "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." *Welch v. Carey,* 350 F.3d 1079, 1083 (9th Cir.2003) (emphasis added).

***3** The last action taken on Wood's 1995 postconviction motion was in December of that year, when the state court acted on Wood's motion for a ruling, and appointed postconviction counsel. But despite being able to seek action, Wood never again moved for a ruling. Indeed, he made no attempt to communicate with the court for any reason for over eight years. It was not until April 2004, when he sent the now-missing letter to the court, and then in August 2004, when he filed a new postconviction application, that he showed any interest in continuing to pursue relief from his convictions and sentence. [FN3]

Significantly, the fact that Wood represented in the 2004 application that "[n]o other postconviction proceedings [had been] filed," Dist. Ct. R. at 217, indicates that he had lost interest in, and had abandoned, the 1995 motion. [FN4] Similarly, he did not mention the 1995 motion when prompted by the form on which he sought federal habeas relief. Even when the district court threatened to dismiss his federal petition as untimely, Wood never claimed an interest in the 1995 motion. And when the district court dismissed the federal petition as untimely, Wood sought reconsideration without resort to the 1995 motion.

Under these unique circumstances, we conclude that Wood abandoned his 1995 motion before filing his 2004 petition. We need not decide, however, precisely when the abandonment occurred, as any break in the pendency of the 1995 motion after AEDPA's enactment renders Wood's 2008 federal habeas petition untimely. Specifically, a full year elapsed from the time the Colorado Supreme Court denied certiorari on February 5, 2007, until Wood filed his federal habeas petition on February 5, 2008. Consequently, there is no time left to account for *any* untolled period between AEDPA's April 24, 1996 enactment and Wood's 2004 postconviction application.

Wood's position appears to be that, without a ruling by the state postconviction court, his 1995 motion never stopped tolling the limitations period. But as the Respondents note, that would mean "the 1995 motion is *still* pending because it has never been ruled upon." Resp. Br. at 19. At some point, though, we must give meaning to Congress's intent in establishing a one-year limitations period. Thus, where, as here, a petitioner's inaction and subsequent statements on the limitations issue indicate that he stopped "attempting ... to exhaust state court remedies," *Serrano,* 383 F.3d at 1184, and abandoned a state postconviction application, AEDPA's tolling provision will deactivate, and the limitations period will run.[FN5]

CONCLUSION

The judgment of the district court is AFFIRMED. Wood's second motion to supplement the record is GRANTED. The motion to proceed in forma pauperis is GRANTED.

FN* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir.

R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

FN1. Although the jury was deadlocked on the murder counts, the jury's foreman had signed the guilty verdicts on the robbery and menacing counts. Dist. Ct. R. at 183-85. It appears, however, that the bench trial involved all of the original charges filed against Wood, not just the murder charges. *See id.* at 190-94, 196.

FN2. Although the district court's ultimate disposition of this case rested on grounds other than timeliness, "we have discretion to affirm on any ground adequately supported by the record." *Davis v. Roberts,* 425 F.3d 830, 834 (10th Cir.2005) (quotation omitted); *see also Jones v. Hulick,* 449 F.3d 784, 787 (7th Cir.2006) (considering timeliness of habeas petition for first time on appeal); *White v. Klitzkie,* 281 F.3d 920, 921-22 (9th Cir.2002) (considering timeliness of habeas petition on appeal even though the issue was not decided by the district court or included in the COA). We pause for a moment, though, to note the Supreme Court's admonition that a federal court cannot "override a State's deliberate waiver of a limitations defense" and sua sponte dismiss a habeas petition. *Day v. McDonough,* 547 U.S. 198, 202, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006). In their habeas answer, the Respondents provided a cryptic response to the timeliness question. They first incorporated an argument from their pre-answer response about the statute of limitations expiring before Wood filed his habeas petition, and then stated that they were "not challenging, but do not concede, the timeliness of [Wood's] [habeas] petition." R., Vol. I at 273. While 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. *Cf. Day,* 547 U.S. at 209, 126 S.Ct. 1675 (holding that state's erroneous concession of habeas petition's timeliness did not preclude the district court from sua sponte dismissing the petition as untimely).

Our consideration of 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. *Cf. id.* at 210, 126 S.Ct. 1675 (instructing courts considering the issue of timeliness sua sponte to "assure ... that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and determine whether the interests of justice would be better served by ad-

dressing the merits or by dismissing the petition as time barred" (quotation omitted)).

FN3. Even if the April 2004 letter was an attempt to inform the court of appointed counsel's inaction or to inquire about the status of his 1995 motion, we think it came too late. But more fundamentally, we question whether the letter in fact mentioned anything about the 1995 motion, given that Wood's August 2004 postconviction petition stated that no other postconviction applications had been filed.

FN4. If we were to blindly accept Wood's assertion that his 2004 postconviction application were his first, the limitations period for filing a federal habeas petition would have expired on April 24, 1997-over a decade before he filed his 2008 petition for habeas relief. *See Clark v. Oklahoma,* 468 F.3d 711, 714 (10th Cir.2006) ("Only state petitions for post-conviction relief filed within the one year allowed by AEDPA will toll the statute of limitations.").

FN5. Although "the timeliness provision in the federal habeas corpus statute is subject to equitable tolling," *Holland v. Florida,* ---U.S. ----, 130 S.Ct. 2549, 2554, 177 L.Ed.2d 130 (2010), Wood concedes that "[t]he availability of equitable tolling is not an issue." Aplt. Supp. Opening Br. at 23. In any event, equitable tolling requires "(1) that [Wood] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland,* 130 S.Ct. at 2563 (quotation omitted). For the same reasons discussed above in regard to statutory tolling, we conclude that Wood did not diligently pursue his 1995 motion for state postconviction relief. Therefore, he does not qualify for equitable tolling.

C.A.10 (Colo.),2010.
Wood v. Milyard
Slip Copy, 2010 WL 4813580 (C.A.10 (Colo.))

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APPENDIX B

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK WOOD, *Petitioner*,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent*.

Slip Copy, 2009 WL 1973531 (D.Colo.)
(Cite as: 2009 WL 1973531 (D.Colo.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Colorado.
Patrick WOOD, Applicant,
v.
Kevin MILYARD, Warden, Sterling Correctional Facility, and The Attorney General of the State of Colorado, Respondents.

Civil Action No. 08-cv-00247-WYD.
July 6, 2009.

Patrick Wood, Sterling, CO, pro se.

Patricia Rae Van Horn, Colorado Attorney General's Office-Department of Law, Denver, CO, for Respondents.

ORDER DENYING 28 U.S.C. § 2254 APPLICATION

WILEY Y. DANIEL, Chief Judge.

*1 Applicant, Patrick Wood, is a prisoner in the custody of the Colorado Department of Corrections (DOC) who currently is incarcerated at the Sterling, Colorado, correctional facility. On February 5, 2008, Mr. Wood filed *pro se* an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He paid the $5.00 filing fee.

In the application, Mr. Wood asserted five claims: (1)(a) that convicting him of both felony murder and second-degree murder of the same victim and of aggravated robbery violates double jeopardy principles and (b) that convicting him of aggravated robbery and then using that offense as the predicate offense for the felony murder conviction violates double jeopardy principles; (2) that the waiver of his right to a jury trial on the murder counts was involuntary because defense counsel's advisement was inadequate and because the trial judge accepted his waiver without ensuring that it was made knowingly and voluntarily; (3) that his convictions were obtained in violation of his right not to incriminate himself, i.e., defense counsel advised him to testify at trial, which

> caused him to incriminate himself; (4) that his convictions were the result of ineffective assistance of both trial and appellate counsel, and specifically that trial counsel "was ineffective for advising [him] to waive his right to a second jury trial" and to "waive his right against self incrimination," in "failing to advocate on [his] behalf, and in failing to "move for the 1 st Degree Felony Murder to be stricken from the trial judge's consideration" at the bench trial "or at least in the alternative in failing to accurately replay the implications of the felony murder statute to [him]" and "in failing to identify obvious and key issues on direct appeal," *see* application at 6a; and (5) that the felony murder statute violates equal protection principles because "it disproportionately imposes the same punishment on one who commits a murder with premeditation after deliberation, as on one who has no intent to kill whatsoever and accidentally does so during the course of a felony." *See* application at 6a-6b.

