No. 13-324

In The
Supreme Court of the United States

ROBERT LASSITER,

Petitioner,

v.

CITY OF PHILADELPHIA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

By identifying, during a Rule 16 conference held shortly after Defendants had filed an Answer, several deficiencies apparent on the face of the pleadings, including a statute of limitations defense which Defendants had neglected to plead, did the District Court irrevocably waive or forfeit that defense for Defendants even though Defendants otherwise indisputably would have been able to amend their Answer, where the court left to the parties how to deal with the deficiencies, and granted leave to amend and thereafter judgment on the pleadings only upon appropriate motions and following full briefing by the parties?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

During an initial Rule 16 scheduling conference conducted only six weeks after Defendants filed an Answer to Robert Lassiter's section 1983 civil rights Complaint, and before either party had served discovery requests, the District Court pointed out two potentially fatal problems apparent to the court on the face of Lassiter's Complaint – certain "inconsistencies and anomalies" relating to the timing of Lassiter's alleged damages serious enough to trigger F.R.Civ.P. 11 concerns, and a possible statute of limitations issue. Petitioner's Appendix ("App.") 24a. Specifically, Lassiter's complaint claimed various medical expenses incurred in February 2009, even though the false arrest and excessive force which formed the basis for his claim occurred three months later, in May 2009. As for the limitations issue, Lassiter filed his complaint on May 25, 2011, more than two years after the incident in question had occurred.[1]

The District Court did not act on either of these issues, but simply invited the parties to advise the court as to how "this matter should proceed."[2]

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[1] In a claim brought under §1983, the underlying state's statute of limitations applies, which in Pennsylvania is two years. *Smith v. Pittsburgh*, 764 F.2d 188, 194 (3d Cir. 1985).

[2] The sole sources of information in the record regarding the unrecorded conference in chambers are the District Court's Order entered September 20, 2011, following the conference, and its February 23, 2012, Order granting Defendants' motion for leave to amend their Answer to assert the statute of limitations

(Continued on following page)

App. 30a. The court expressly denied that it "instructed the Defendants to file an Amended Answer," or that it "informed the Defendants' counsel that [it] would grant them leave to file an Amended Answer." App. 29a. The court granted the Defendants' subsequently filed motion for leave to amend their Answer only after that motion was fully briefed by both parties. Likewise, the court granted the Defendants' eventual motion for judgment on the pleadings only after full briefing.

These circumstances in no way support Lassiter's claim that the Third Circuit has given District Court judges "carte blanche" to raise unpleaded affirmative defenses "*sua sponte*" in Rule 16 conferences. Petition at 4. The Court of Appeals merely held that, in the particular circumstances of this case, "[b]ecause defendants could have amended the answer to include the statute of limitations defense," and because the untimeliness was "obvious" and undisputed, the District Court's "prompt identification and efficient resolution" of the limitations issue, while continuing to leave all litigation decisions to the parties and acting only after each party had been heard, did not constitute error. Such conclusion does not conflict with this Court's decisions or those of other circuits, and is fully consistent with F.R.Civ.P. 8(c), as well as Rule 16.

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defense. Since it is in neither of these sources, it is unclear where the Court of Appeals derived the statement that "[t]he District Court . . . suggested that defendants could amend their answer . . . ." App. 4a.

Furthermore, whether or not the District Court at the Rule 16 conference properly spoke or should have remained silent regarding the potential limitations defense, there is no authority or logic to justify Lassiter's argument that *Defendants* should be punished for an action by the *court,* over which Defendants had no control, by construing the *court's* action to effect an irrevocable waiver or forfeiture of the defense on Defendants' behalf. At this very early stage of the case, Defendants clearly would have been able to amend their Answer going forward, either by leave of court "freely give[n]" or in responding to an amendment by Lassiter. Defendants did nothing to change that prospect.