I. *Federal Court Proceedings*

On January 26, 1994, Mr. Wood filed a habeas corpus application in this court. On March 22, 1995, the Honorable John L. Kane accepted and adopted the August 1, 1994, recommendation of former Magistrate Judge Richard M. Borchers; denied the application for failure to exhaust state

remedies; and dismissed the action. *See Wood v. Furlong,* No. 94-cv-00219-JLK (D.Colo. Mar. 22, 1995).

On February 5, 2008, Mr. Wood filed *pro se* the instant habeas corpus application. In an order filed on May 29, 2008, Magistrate Judge Boyd N. Boland ordered the respondents to file within twenty days a pre-answer response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and/or

> exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A). On June 17, 2008, the respondents filed their pre-answer response asserting that the instant action was subject to dismissal as a mixed petition containing both exhausted and unexhausted claims. On July 7, 2008, Mr. Wood filed a reply to pre-answer response.

***2** Magistrate Judge Craig B. Shaffer reviewed the pre-answer response, the reply, and the relevant appellate court briefs, and agreed that claims 1(b), 3, 4, and 5 did not appear to have been exhausted. Therefore, in an order filed on August 15, 2008, Magistrate Judge Shaffer directed Mr. Wood to show cause within thirty days why the application should not be denied as a mixed petition. Alternatively, the magistrate judge informed Mr. Wood that rather than have the court dismiss the application as a mixed petition, he would be allowed to dismiss voluntarily the unexhausted claims and proceed on the exhausted claims.

On September 15, 2008, Mr. Wood submitted his response titled "Objection to Finding of Unexhausted Claims, and Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims." In the September 15 response, Mr. Wood moved to dismiss voluntarily unexhausted claims 1(b), 3, 4, and 5, and asked only to proceed on exhausted claims 1(a) and 2. In an order filed on September 22, 2008, Senior Judge Zita L. Weinshienk construed Mr. Wood's objection to the finding of unexhausted claims as filed pursuant to 28 U.S.C. § 636(b)(1)(A), overruled the objection, granted Mr. Wood's motion for voluntary dismissal, dismissed unexhausted claims 1(b), 3, 4, and 5, and allowed Mr. Wood to proceed only on exhausted claims 1(a) and (2). On September 22, 2008, the action was reassigned to me.

On October 2, 2008, I ordered the respondents to file an answer on or before October 31, 2008. On October 30, 2008, the respondents filed their answer. On April 14, 2009, I ordered the respondents to provide me with the record from the state court trial. On April 20, 2009, the respondents provided the state court trial record.

I must construe liberally any filings by Mr. Wood because he is not represented by an attorney. *See Haines v. Kerner,* 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir.1991). However, I should not be an advocate for a *pro se* litigant. *See Hall,* 935 F.2d at 1110. For the reasons stated below, I will review the remaining claims 1(a) and (2) on the merits, dismiss them as meritless, and deny the instant application.

II. *State Court Proceedings*

In 1986, Mr. Wood was charged in Adams County District Court Criminal Action No. 86CR123 with first-degree murder after deliberation, first-degree murder felony murder (felony murder), aggravated robbery, and two counts of felony menacing for shooting and killing the assistant

manager of a pizza delivery store in Westminster, Colorado. A jury found him guilty of the aggravated robbery and felony menacing counts, but was unable to reach a verdict on the murder counts. In exchange for withdrawing the death penalty from consideration, Mr. Wood waived his right to a jury trial on the murder counts and, at a subsequent bench trial, the trial court found him guilty of felony murder and second-degree murder. During sentencing on January 21, 1987, the trial court merged the murder and aggravated robbery counts, and sentenced

> ***3** him to the DOC for forty years to life on the merged counts and to four-year terms on the two menacing counts, to run concurrently with the life sentence.

On May 4, 1989, Mr. Wood's convictions were affirmed on direct appeal. *See People v. Wood,* No. 87CA0273 (Colo.Ct.App. May 4, 1989) (not published). On October 23, 1989, the Colorado Supreme Court denied certiorari review. On June 29, 1995, Mr. Wood filed in state court a motion for appointment of counsel, an affidavit of indigency, and a motion to vacate judgment of conviction and sentence. *See* answer, ex. C; *see also* answer, ex. D, register of actions at 12. However, despite the fact that on October 30, 1995, Mr. Wood filed a request for a ruling on the previously filed motions, the trial court apparently only ruled on the motion for appointment of counsel, granting it on December 1, 1995. *See* answer, ex. D, register of actions at 12.

On August 19, 2004, Mr. Wood filed a postconviction motion pursuant to Rule 35(c) of the Colorado Rules of Criminal Procedure, which the trial court denied on September 3, 2004. On August 3, 2006, the Colorado Court of Appeals affirmed. *See People v. Wood,* No. 04CA2252 (Colo.Ct.App. Aug. 3, 2006) (not published). On February 5, 2007, the Colorado Supreme Court denied certiorari review. On February 5, 2008, Mr. Wood filed *pro se* the instant habeas corpus application in this court.

III. *Standard of Review on the Merits*

Title 28 U.S.C. § 2254(d) provides that a writ of habeas corpus may not be issued with respect to any claim that was adjudicated on the merits in state court unless the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C. § 2254(d).

Claims of legal error and mixed questions of law and fact are reviewed pursuant to 28 U.S.C. § 2254(d)(1). *See Cook v. McKune,* 323 F.3d 825, 830 (10th Cir.2003). The threshold question pursuant to § 2254(d)(1) is whether Mr. Wood seeks to apply a rule of law that was clearly established by the Supreme Court at the time his conviction became final. *See Williams v. Taylor,* 529 U.S. 362, 390 (2000). Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412. Furthermore,

> clearly established law consists of Supreme Court holdings in cases where the

facts are at least closely-related or similar to the case *sub judice.* Although the legal rule at issue need not have had its genesis in the closely-related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context.

***4** *House v. Hatch,* 527 F.3d 1010, 1016 (10th Cir.2008).

If there is no clearly established federal law, that is the end of my inquiry pursuant to 28 U.S.C. § 2254(d)(1). *See id.* at 1018. If a clearly established rule of federal law is implicated, I must determine whether the state court's decision was contrary to or an unreasonable application of that clearly established rule of federal law. *See Williams,* 529 U.S. at 404-05.

A state-court decision is contrary to clearly established federal law if: (a) "the state court applies a rule that contradicts the governing law set forth in Supreme Court cases"; or (b) "the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from [that] precedent." *Maynard [v. Boone],* 468 F.3d [665,] 669 [(10th Cir.2006)] (internal quotation marks and brackets omitted) (quoting *Williams,* 529 U.S. at 405). "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.' " *Williams,* 529 U.S. at 405 (citation omitted).

A state court decision involves an unreasonable application of clearly established federal law when it identifies the correct governing legal rule from Supreme Court cases, but unreasonably applies it to the facts. *Id.* at 407-08. Additionally, we have recognized that an unreasonable application may occur if the state court either unreasonably extends, or unreasonably refuses to extend, a legal principle from Supreme Court precedent to a new context where it should apply.

House, 527 F.3d at 1018.

My inquiry pursuant to the "unreasonable application" clause is an objective inquiry. *See Williams,* 529 U.S. at 409-10. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable." *Id.* at 411. "[A] decision is 'objectively unreasonable' when most reasonable jurists exercising their independent judgment would conclude the state court misapplied Supreme Court law." *Maynard,* 468 F.3d at 671. "[O]nly the most serious misapplications of Supreme Court precedent will be a basis for relief under [28 U.S.C.] § 2254." *Id.*

Claims of factual error are reviewed pursuant to 28 U.S.C. § 2254(d)(2). *See Romano v. Gibson,* 278 F.3d 1145, 1154 n. 4 (10th Cir.2002). Section 2254(d)(2) allows me to grant a writ of habeas corpus only if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented. Pursuant to § 2254(e)(1), I must presume that the state court's factual determinations are correct and Mr. Wood bears the burden of rebutting the presumption by clear and convincing evidence. "The standard is demanding but not insatiable ... [because] '[d]eference does not by definition preclude relief.' " *Miller-El v. Dretke,* 545 U.S. 231, 240 (2005) (quoting *Miller-El v. Cockrell,* 537 U.S. 322, 340 (2003)).

*5 I "owe deference to the state court's result, even if its reasoning is not expressly stated." *Aycox v. Lytle,* 196 F.3d 1174, 1177 (10th Cir.1999). Therefore, I "must uphold the state court's summary decision unless [my] independent review of the record and pertinent federal law persuades [me] that its result contravenes or unreasonably applies clearly established federal law, or is based on an unreasonable determination of the facts in light of the evidence presented." *Id.* at 1178. "[T]his 'independent review' should be distinguished from a full de novo review of the petitioner's claims." *Id.*

Finally, if the state court does not address a claim on the merits, I must review the claim *de novo* and the deferential standards in 28 U.S.C. § 2254(d) are not applicable. *See Gipson v.. Jordan,* 376 F.3d 1193, 1196 (10th Cir.2004).

IV. *Claims*

Only remaining claims 1(a) and 2 currently are before me. I initially will address Mr. Wood's claim 1(a) that convicting him of both felony murder and second-degree murder of the same victim and of aggravated robbery violates double jeopardy principles. Upon current briefing, it appears that claim 1(a) may be procedurally defaulted. Because this court already stated that the issue of exhaustion would not be addressed further and because claim 1(a) previously was determined to have been exhausted, I feel compelled, in the interest of fairness to Mr. Wood, to address claim 1(a) on the merits. *See Cannon v. Mullin,* 383 F.3d 1152, 1159 (10th Cir .2004) (When questions of procedural bar are problematic, and the substantive claim can be disposed of readily, a federal court may exercise its discretion to bypass the procedural issues and reject a habeas claim on the merits.) (citing *Romero v. Furlong,* 215 F.3d 1107, 1111 (10th Cir.2000)). Because the state courts did not address the merits of the federal habeas corpus claim Mr. Wood raises here, I will exercise my own independent judgment in deciding the claim. *See Gipson,* 396 F.3d at 1196.

In his motion to vacate judgment of conviction and sentence filed on June 29, 1995 Mr. Wood asserted that convicting him of both felony murder and second-degree murder of the same victim violates double jeopardy principles, a claim which the state courts never addressed on the merits. In addition to the claim Mr. Wood raised in his 1995 postconviction motion, Mr. Wood also argues before me that convicting him of aggravated robbery violates double jeopardy principles, as well. Specifically, he alleges that:

> Petitioner was convicted of both 1 st Degree Felony Murder, and 2nd Degree Felony Murder and Aggravated Robbery, which violates principles of Double Jeopardy, and resulted in conviction of two separate murder counts for a single victim, and in being twice convicted for Aggravated Robbery, as an underlying felony for the Felony Murder count and separate as its own charge.
>
> Application at 5.

A person may be prosecuted for more than one crime based on the same conduct if each crime requires proof of a fact that the other does not. *Blockburger v. United States,* 284 U.S. 299, 304 (1932); *United States v. Pearson,* 203 F.3d 1243, 1267-68 (10th Cir.2000).

*6 I have reviewed the versions of the relevant Colorado statutes in effect at the time Mr. Wood was charged and convicted.

A person committed the crime of murder in the first degree, felony murder, a class one felony, if "[a]cting either alone or with one or more persons, he commits or attempts to commit ... robbery ... and, in the course of or in furtherance of the crime that he is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone." Colo.Rev.Stat. § 18-3-102(1)(b) (1978 Repl.Vol.). A person committed second-degree murder, a class two felony, if he "causes the death of a person knowingly, but not after deliberation." Colo.Rev.Stat. § 18-3-103(1)(a) (1978 Repl.Vol.). A person who committed robbery was guilty of aggravated robbery, a class three felony, if "during the act of robbery or immediate flight therefrom [h]e ... by the use of force, threats, or intimidation with a deadly weapon knowingly puts the person robbed or any other person in reasonable fear of death or bodily injury." Colo.Rev.Stat. § 13-4-302(1)(b) (1978 Repl.Vol.).

After review of the relevant Colorado statutes in effect in Colorado at the time Mr. Wood was charged and convicted, I find it clear that the crimes of felony murder, second-degree murder, and aggravated robbery require different proof and are separate and distinct crimes. Therefore, I find that Mr. Wood's convictions for the crimes at issue do not violate *Blockburger.*

As his second claim, Mr. Wood alleges that the waiver of his right to a jury trial on the murder counts was involuntary because defense counsel's advisement was inadequate and because the trial judge accepted his waiver without ensuring that it was made knowingly and voluntarily. A defendant is entitled to a jury trial, but he may waive that right so long as he does so knowingly, voluntarily, and intelligently. *See, e.g., United States v. Robertson,* 45 F.3d 1423, 1431-32 (10th Cir.1995) (citing *Adams v.. U.S. ex rel. McCann,* 317 U.S. 269, 275 (1942), and *Patton v. United States,* 281 U.S. 276, 312 (1930). Specifically, a defendant may waive his Sixth Amendment right to a jury trial when: (1) he gives "express, intelligent consent"; (2) the government consents; and (3) the waiver is "approved by the responsible judgment of the trial court." *Adams,* 317 U.S. at 277-78. The adequacy of a jury trial waiver is a mixed question of law and fact. *United States v. Farris,* 77 F.3d 391, 396 (11th Cir.1996). Mixed questions of law and fact are reviewed pursuant to § 2254(d)(1). *See Cook,* 323 F.3d at 830.

The state court record contains a written jury trial waiver, dated January 5, 1987, bearing Mr. Wood signature. The waiver states, in relevant part:

> I, Patrick Wood, having been advised of my constitutional right to a trial to a jury of twelve as well as the statutory right contained in C.R.S. 18-1-406, hereby waive my right to a jury and agree to have the matter tried to the Court. I understand the following rights:
>
> *7 1. I am charged in the above-captioned action with, among other things, first degree murder (two counts).
>
> 2. There has previously been a jury trial in this action and the jury was hopelessly deadlocked and a mistrial was declared at my insistence.
>
> 3. I understand that my waiver of jury must be voluntary meaning not the result of any promise, threat or coercion but rather that the waiver is the result of talk-

ing this matter over with my attorney, thinking about it and making my own decision to waive the jury in the above-captioned action.

4. It is the advice of my counsel that a jury be waived and the matter tried to the Court but I understand that it is completely my decision whether to have the fact finder in my case be a judge or a jury.

5. After thought and consultation with my lawyer and my family, I voluntarily ask this Court to receive my waiver of a jury and ask the Judge to be the fact finder in this case.

Answer, ex. M, waiver of jury trial; *see also* trial tr., vol. I at 187, Jan. 5, 1987.

A minute order from January 5, 1987, the day Mr. Wood signed the waiver, states, in pertinent part:

COURT HEARS STATEMENTS OF COUNSEL & DEFENDANT. DEFENDANT SIGNS WAIVER OF RIGHT TO JURY TRIAL. DDA WAIVES PEOPLE'S RIGHT TO JURY TRIAL.