Respondents, the City of Philadelphia, Thomas Press, and Police Officers Edward Oleyn and Nick Coco, respectfully request that this Court deny Robert Lassiter's petition to review the judgment of the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was reported at *Lassiter v. City of Philadelphia*, 716 F.3d 53 (3d Cir. 2013), and is also found at Appendix B of the Petition at pages 3a through 10a. Both the decision of the District Court granting the Defendants leave to file an Amended Answer, and its subsequent opinion granting their Motion for Judgment on the Pleadings, were unpublished but are included within the Petition

at Appendix F (pages 24a through 31a) and Appendix D (pages 13a through 22a) respectively. The District Court's Order issued following the September 20, 2011, Rule 16 conference, also unpublished, was not included within the Petition but is included in Respondents' Appendix ("Resp. App.") at page 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 8(c)(1) provides in pertinent part: "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: . . . statute of limitations . . . ."

Federal Rule of Civil Procedure 15(a)(2) states in pertinent part that "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."

Federal Rule of Civil Procedure 16(c)(2) provides in pertinent part that "[a]t any pretrial conference, the court may consider and take appropriate action on the following matters: (A) formulating and simplifying the issues, and eliminating frivolous claims or defenses; . . . and (P) facilitating in other ways the just, speedy, and inexpensive disposition of the action."

STATEMENT OF THE CASE

A. May 2011 to August 2011: The Initial Pleadings.

On May 25, 2011, Lassiter filed a Complaint in the United States District Court for the Eastern District of Pennsylvania, alleging that unnamed officers (subsequently identified as Philadelphia Police Officers Edward Oleyn and Nick Coco) violated his civil rights through a false arrest and unconstitutional use of force arising from their service of an outstanding, but allegedly inactive, bench warrant on Lassiter. The complaint alleged that this incident took place on May 22, 2009. App. 4a. The complaint also named as defendants Thomas Press, the Managing Investigator of the First Judicial District of Pennsylvania Warrant Unit; and the City of Philadelphia, as allegedly responsible for the testing, hiring, training and supervision of the officers involved.

Despite the fact that the complaint pleaded that the alleged incident took place on May 22, 2009, paragraph 16 of the complaint sought to recover damages for medical expenses incurred by Lassiter as far back as February 2009, several months before the alleged date of the incident. App. 30a.

On August 2, 2011, the Defendants jointly filed an Answer to Lassiter's Complaint; the Answer denied all liability but did not plead as an affirmative defense the statute of limitations. App. 4a.

B. September 20, 2011: The Rule 16 Conference.

On September 20, 2011, the District Court convened the parties for the initial Rule 16 scheduling conference in the case. App. 4a. At the conference, the District Court brought to the parties' attention: 1) Lassiter's demand for medical expenses incurred several months before the alleged civil rights violations; and 2) a possible statute of limitations issue apparent on the face of the Complaint. App. 24a. In the words of the District Court, referring to the limitations defense, the court "raised a legal concern during the September 22, 2011 Rule 16 conference in Chambers and invited defendants to advise us as to how 'this matter should proceed.'" App. 30a, Resp. App. 1. The District Court neither "instructed the Defendants to file an Amended Answer alleging the defense," nor "informed the Defendants' counsel that [we] would grant them leave to file an Amended Answer, alleging the Statute of Limitations as an Affirmative Defense." App. 29a.

C. September 21, 2011 through March 30, 2012: Defendants Move to Amend Their Answer and Later for Judgment on the Pleadings, in Each Instance Affording Lassiter the Opportunity to Be Heard on the Limitations Issue.

Following the conference, Lassiter took no action to amend his Complaint, leading the District Court ultimately to conclude that Lassiter might be deliberately refusing to correct his pleading deficiencies

because "with the filing of an amended complaint comes the filing of an amended answer."[3] App. 30a. On September 28, 2011, Defendants filed a Motion for Leave to File an Amended Answer with Amended Affirmative Defenses, seeking to add the statute of limitations defense. App. 5a. Lassiter filed a brief opposing that motion on October 5, 2011. After consideration of the briefs, the District Court granted leave to amend on February 23, 2012. App. 23a-31a.

On March 7, 2012, Defendants filed a Motion for Judgment on the Pleadings which sought dismissal of all of Lassiter's claims as time-barred. Lassiter filed a brief opposing that motion on March 21, 2012.

D. May 29, 2012: The District Court Grants Defendants' Contested Motion for Judgment on the Pleadings and Dismisses Lassiter's Action as Time-Barred.

On May 29, 2012, after consideration of the arguments of both parties, the District Court granted Defendants' motion and entered judgment in favor of the Defendants. App. 13a-22a.