Trial tr., vol. I at 274, Jan. 5, 1987.

The Colorado Court of Appeals in No. 04CA2252 rejected Mr. Wood's claim because the record clearly showed that his jury trial waiver was valid:

Here, defendant admits that he signed a written waiver of his right to a jury trial but asserts that it is not valid because he was not "personally questioned by the district court assuring that the waiver was voluntary, knowing and intelligently entered." However, the record contains defendant's written waiver form and a minute order indicating, "[C]ourt hears statements of counsel and defendant. Defendant signs waiver of right to jury trial. DDA waives People's right to jury trial."

Answer, ex. J, No. 04CA2252, slip op. at 6.

I find that the decision of the state appeals court that Mr. Wood's jury trial waiver was knowing, voluntary, and intelligent did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal Supreme Court law. *See* 28 U.S.C. § 2254(d)(1).

V. *Conclusion*

For the reasons stated above, habeas corpus relief will be denied. Accordingly, it is

ORDERED that the remaining claims 1(a) and (2) are dismissed as meritless, the habeas corpus application is denied, and the action is **DISMISSED WITH PREJUDICE.** It is

FURTHER ORDERED that each party shall bear his own costs and attorney's fees.

D.Colo.,2009.
Wood v. Milyard
Slip Copy, 2009 WL 1973531 (D.Colo.)

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APPENDIX C

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK WOOD, *Petitioner*,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent*.

Westlaw

Not Reported in F.Supp.2d, 2008 WL 4368609 (D.Colo.)
(Cite as: 2008 WL 4368609 (D.Colo.))

H
Only the Westlaw citation is currently available.

United States District Court,
D. Colorado.
Patrick WOOD, Applicant,
v.
Kevin MILYARD, Warden, Sterling Correctional Facility, and The Attorney General of the State of Colorado, Respondents.

Civil Action No. 08-cv-00247-BNB.
Sept. 22, 2008.

Patrick Wood, Sterling, CO, pro se.

Patricia Rae Van Horn, Colorado Attorney General's Office-Department of Law, Denver, CO, for Respondents.

ORDER TO OVERRULE OBJECTION, DISMISS IN PART, AND DRAW REMAINING CLAIMS TO A DISTRICT JUDGE AND TO A MAGISTRATE JUDGE

ZITA L. WEINSHIENK, Senior District Judge.

***1** Applicant, Patrick Wood, is a prisoner in the custody of the Colorado Department of Corrections (DOC) who currently is incarcerated at the Sterling, Colorado, correctional facility. Mr. Wood filed *pro se* an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (2006). He paid the $5.00 filing fee.

In an order filed on May 29, 2008, Magistrate Judge Boyd N. Boland ordered Respondents to file within twenty days a Pre-Answer Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and/or exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A). On June 17, 2008, Respondents filed their Pre-Answer Response asserting that the instant action is subject to dismissal as a mixed petition containing both exhausted and unexhausted claims. On July 7, 2008, Mr. Wood filed a Reply to Pre-Answer Response.

In an order filed on August 15, 2008, Magistrate Judge Craig B. Shaffer directed Mr. Wood to show cause within thirty days why the application should not be denied as a mixed petition. Alternatively, Magistrate Judge Shaffer informed Mr. Wood that rather than have the Court dismiss the application as a mixed petition, he would be allowed to dismiss voluntarily the unexhausted claims and proceed on the exhausted claims. On September 15, 2008, Mr. Wood submitted his response titled "Objection to Finding of Unexhausted Claims, and Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims."

The Court must construe liberally the application, the Reply, and the combination objection and partial voluntary dismissal filed by Mr. Wood because he is not represented by an attorney. *See Haines v. Kerner,* 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon,* 935 F .2d 1106, 1110 (10th Cir.1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall,* 935 F.2d at 1110. In the combination objection and partial voluntary dismissal, Mr. Wood appears to object to Magistrate Judge Shaffer's August 15, 2008, order directing him to show cause why the application should not be denied as a mixed petition and to his finding that certain asserted claims are unexhausted. For the reasons stated below, the objection will be construed as filed pursuant to 28 U.S.C. §

636(b)(1)(A), and will be overruled.

Pursuant to § 636(b)(1)(A), a judge may reconsider any pretrial matter designated to a magistrate judge to hear and determine where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. The Court has reviewed the file and finds that Magistrate Judge Shaffer's August 15, 2008, order is not clearly erroneous or contrary to law. Therefore, Mr. Wood's objection will be overruled. For the reasons stated below, the August 15 "Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims" will be granted.

Mr. Wood alleges that he was convicted in 1986 in Adams County District Court Criminal Action No. 86CR123 on charges of second-degree murder, first-degree felony murder, aggravated robbery, and felony menacing. The trial court sentenced him to the DOC for forty years to life. He alleges that on January 21, 1987, the judgment of conviction was entered. On May 4, 1989, his convictions were affirmed on direct appeal. *See People v. Wood,* No. 87CA0273 (Colo.Ct.App. May 4, 1989) (not published). On October 23, 1989, the Colorado Supreme Court denied certiorari review.

***2** On January 26, 1994, he filed a habeas corpus application in this Court, which on March 22, 1995, accepted and adopted former Magistrate Judge Richard M. Borchers' August 1, 1994, recommendation, and denied the application for failure to exhaust state remedies. *See Wood v. Furlong,* 94-cv-00219-JLK (D.Colo. Mar. 22, 1995). On June 29, 1995, Mr. Wood filed in state court a motion for appointment of counsel, an affidavit of indigency, and a motion to vacate judgment of conviction and sentence. *See* Response at ex. D. However, despite the fact that on October 30, 1995, Mr. Wood filed a request for a ruling on the previously filed motions, the trial court apparently only ruled on the motion for appointment of counsel, granting it on December 1, 1995. *See* Response at ex. D.

Mr. Wood alleges that on August 19, 2004, he filed a postconviction motion pursuant to Rule 35(c) of the Colorado Rules of Criminal Procedure, which the trial court denied on September 3, 2004. On August 3, 2006, the Colorado Court of Appeals affirmed. *See People v. Wood,* No. 04CA2252 (Colo.Ct.App. Aug. 3, 2006) (not published). On February 5, 2007, the Colorado Supreme Court denied certiorari review. On February 8, 2008, Mr. Wood filed the instant habeas corpus application.

Pursuant to 28 U.S.C. § 2254(b)(1), an application for a writ of habeas corpus may not be granted unless it appears that the applicant has exhausted state remedies or that no adequate state remedies are available or effective to protect the applicant's rights. *See O'Sullivan v. Boerckel,* 526 U.S. 838 (1999); *Dever v. Kansas State Penitentiary,* 36 F.3d 1531, 1534 (10th Cir .1994). The exhaustion requirement is satisfied once the federal claim has been presented fairly to the state courts. *See Castille v. Peoples,* 489 U.S. 346, 351 (1989). Fair presentation requires that the federal issue be presented properly "to the highest state court, either by direct review of the conviction or in a postconviction attack." *Dever,* 36 F.3d at 1534.

Furthermore, the "substance of a federal habeas corpus claim" must have been presented to the highest state court in order to satisfy the fair presentation requirement. *Picard v. Connor,* 404 U.S. 270, 278

(1971); *see also Nichols v. Sullivan,* 867 F.2d 1250, 1252 (10th Cir.1989). Although fair presentation does not require a habeas corpus petitioner to cite "book and verse on the federal constitution," *Picard,* 404 U.S. at 278 (internal quotation marks omitted), "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts." *Anderson v. Harless,* 459 U.S. 4, 6 (1982) (per curiam). A claim must be presented as a federal constitutional claim in the state court proceedings in order to be exhausted. *See Duncan v. Henry,* 513 U.S. 364, 365-66 (1995) (per curiam).

Finally, "[t]he exhaustion requirement is not one to be overlooked lightly." *Hernandez v. Starbuck,* 69 F.3d 1089, 1092 (10th Cir.1995). A state prisoner bringing a federal habeas corpus action bears the burden of showing that he has exhausted all available state remedies. *See Miranda v. Cooper,* 967 F.2d 392, 398 (10th Cir.1992) . Even if state remedies properly have been exhausted as to one or more of the claims presented, a habeas corpus application is subject to dismissal as a mixed petition unless state court remedies have been exhausted for all of the claims raised. *See Rose v. Lundy,* 455 U.S. 509, 522 (1982); *Harris v. Champion,* 48 F.3d 1127, 1133 (10th Cir.1995).

***3** Mr. Wood asserts five claims: (1)(a) that convicting him of both felony murder and second-degree murder of the same victim violates double jeopardy principles and (b) that convicting him of aggravated robbery and then using that offense as the predicate offense for the felony murder conviction violates double jeopardy principles; (2) that the waiver of his right to a jury trial on the murder counts was involuntary because defense counsel's advisement was inadequate and because the trial judge accepted his waiver without ensuring that it was made knowingly and voluntarily; (3) that his convictions were obtained in violation of his right not to incriminate himself, i.e., defense counsel advised him to testify at trial, which caused him to incriminate himself; (4) that his convictions were the result of ineffective assistance of both trial and appellate counsel, and specifically that trial counsel "was ineffective for advising [him] to waive his right to a second jury trial" and to "waive his right against self incrimination," in "failing to advocate on [his] behalf, and in failing to "move for the 1st Degree Felony Murder to be stricken from the trial judge's consideration" at the bench trial "or at least in the alternative in failing to accurately replay the implications of the felony murder statute to [him]" and "in failing to identify obvious and key issues on direct appeal," *see* application at 6a; and (5) that the felony murder statute violates equal protection principles because "it disproportionately imposes the same punishment on one who commits a murder with premeditation after deliberation, as on one who has no intent to kill whatsoever and accidentally does so during the course of a felony." *See* application at 6a-6b.

Respondents conceded that Mr. Wood exhausted state court remedies for subpart (a) of claim 1 and for claim 2 in his 2004 postconviction motion. They argued that Mr. Wood failed to exhaust state court remedies for subpart (b) of claim 1, and for claims 3, 4, and 5. Respondents specifically contended that claims 1(b) and 3 have not been presented to the state courts. They maintained that the allegations in claim 3 were part of the ineffective assistance of counsel claim that Mr. Wood raised in his 1995 postconviction motion, which was never ruled upon by the state courts, but

were not presented as a self-incrimination claim.

Respondents further contended that claim 4 contains allegations of ineffective assistance of counsel that have not been presented to state court. They specifically contended that in the 1995 postconviction motion, Mr. Wood asserted that counsel was ineffective for advising him to testify that his shooting of the victim was an accident, and for failing to explain the law applicable to lesser-included offenses and the offenses of which he would be convicted. They further contended that in the 2004 postconviction motion, Mr. Wood asserted that counsel was ineffective for waiving his right to a jury trial on the murder counts without his consent, a claim that both the trial court and the Colorado Court of Appeals rejected on the merits. The state appeals court did not consider an additional allegation of ineffective assistance of counsel, i.e., that counsel was ineffective for advising Mr. Wood to testify at trial, because Mr. Wood made the allegation for the first time in his reply brief. Lastly, Respondents argued that claim 5 has not been presented to the state courts, although they maintained that Mr. Wood did raise a different equal protection claim in his 2004 postconviction motion, i.e., that the first-degree and second-degree murder statutes violate equal protection because there is no distinguishable difference between the two crimes, which was rejected by both the trial court and the Colorado Court of Appeals on the basis that it could have been raised on direct appeal.

***4** Magistrate Judge Shaffer reviewed the relevant appellate court briefs, and agreed that claims 1(b), 3, 4, and 5 do not appear to have been exhausted. In his "Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims," Mr. Wood voluntarily dismisses unexhausted claims 1(b), 3, 4, and 5, and asks only to proceed on exhausted claims 1(a) and 2. Accordingly, it is

ORDERED that the "Objection to Finding of Unexhausted Claims" submitted on September 15, 2008, by Applicant, Patrick Wood, is overruled. It is

FURTHER ORDERED that the "Motion to Dismiss Voluntarily Claims Deemed Unexhausted and to Proceed on Exhausted Claims" submitted on September 15, 2008, by Applicant is granted. It is

FURTHER ORDERED that unexhausted claims 1(b), 3, 4, and 5 are dismissed. It is

FURTHER ORDERED that Applicant is allowed to proceed only on exhausted claims 1(a) and 2. It is

FURTHER ORDERED that the remaining claims 1(a) and (2) and the action are drawn to a district judge and to a magistrate judge.

D.Colo.,2008.
Wood v. Milyard
Not Reported in F.Supp.2d, 2008 WL 4368609 (D.Colo.)

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APPENDIX D

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK WOOD, *Petitioner*,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent*.

FILED
United States Court of Appeals
Tenth Circuit

January 4, 2010

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PATRICK WOOD,

Petitioner-Appellant,

v.

KEVIN MILYARD, Warden Sterling Correctional Facility, and THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents-Appellees.

No. 09-1348

(D.C. No. 1:08-CV-00247-WYD)
(D. of Colo.)

ORDER

Before **TYMKOVICH**, Circuit Judge.

Patrick Wood, a state prisoner acting pro se,[1] filed an application for a writ of habeas corpus in United States District Court. The court denied relief, and Wood now seeks permission to appeal.

This case concerns a conviction under Colorado law that became final twenty years ago. Wood has filed numerous actions in state and federal court since that time, and his petition presents several complex procedural and substantive issues. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(c),

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[1] Because he proceeds pro se, we construe Wood's filings liberally. *Freeman v. Watkins*, 479 F.3d 1257, 1259 (10th Cir. 2007).

we hold that two of Wood's claims are "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Allen v. Zavaras*, 568 F.3d 1197, 1198 (10th Cir. 2009) (granting a COA "on a single, narrow issue").

We therefore GRANT a certificate of appealability (COA) on two issues only: (1) Wood's claim that his simultaneous convictions for felony murder and second degree murder violate his right against double jeopardy under the Fifth and Fourteenth Amendments to the Constitution, and (2) Wood's claim that his decision to waive a jury trial was not "knowing, intelligent, and voluntary." As explained below, we further appoint Wood counsel to assist in arguing his appeal.

In granting a COA on these claims, we recognize they may be subject to dismissal for various procedural reasons. We will analyze these procedural matters further when we hear the substance of Wood's appeal, and we direct the parties to address those matters in their briefing before this court. We DENY a COA as to Wood's remaining claims.

I. Background

A. Wood's Crimes and Convictions in State Court

In 1986, Wood shot and killed the assistant manager of a Colorado pizza delivery store during a botched robbery. He was tried before a jury in state court for his crimes, but the proceedings resulted in a mistrial. On the advice of

counsel, he subsequently waived his right to a jury, proceeded with a trial to the bench, and was convicted of various crimes.

With regard to the homicide, Wood was convicted of both first degree felony murder under Colorado Revised Statutes § 18-3-102(1)(b) and second degree murder under Colorado Revised Statutes § 18-3-103. For sentencing purposes, the state court "merged" his two murder convictions and his conviction for armed robbery and sentenced him to a single term of life imprisonment for all three crimes. *See* R. at 150. The two separate murder convictions, however, remain on the state court records.

Wood unsuccessfully completed his direct appeal on October 23, 1989, when the Colorado Supreme Court denied certiorari. Over the past twenty years, Wood has continued to challenge his convictions in state and federal court.