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[3] The February 23, 2012, Order granting Defendants leave to amend also required Lassiter's counsel to file a Memorandum explaining why he should not be sanctioned for an apparent Rule 11 violation as a result of pleading a "factual impossibility" and failing to correct it. App. 30a-31a.

E. The District Court's Opinions.

1. The February 23, 2012, Grant of Leave to Amend.

In ruling on Defendants' motion for leave to file an Amended Answer, the District Court noted that Lassiter admitted that he "made an error by failing to file the Complaint within the two year statute of limitations period," and rejected Lassiter's argument that Defendants had waived the defense by their failure to include it in their original answer. App. 25a. The District Court relied upon *Charpentier v. Godsil*, 937 F.2d 859 (3d Cir. 1991), in which the Third Circuit held that "[f]ailure to raise an affirmative defense by responsive pleading or appropriate motion . . . does not always result in waiver because under F.R.Civ.P. 15(a), a responsive pleading may be amended at any time by leave of court to include an affirmative defense, and 'leave shall be freely given when justice so requires.'" *Id.* at 863-64. Unless the opposing party will be prejudiced, leave to amend should generally be allowed. *Id.* at 864. Thus, "a defendant does not waive an affirmative defense if he raised the issue at a pragmatically sufficient time, and the plaintiff was not prejudiced in its ability to respond." App. 26a. Because Defendants' request was "raised early in the course of the litigation," when no discovery had taken place other than the exchange of Initial Disclosures, because Lassiter made no

recognizable claim of prejudice,[4] and because grant of leave to amend put Lassiter on full notice of the defense "such that he now has an opportunity to demonstrate why the statute of limitations defense should not succeed," leave to amend was "freely given." App. 27a-28a.

In its decision, the District Court also addressed Lassiter's argument that it had "erred in raising, *sua sponte*, the statute of limitations issue at the Rule 16 conference and 'instruct[ing] Defendants to file an Amended Answer raising the defense[ ].'" App. 25a. The court addressed this, "not because . . . [this argument] has merit, but to correct the record in light of plaintiff's mischaracterization of the proceedings here." App. 29a. The court clarified that it had *not* "*sua sponte* disposed of *any* matter – we merely raised a legal concern during the September 22, 2011 Rule 16 conference in Chambers and invited defendants to advise us as to how 'this matter should proceed.'" App. 29a-30a.

2. The May 29, 2012, Order Dismissing Lassiter's Complaint.

In ruling on Defendants' Motion for Judgment on the Pleadings, the District Court pointed out that Lassiter did not dispute that his Complaint had been

[4] The District Court properly recognized that concern that an affirmative defense will be successful is not the type of "prejudice" that will defeat amendment. App. 27a n. 2.

filed several days after the applicable statute of limitations had run. App. 13a. The court again rejected Lassiter's argument that Defendants had waived the defense, for the reasons already stated in its February 23, 2012, Order. App. 15a. The court also rejected Lassiter's argument that equitable tolling should save his Complaint, which Lassiter admitted was filed late solely because of "human error" and not because of any extraordinary circumstance. App. 17a-18a.

3. The Court of Appeals Opinion.

On May 13, 2013, the Court of Appeals affirmed the District Court's dismissal of Lassiter's Complaint. In its decision, the Court addressed only Lassiter's argument that the District Court had "improperly raised the statute of limitations issue *sua sponte* at the Rule 16 conference." App. 5a. The Court found that the District Court had not acted improperly given the facts of the case – because Defendants could have amended their Answer under *Charpentier*, and because the untimeliness of the complaint was "obvious" and factually and legally undisputed. App. 7a. Given those two critical facts, the Court reasoned that "it would have been pointless for the District Court to allow this case to continue to occupy space on the docket." App. 7a. Therefore, identifying the issue at the first conference and "inviting the parties to brief the issue" if they pursued it did not constitute error. App. 7a.

Because the Court of Appeals did not deem the District Court's actions improper, it did not reach Lassiter's contention that the District Court's action acted to waive or forfeit the defense, precluding Defendants from thereafter amending their Answer or moving for judgment on the pleadings.