B. Wood's First Federal Habeas Petition and His State Court Petitions for Post-Conviction Relief

In 1994, Wood filed a pro se petition for a writ of habeas corpus in United States District Court, which the court dismissed on the ground that Wood had not exhausted his state court remedies with respect to the constitutional claims he alleged. *See* R. at 122, 125. In 1995, he filed a pro se Motion to Vacate Judgment of Conviction and Sentence in state court. From the docket sheet, it appears that the only action the state court took regarding this post-conviction motion was to appoint Wood counsel. *Id.* at 153. For the eight years following

the appointment of counsel, nothing else occurred, and Wood did not request a ruling.

In 2004, Wood revived his state court proceedings when he filed a Petition for Postconviction Relief. *See id.* at 153. This time, however, the petition was ruled upon and disposed of. The court denied all but one of Wood's claims on the ground that they were procedurally defaulted as a matter of state law, either because they were untimely filed or because they violated Colorado Rule of Criminal Procedure 35(c)(3)(VII). That rule denies post-conviction relief for any claim that "could have been presented in an appeal previously brought." The court denied Wood's remaining claim—which alleged ineffective assistance of trial counsel regarding Wood's waiver of his right to a jury trial—on the merits without granting a hearing. R. at 167–69. The Colorado Court of Appeals affirmed, and the Colorado Supreme Court denied certiorari on February 5, 2007. *See id.* at 207–214, 238.

C. The Instant Federal Habeas Application

On February 5, 2008, Wood filed the instant habeas application in United States District Court. Wood presented six constitutional claims, which the district court described as follows:

> (1)(a) that convicting him of both felony murder and second-degree murder of the same victim violates double jeopardy principles and (b) that convicting him of aggravated robbery and then using that offense as the predicate offense for the felony murder conviction violates

> double jeopardy principles; (2) that the waiver of his right to a jury trial on the murder counts was involuntary because defense counsel's advisement was inadequate and because the trial judge accepted his waiver without ensuring that it was made knowingly and voluntarily; (3) that his convictions were obtained in violation of his right not to incriminate himself, i.e., defense counsel advised him to testify at trial, which caused him to incriminate himself; (4) that his convictions were the results of ineffective assistance of both trial and appellate counsel . . . ; and (5) that the [Colorado] felony murder statute violates equal protection principles . . . .

R. at 251–52 (D. Ct. Dkt., Doc. 17, Aug. 15, 2008 Order to Show Cause).

After the district court ordered briefing from the parties on various procedural matters, Wood voluntarily dismissed four of his claims due to his failure to exhaust state court remedies. Only claims (1)(a) and (2) survived, and the court denied relief on the merits for these remaining claims.

II. Discussion

The district court found that four of Wood's constitutional claims were never properly presented to a state court and were therefore unexhausted. In response, Wood voluntarily dismissed them. We find that the district court's order upholding this voluntary dismissal was neither "debatable" nor "wrong." *Slack*, 529 U.S. at 484. But Wood's remaining claims—(1)(a) and (2)—present difficult procedural and merits questions, and we therefore grant a COA as to those claims.

A. Failure to Exhaust State Court Remedies

The district court determined that claims (1)(b), (3), (4), and (5) were unexhausted under 28 U.S.C. § 2254(b)(1)(A) and consequently ordered Wood to "show cause . . . why the habeas corpus application should not be denied as a mixed petition." R. at 253 (D. Ct. Dkt., Doc. 17, Aug. 15, 2008 Order to Show Cause). As an alternative to dismissal of the petition in its entirety, the court also provided Wood the option to "dismiss voluntarily the unexhausted claims and proceed with the exhausted claims." *Id.*; *see also Fairchild v. Workman*, 579 F.3d 1134, 1156 (10th Cir. 2009) (noting that when faced with a mixed habeas petition, the district court may allow the petitioner to "dismiss the unexhausted claims and proceed with the exhausted claims" (quoting *Harris v. Lafler*, 553 F.3d 1028, 1031 (6th Cir. 2009))).

Wood chose the latter course. Although he maintained he had properly exhausted all of his constitutional claims, Wood informed the district court that he "hereby dismisses voluntarily the claims that are deemed unexhausted, and wishes to proceed on his exhausted claims." R. at 259 (D. Ct. Dkt., Doc. 18). The court accepted this decision and dismissed claims (1)(b), (3), (4), and (5). *See* R. at 267 (D. Ct. Dkt., Doc. 19, Sept. 22, 2008 Order).

In seeking a COA, Wood "maintains that it was error for the district Court to rule that his other Habeas Corpus Claims were not exhausted." Pet'r Opening Br. at 10. Wood, however, is bound by his decision to dismiss his unexhausted

claims, notwithstanding his pro se status. *See Tapia v. Lemaster*, 172 F.3d 1193, 1196 (10th Cir. 1999) ("Mr. Tapia argues that he should not be held accountable for the decision to pursue only the exhausted claims because he was pro se. . . . Mr. Tapia's pro se status does not justify reconsideration of the choice he made in his prior habeas matter." (internal citation omitted)).

Wood has therefore failed to show that the district court's decision to dismiss his unexhausted claims—at Wood's own request—was debatable or wrong. *See Coppage v. McKune*, 534 F.3d 1279, 1281 (10th Cir. 2008) (setting forth the standard for granting a COA to review a procedural ruling). We deny him a COA as to claims (1)(b), (3), (4), and (5).[2]

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[2] It appears Wood presented a version of claim (5) to the Colorado District Court in his August 19, 2004 Petition for Postconviction Relief. *See* R. at 163–65. In claim (5), Wood asserts the Colorado felony murder statute under which he was convicted violates Fourteenth Amendment equal protection principles because it "disproportionately imposes the same punishment on one who commits a murder with premeditation . . . on one who has no intent to kill whatsoever." *Id.* at 11–12 (Application for a Writ of Habeas Corpus). This claim, however, is clearly without merit. *See Ragland v. Hundley*, 79 F.3d 702, 706 (8th Cir. 1996) ("Ragland . . . argues that his equal protection rights are violated by the felony-murder doctrine. He argues that felony murder itself amounts to an impermissible classification because only felony murderers are liable for murders that they did not intentionally aid and abet. . . . [I]t is perfectly rational and permissible for a state to equate knowing participation in [the underlying] felonies with . . . the murders which foreseeably ensue." (footnote omitted)). We therefore deny a COA on claim (5) on the alternative ground that it lacks merit. *See Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005) (holding that we may deny a COA "on any ground adequately supported by the record" (quoting *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004))).

B. Wood's Remaining Claims

After the voluntary dismissal, only two of Wood's claims remain. In claim (1)(a), Wood asserts his simultaneous convictions for felony murder and second degree murder violate his right against double jeopardy under the Fifth and Fourteenth Amendments to the Constitution. In claim (2), Wood asserts that the waiver of his jury trial rights was unconstitutional because it was based upon "improper and erroneous" advice on the part of his trial counsel and his trial judge did not independently assess the adequacy of his waiver.

As an initial matter, both of these claims might be subject to dismissal due to the potential untimeliness of Wood's application for habeas corpus. Moreover, the claims might also be barred from our consideration—at least in part—due to an independent and adequate state procedural rule. The district court did not address these procedural matters and instead decided claims (1)(a) and (2) on the merits, although the claims present difficult legal questions. We therefore grant a COA as to claims (1)(a) and (2).

1. Untimeliness

Soon after Wood filed the instant habeas application, the district court ordered him to "show cause why the application should not be denied as time-barred" under the limitations period of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d). R. at 40 (D. Ct. Dkt., Doc. 2, Feb.

19, 2008 Order to Show Cause). Wood complied with this order and filed a lengthy response.