REASONS FOR DENYING THE PETITION

Lassiter seeks review on the premise that the Court of Appeals' decision gives "carte blanche" to District Courts to generally "raise" affirmative defenses not contained in a defendant's responsive pleading. Petition at 4. He further claims that such "carte blanche" places the Third Circuit in conflict with decisions of this Court and other Circuits, and with the dictates of F.R.Civ.P. 8(c). Petition at 4-5.

As a threshold matter, the Court of Appeals' decision cannot be read as Lassiter asserts, but is limited by its terms to early identification, prior to any material proceedings, in cases such as Lassiter's, where the defense is apparent on the face of the complaint and not otherwise subject to factual or legal dispute, and where further action by the trial court only follows after appropriate motions by the parties and a full opportunity to brief the merits. There is no divergence from this Court's precedent, nor Circuit split, on this issue. Moreover, even if this Court were to find error in the District Court's identification of an issue that was apparent on the face of

the complaint, any discussion by this Court would be highly academic, as it would be a novel and extraordinary holding for this Court even to suggest that an overreaching by the trial court acts to effect a waiver or forfeiture of a defense by the defendant.

A. There Is No Conflict With Decisions of This Court.

Contrary to Lassiter's contentions, the Court of Appeals' decision presents no conflict with cases such as *Wood v. Milyard*, 132 S. Ct. 1826 (2012); *Day v. McDonough*, 547 U.S. 198 (2006); or *Arizona v. California*, 530 U.S. 392 (2000). None of these cases holds that the mere identification of an affirmative defense in any context outside of *in forma pauperis* reviews and *habeas* petitions is *per se* error. None requires (or supports) holding that Defendants irrevocably waived the statute of limitations a mere six weeks after filing their original Answer before any optional discovery had occurred, or that a court can waive a defense for a party. None conflicts with the District Court leaving all tactical decisions to the parties and requiring full briefing prior to making any decision.

In *Wood*, this Court held that a federal appeals court possesses the authority, although not the obligation, to address the timeliness of a state prisoner's federal *habeas* petition on the court's own initiative. 132 S. Ct. at 1828. The Court then found that the appeals court had abused its discretion when it *sua sponte* ruled on the timeliness of a petition after the state had "deliberately" waived its limitations defense

and not sought the dismissal. *Id.* at 1835. The state in *Wood* had told the District Court twice that it would "not challenge, but [is] not conceding" the timeliness of Wood's petition. This Court reasoned that the state's "decision not to contest the timeliness of Wood's petition did not stem from an 'inadvertent error,'" but rather, "after expressing its clear and accurate understanding of the timeliness issue," the state "chose, in no uncertain terms, to refrain from interposing a timeliness 'challenge' to Wood's petition." *Id.* at 1830.

The difference between the situation in *Wood* and the present case could not be clearer. Defendants' initial failure to plead the limitations defense here indisputably was the result of "inadvertent error," and certainly not a deliberate, intelligent waiver of the defense. *Wood* therefore supports the Court of Appeals' and District Court's conclusion in this case that no waiver occurred.[5] *Wood* also quotes from this Court's opinion in *Day* that "[o]rdinarily, in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer *or in an amendment thereto*." *Id.* at 1832, quoting *Day*, 547 U.S. at 202 (emphasis added). *Wood* and *Day* thus both recognize that amendment of a responsive pleading is a permissible means of asserting a statute of

[5] A District Court's decision regarding the waiver of an affirmative defense may be reversed only if it constituted an abuse of discretion. *Cetel v. Kirwan Fin. Group, Inc.*, 460 F.3d 494, 506 (3d Cir. 2006), *cert. denied*, 549 U.S. 1207 (2007).

limitations defense and avoiding the waiver or forfeiture of that defense.

Day, in fact, affirmed the handling by a District Court of a statute of limitations defense to the *habeas* petition in that case. In *Day*, the state answered the petition by agreeing that it was timely under a specified but erroneous calculation. *Day*, 547 U.S. at 201. Again, this Court distinguished a "miscalculation" from "intelligent waiver," held that the state had not waived its timeliness defense, and affirmed the District Court's ultimate dismissal of the petition. *Id.* at 202. The Court held that, before dismissal, a court must accord both parties fair notice and an opportunity to present their positions, and also must assure itself that the petitioner has not been significantly prejudiced by the delay in focusing on the limitations issue. *Id.* at 210. *Day*, therefore, also is supportive of the result in this case, since Defendants did not make an "intelligent waiver," and the District Court provided notice and a full opportunity for all parties to brief the merits before ruling on the defense.