In his response to the show cause order, Wood implied that his 1995 Motion to Vacate Judgment of Conviction and Sentence, which he filed in state court, tolled the AEDPA statute of limitations under § 2244(d)(2) and *Carey v. Saffold*, 536 U.S. 214 (2002). *See* R. at 50–52 (D. Ct. Dkt., Doc. 3, March 20, 2008 Resp. to Show Cause Order). Section 2244(d)(2) states that the AEDPA statute of limitations is tolled while "a properly filed application for State post-conviction or other collateral review . . . is *pending*." (emphasis added). *Carey* held that a state application for post-conviction review remains "pending" under § 2244(d)(2) "until the application has achieved final resolution through the State's post-conviction procedures." 536 U.S. at 220. The district court rejected these arguments, holding that "[i]t is clear on the face of the [habeas] application that this action is time-barred." R. at 73 (D. Ct. Dkt., Doc. 5, Apr. 3, 2008 Order of Dismissal).

Wood subsequently filed a motion to reconsider, restating his arguments regarding the timeliness of his federal habeas application. *See* R. at 82 (D. Ct. Dkt., Doc. 9). The court did not address the substance of any of these arguments, but nonetheless granted the motion to reconsider. *See* R. at 92–93 (D. Ct. Dkt., Doc. 11, May 22, 2008 Order). The court then ordered the respondent to file a Pre-Answer Response to address timeliness under § 2244(d) and exhaustion of

state court remedies under § 2254(b)(1)(A). *See* R. at 95 (Pre-Answer Response). But again, the court never addressed or analyzed the issue of timeliness under AEDPA; as discussed above, Wood voluntarily dismissed his unexhausted claims, and the district court proceeded to adjudicate the merits of the remaining claims.

It is therefore an open question whether Wood's current habeas application was timely filed under AEDPA. Wood's conviction became final in 1990, after the Colorado Supreme Court denied certiorari to review his direct appeal and Wood failed to seek review in the United States Supreme Court. *See Hall v. Scott*, 292 F.3d 1264, 1266 (10th Cir. 2002). And although Wood filed a federal petition for habeas corpus in 1994—prior to AEDPA's 1996 effective date—the instant application was filed in 2008 and is clearly subject to AEDPA's limitations period. *See May v. Workman*, 339 F.3d 1236, 1237 (10th Cir. 2003) (citing § 2244(d)(1) and *Fisher v. Gibson*, 262 F.3d 1135, 1142 (10th Cir. 2001)).

Moreover, it appears Wood took no action in state court to pursue his 1995 Motion to Vacate Judgment of Conviction and Sentence. Indeed, after the state court appointed counsel for Wood, the next two docket entries in the state court records relating to Wood are a letter from Wood to the court and Wood's petition for post-conviction relief—both of which he filed pro se in 2004, nine years after the court appointed counsel to pursue his 1995 motion. *See* R. at 153. Wood's apparently dilatory behavior calls into question his eligibility for the tolling provision of § 2244(d)(2) and his eligibility for equitable tolling. *See May*, 339

F.3d at 1237 (holding that merely filing requests for documents in state court does not toll the AEDPA limitations period under § 2244(d)(2)); *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000) (holding that state prisoners are not allowed to toll the AEDPA limitations period "indefinitely" by "beginning a [state legal] process and abandoning it"); *see also Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003) (equitable tolling under AEDPA is unavailable unless the petitioner has pursued his claims diligently).

The limitations period contained in AEDPA is central to its purpose of bringing finality to state court criminal judgments. *See Herrera v. Lemaster*, 301 F.3d 1192, 1198 (10th Cir. 2002) ("In enacting AEDPA 'Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law.'" (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000))). And even though the district court did not rely upon the AEDPA limitations period to dispose of Wood's habeas application, we may rely upon it in disposing of his appeal. *See Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005) (holding that we may deny habeas relief "on any ground adequately supported by the record" (quoting *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004))).

Because the timeliness of Wood's instant habeas application is an important preliminary matter, briefing by the parties on this issue would assist in the

determination of this appeal. We therefore order the parties to address the timeliness of Wood's habeas application in their briefing to this court.

2. Claim (1)(a): Double Jeopardy

Wood presented his double jeopardy claim to state court in his 2004 petition for post-conviction relief, but the court disposed of the claim on procedural grounds, finding it barred under Colorado Rule of Criminal Procedure 35(c)(3)(VII). *See* R. at 31–32 (*People v. Wood*, No. 04CA2252, Slip. Op. at 4–5 (Colo. Ct. App. Aug. 3, 2006)); *see also* Colo. R. Crim. P. 35(c)(3)(VII) ("The court shall deny any claim that could have been presented in an appeal previously brought or postconviction proceeding previously brought . . . ."). Below, the district court acknowledged the potential procedural default, but nonetheless proceeded to address the merits of Wood's double jeopardy claim. R. at 442 (D. Ct. Dkt., Doc. 25, July 6, 2009 Order) ("Upon current briefing, it appears that claim 1(a) may be procedurally defaulted. . . . [But] I feel compelled, in the interest of fairness to Mr. Wood, to address claim 1(a) on the merits.").[3]

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[3] In his briefing to the district court, Wood argued he had failed to assert his double jeopardy claim on direct appeal—and had consequently failed to comply with Colorado Rule of Criminal Procedure 35(c)(3)(VII)—due to the ineffective assistance of his appellate counsel. R. at 48 (D. Ct. Dkt., Doc. 15). He made the same argument to the Colorado courts when his 2004 Petition for Post-Conviction Relief was denied. R. at 171, 176. According to Wood, his appellate counsel's ineffectiveness was cause for his failure to comply with state procedural rules. The district court did not address this contention, but the parties should address it in their briefing to this court.

Analyzing the claim de novo, the district court held that Wood's simultaneous convictions for first degree felony murder and second degree murder are not a violation of Wood's double jeopardy rights. In the district court's view, because each of the two Colorado murder statutes require proof of a legal element not found in the other, they pass the test articulated by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932). Thus, according to the district court, Wood's dual murder convictions do not amount to an impermissible multiple punishment.

The test in *Blockburger*, however, is merely a tool to assist federal courts in ascertaining the intent of a legislature—generally, legislatures are not presumed to have authorized multiple punishments for a single offense. *See Missouri v. Hunter*, 459 U.S. 359, 366–68 (1983); *see also White v. Howes*, 586 F.3d 1025, 1031 (6th Cir. 2009); *Lucero v. Kerby*, 133 F.3d 1299, 1316 (10th Cir. 1998). On the other hand, a court does not violate double jeopardy principles when it imposes multiple punishments for a single offense which have been authorized by the relevant legislature. *Lucero*, 133 F.3d at 1316 ("[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." (quoting *Hunter*, 459 U.S. at 366)). Here, because Wood's convictions were made under state law, we must defer to the decisions of the Colorado Supreme Court in assessing whether Wood's two

murder convictions were authorized by the legislature. *See White*, 586 F.3d at 1031; *Lucero*, 133 F.3d at 1316.

Reading his pro se filings generously, Wood contends the Colorado General Assembly did not intend to impose multiple convictions for a single homicide. Wood cites various cases from the Colorado Supreme Court to support this argument. *See People v. Hickam*, 684 P.2d 228, 231 (Colo. 1984) ("[The defendant] was convicted on the first-degree felony murder charge and of the lesser included offense of second-degree murder. A defendant may not be convicted of both . . . . Accordingly, the second-degree murder conviction is reversed . . . ."); *People v. Lowe*, 660 P.2d 1261, 1270–71 (Colo. 1983) ("Only one conviction of murder is permitted for the killing of one victim . . . . It would be a strange system of justice that would permit the defendant to be sentenced to two . . . sentences for the killing of one person." (internal citation omitted)); *see also People v. White*, 64 P.3d 864, 876 (Colo. Ct. App. 2002) ("Only one conviction of murder is permitted for the killing of one victim.").