Lassiter cites to *Arizona v. California* for the proposition that a court's identification of a statute of limitations defense conflicts with the principle of party presentation in an adversarial system. In that case, this Court rejected the argument that it should have considered a preclusion defense to long-running litigation as to water rights from the Colorado River even though the parties had failed to raise it earlier in the litigation "despite ample opportunity and cause to do so." 530 U.S. at 413. Although the Court

reasoned that a court could dismiss an action *sua sponte* if it were on notice that it had previously decided the issue presented, even if the defense had not been raised, that circumstance was not present in the case before it. The Court stated that "trial courts must be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principle of party presentation so basic to our system of adjudication."[6] *Id.*

But there is nothing about the present case which improperly "erod[es] the principle of party presentation." The District Court did not predetermine the defense which Lassiter himself admits was fully apparent on the face of his Complaint; it did not even demand briefing with the intention of issuing a ruling, but instead completely left the choice to Defendants as to whether to move to amend and subsequently to dismiss, and required full briefing before making each decision, all consistent with the concept of "party presentation." Lassiter engages in some wishful thinking that, had the District Court not "raised" the defense at the Rule 16 conference, Defendants never would have spotted it, but given Lassiter's acknowledgment that it was patently obvious, the District Court's simple identification did nothing more than speed up the inevitable presentation of this issue by the parties.

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[6] The other cases of this Court from which Lassiter selectively quotes have nothing to do with affirmative defenses or any circumstances similar to this case.

B. There Is No Circuit Conflict or Conflict With Rule 8(c).

Lassiter's Petition also claims that the Third Circuit's decision is in conflict with two cases from other circuits allegedly involving "*sua sponte*" action by a District Court on an unpleaded statute of limitations defense – *Haskell v. Washington Township*, 864 F.2d 1266 (6th Cir. 1988), and *Eriline Co. S.A. v. Johnson*, 440 F.3d 648 (4th Cir. 2006). Again, both cases are easily distinguishable and present no conflict. And, as already recognized by *Wood* and *Day*, there also is no conflict with the requirement of Rule 8(c)(1) that affirmative defenses must be asserted in responsive pleadings, given that amendments to raise such defenses are permitted.

In *Haskell*, more than three *years* of litigation, including several cross-motions for partial summary judgment, had transpired before the District Court, in the course of deciding one of those motions, *sua sponte* noted a possible statute of limitations defense to one of Haskell's claims and, without any motion by the defendants, granted them leave to file an amended answer and a motion for partial summary judgment on the defense. *Haskell,* 864 F.2d at 1271-72. Approximately a week later, after defendants had filed the motion and apparently without any opportunity for the plaintiff to contest the issue, the District Court dismissed the claim. *Id.* at 1272.

On appeal, the Sixth Circuit considered the critical factor to be whether the defendants had

waived the statute of limitations defense by failing to raise it until the District Court had acted. It concluded that, *"[b]ecause of the length of the time (over three years) and extensive litigation (three published opinions) between the filing of this action and the district court's sua sponte raising of this issue*, the interests of justice require that we hold, *under the circumstances of this case*, that the defendants-appellees' failure to raise the limitations defense in a timely fashion constitutes a waiver." *Id.* at 1273 (emphasis added). And because the limitations defense already had been waived *by the defendants,* it was improper for the court to revive it.

In *Eriline*, the District Court, approximately eighteen months after the action commenced and in the course of deciding a second set of motions for default judgment, *sua sponte* raised and ruled on a statute of limitations defense, holding that the plaintiff's claims were barred by state and federal statutes of limitations and dismissing the case. *Eriline*, 440 F.3d at 651. The Fourth Circuit held that the defendant (who had never appeared in the case) had waived the statute of limitations defense, so that the District Court's raising and deciding the defense on its own initiative constituted an error of law.

In the present case, the Court of Appeals correctly recognized that waivers had occurred in both *Haskell* and *Eriline*, primarily because of the lengthy and protracted litigation which had preceded the trial court's raising of the defense in each instance. App. 8a ("Because of the length of time and extensive

litigation in those cases, the courts determined that the statute of limitations defense had been waived under Rule 8(c)."). Furthermore, in both cases the trial court essentially raised and ruled on the waived defense without permitting the plaintiff a meaningful opportunity to be heard. The judge in *Haskell sua sponte* granted the defendants leave to amend and to move for summary judgment, then granted that motion days after it was filed; *Eriline* simply simultaneously raised and ruled on the defense. In contrast, as the Court of Appeals emphasized here, the District Court took no action after the Rule 16 conference other than to decide motions brought and fully briefed by the parties. App. 8a.

Accordingly, there is no circuit split. All three cases look to whether, given the length and nature of the litigation at the time the District Court "raised" the defense, the defendants had already irrevocably waived the statute of limitations, and therefore could no longer amend their responsive pleadings to add the defense. All three cases also turned on whether the court had afforded the opportunity to all parties to be heard on the merits of the defense before ruling on the issue. Because the present case had just begun, no possible prejudice to Lassiter ensued from the proposed amendment, and the District Court ruled only following motions and briefing by the parties, the Court of Appeals correctly recognized *Haskell* and *Eriline* to be "inapposite" and "unpersuasive." App. 8a.

C. There Is No Basis for Imposing a Waiver or Forfeiture of an Otherwise Unwaived Statute of Limitations Defense Due to an Action by the District Court Over Which the Defendant Has No Control.

Lassiter's Petition is conspicuously silent on an issue present in this case which is absent in the supposed "conflicts" he attempts to posit. None of the cases discussed concludes that a defendant should be punished for a court's "*sua sponte*" raising of an unpleaded statute of limitations defense in circumstances where the defendant easily could have amended its pleading to add the defense. Yet that is exactly the result which Lassiter demands. Because Defendants had no control over what the District Court did at the Rule 16 conference, they should not bear the consequences for something for which they were not responsible.

Even Lassiter admits that "Defendants still would have been able to raise the defense and amend their Answer if they had done so in a timely manner." Petition at 11. Thus, the only reason Lassiter maintains that Defendants could not amend their Answer in this case has nothing to do with any action within the Defendants' control. Even if the District Court slightly overstepped its boundaries at the Rule 16 conference, Defendants had no control over what the court said at that conference. Nevertheless, Lassiter insists that the court's action effected a forfeiture or waiver of the defense on Defendants' behalf, irrevocably removing the defense from the case.

The cases discussed in Lassiter's Petition offer no support for such a draconian result. *Haskell* and *Eriline* found that the Defendants themselves waived the defense due to the time elapsed and the extent of the proceedings (supporting a conclusion of prejudicial delay to the plaintiff, and consequent inability to amend). In contrast, *Davis v. Bryan*, 810 F.2d 42 (2d Cir. 1987), which Lassiter briefly references, found that although the trial judge had erred in that case by dismissing the complaint on limitations grounds even though the defendant had never raised that defense, the Court took pains to "make it clear that we do not express the opinion that the appellees have waived the statute of limitations defense." *Id.* at 45. In other words, waiver or forfeiture was not the consequence of the trial court's error.

And while Lassiter complains that it is wholly "speculative" to assume that Defendants ever would have recognized the defense and timely sought leave to amend, the patency of the defense in this case renders it highly unlikely that Defendants would not have quickly discerned it. Indeed, Lassiter essentially is asking this Court, as he did the courts below, to reward his own gamesmanship in refusing to amend his otherwise deficient complaint, which would have triggered a new responsive pleading and reexamination of the Complaint.

In sum, whatever the advisability of a District Court judge identifying an obvious statute of limitations defense at an early Rule 16 conference, Lassiter's only hope of avoiding dismissal of his case as

time-barred depends upon the conclusion that such identification necessarily waives or forfeits that defense forever *for Defendants*. Neither caselaw, logic, nor equity supports such a result. The facts of this case render it a particularly poor candidate for certiorari by this Court.

CONCLUSION

For all the foregoing reasons, Lassiter's petition for a writ of certiorari should be denied.

Respectfully submitted,

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