In response, the state argues that prior to sentencing, "the trial court merged the second degree murder conviction . . . into the felony murder conviction and imposed a single sentence," and as a result, Wood's double jeopardy rights were not violated. *See* Resp. to Req. for COA at 10. But this argument does not resolve Wood's double jeopardy claim. The Supreme Court has held that a second conviction—even without an additional sentence—violates

a defendant's double jeopardy rights when the second conviction has not been authorized by the legislature. *See Ball v. United States*, 470 U.S. 856, 865 (1985) ("Thus, the second conviction, *even if it results in no greater sentence*, is an impermissible punishment." (emphasis added)); *United States v. Hernandez*, 94 F.3d 606, 612 (10th Cir. 1996) ("[T]he district court merged the two charges and imposed no sentence for the conspiracy conviction . . . . However, the court did not vacate the conspiracy *conviction* itself." (emphasis in original)); *cf. United States v. Shorter*, 328 F.3d 167, 173 (4th Cir. 2003) ("[H]ere there is no duplicative conviction to be vacated because the district court merged the duplicative counts *into a single conviction*." (emphasis added)).

Given the relevant case law, Wood has carried his burden to show that the district court's disposition of his double jeopardy claim was "debatable." *Slack*, 529 U.S. at 484. We therefore grant Wood a COA on claim (1)(a). Nonetheless, because Wood failed to raise double jeopardy on direct appeal, and because the state courts found the claim to be procedurally defaulted when Wood presented it in his 2004 petition for post-conviction relief, we direct the parties to brief the question whether the claim is barred from our consideration under the independent and adequate state ground doctrine.

3. Claim (2): Invalid Waiver of Right to Jury Trial

Wood's case was first tried to a jury in state court, which found him guilty of robbery and felony menacing but deadlocked on the murder charges. At

Wood's request, the court declared a mistrial. *See* R. at 149, 432. Instead of electing to have his case retried by a jury, Wood agreed to a bench trial in exchange for the prosecution's withdrawal of the death penalty from consideration. *See* Application for COA at 4.

In claim (2), Wood asserts the waiver of his Sixth Amendment right to a jury trial was not "knowing, intelligent, and voluntary," because his trial counsel "improperly and erroneously advised [him] to waive" his rights. Pet'r Opening Br. at 9. Specifically, Wood alleges his trial counsel told Wood he had a "friendly relationship with the trial judge," and on account of this relationship, the judge would be "lenient" and "find [Wood] innocent of the murders." *Id.* at 8–9. Wood styles his challenge to his bench trial as both a claim for ineffective assistance of counsel as well as a claim for an invalid waiver of his constitutional rights. *See* Application for COA at 4.

In state post-conviction proceedings, the Colorado Court of Appeals analyzed the issue under ineffective assistance of counsel standards. *See* R. at 32 (*People v. Wood*, No. 04CA2252, Slip. Op. at 5 (Colo. Ct. App. Aug. 3, 2006)). The court reasoned that, due to Wood's failure to raise the issue on direct appeal, the only cognizable claim Wood could present regarding his jury trial waiver was an ineffective assistance of counsel claim. *See id.* at 31–32; *see also* Colo. R. Crim. P. 35(c)(3)(VIII) ("Notwithstanding (VII) above, the court shall not deny a

postconviction claim of ineffective assistance of trial counsel on the ground that all or part of the claim could have been raised on direct appeal.").

Below, however, the district court did not address the issue under ineffective assistance standards, but rather analyzed only whether Wood's waiver was "knowing, voluntary, and intelligent." R. at 444–46 (D. Ct. Dkt., Doc. 25, July 6, 2009 Order). The district court examined a signed waiver Wood submitted to the trial court, in which he asserted his jury trial waiver was "not the result of any promise, . . . but rather that the waiver is the result of talking this matter over with my attorney, thinking about it, and making my own decision to waive the jury." *Id.* at 432. The district court also noted that the state court record contains at least some evidence of a colloquy between Wood and the trial court discussing his decision to waive a jury trial. *See id.* at 445 (D. Ct. Dkt., Doc. 25, July 6, 2009 Order).

Given the procedural history, Wood's jury trial waiver claim is potentially barred from our consideration due to an independent and adequate state procedural rule, namely Colorado Rule of Criminal Procedure 35(c)(3)(VII).[4] His ineffective assistance of counsel claim relating to the jury trial waiver, however, is cognizable in federal habeas because it was addressed and disposed of on the merits in state court.

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[4] Again, Wood has argued there is cause for his procedural default, namely that his appellate counsel was ineffective. *See* R. at 48 (D. Ct. Dkt., Doc. 15). The parties should address this issue in their briefing to this court.

In light of the district court's failure to address Wood's ineffective assistance of counsel claim, we conclude Wood has shown the district court's disposition of his jury trial waiver claim was "debatable." *Slack*, 529 U.S. at 484. We therefore grant a COA as to claim (2). We direct the parties to address any procedural issues pertinent to this claim in their briefing to the court.

III. Conclusion

For the reasons set forth above, we GRANT a COA on claims (1)(a) and (2). We DENY a COA as to the remaining claims asserted in Wood's habeas application.

Additionally, because disposition of this case, and the interests of justice, would be aided by the appointment of counsel, the office of the Federal Public Defender for the Districts of Wyoming and Colorado is appointed to represent Wood on appeal. *See* 18 U.S.C. § 3006A(a)(2)(B). New counsel may borrow the hard copy of the record on appeal maintained in the clerk's office. In addition, the record is available electronically on the court's docket. Within ten days of the date of this order, new counsel shall submit an entry of appearance to this court.

In addition, counsel for Wood shall file a supplemental opening brief as to claims (1)(a) and (2) described above. The brief should specifically address the merits of those claims, as well as the timeliness of Wood's application for writ of habeas corpus under AEDPA and any state procedural rules that might bar our consideration of claims (1)(a) and (2).

Petitioner's supplemental brief addressing the foregoing is due on or before March 5, 2010. Within thirty days after service of petitioner's brief, respondent shall also file a brief addressing the foregoing. Petitioner may file a reply brief within fourteen days of service of respondent's brief if he so desires. All briefs shall be filed and served in compliance with Federal Rules of Appellate Procedure 28 and 31.

Entered for the Court

Elisabeth A. Shumaker

Elisabeth A. Shumaker
Clerk of Court

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Patrick Wood, *Petitioner*,

v.

KEVIN MILYARD, Warden, Sterling Correctional Facility, *Respondent*.

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

AFFIDAVIT OF SERVICE

Kathleen A. Lord, Assistant Federal Public Defender for the District of Colorado, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for

the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid and addressed to:

Patricia Rae Van Horn
Assistant Attorney General
Appellate Division, CJS
1525 Sherman St. 7th Floor
Denver, CO 80203

It is further attested that the envelope was deposited with the United States Postal Service, Denver, Colorado 80202, on April 7, 2011, and all parties required to be served have been served.

KATHLEEN A. LORD
Assistant Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
tel: (303) 294-7002
fax: (303) 294-1192
e-mail: kathleen_lord@fd.org

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 7th day of April, 2011.

Cassandra Hill
Notary Public

My Commission Expires: 6-21-2014

CASSANDRA HILL NOTARY PUBLIC STATE OF COLORADO

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Patrick Wood, *Petitioner,*

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for the Tenth Circuit

AFFIDAVIT OF MAILING

Kathleen A. Lord, Assistant Federal Public Defender, a member of the Bar of this Court, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were enclosed in an envelope, first-class postage prepaid and addressed to:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

It is further attested that the envelope was deposited with the United States Postal Service, Denver, Colorado 80202, on April 7, 2011, and all parties required to be served have been served.

KATHLEEN A. LORD
Assistant Federal Public Defender

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 7TH day of April, 2011.

Cassandra Hill
Notary Public

My Commission Expires: 10-21-2014

CASSANDRA HILL NOTARY PUBLIC STATE OF COLORADO

My Commission Expires _____