

Adversarial No More: How *Sua Sponte* Assertion of Affirmative Defenses to Habeas Wreaks Havoc on the Rules of Civil Procedure

Abstract .....	178
Introduction .....	179
I. Habeas Corpus: Substantively Unique, Procedurally Unremarkable .....	182
II. Affirmative Defenses: What They Are, and How They Are Pled .....	184
A. Affirmative Defenses Under the Federal Rules .....	184
B. Federal Rule of Civil Procedure 8(c)'s Affirmative Defense Pleading Standard.....	186
C. Rule 8(c) Is A Waiver Rule With No Exceptions .....	187
III. <i>Sua Sponte</i> Action: When Courts Raise Claims and Defenses Normally Raised by the Parties.....	190
IV. The Special Concern of Habeas Cases: Raising Affirmative Defenses to Defeat a Petitioner's Application to Be Freed .....	192
A. <i>Granberry v. Greer</i> : Appellate Courts May Raise Exhaustion <i>Sua Sponte</i> .....	193
B. <i>Caspari v. Bohlen</i> : Federal Courts May Raise Nonretroactivity <i>Sua Sponte</i> .....	196

---

\* Assistant Corporation Counsel, Special Federal Litigation Division, New York City Law Department. I would like to thank the talented and patient editors of the Oregon Law Review for their careful work on this article. I would also like thank my wonderful husband Tom Nolan, who proofreads draft after draft, and finds something nice to say with each new read. Finally, many thanks to my mother-in-law Mary Beth Nolan for her unwavering support and love.

C.	Appellate Courts Have Unanimously Held Procedural Default May Be Raised <i>Sua Sponte</i> .....	197
D.	<i>Day v. McDonough</i> : Statute of Limitations Defenses May Be Raised <i>Sua Sponte</i> .....	198
V.	Affirmative Defenses In Habeas Petitions Should be Waived If Not Raised According to Rule 8(c) .....	200
A.	Rule 8(c) Applies to Habeas Cases .....	200
B.	No Policy Reason Justifies <i>Sua Sponte</i> Revival of Affirmative Defenses .....	202
1.	Comity Justifies the Existence of Certain Affirmative Defenses, But Does Not Excuse Raising Them <i>Sua Sponte</i> .....	202
2.	The Federal Rules Provide Adequate Safeguards for Defendants Who Waive Affirmative Defenses: There Is No Need for Additional Rules in Habeas .....	203
3.	<i>Caspari</i> Was Wrongly Decided: Casting Aside Rule 8(c)'s Waiver Rule With Respect to Retroactivity Has No Precedential Support.....	204
	Conclusion: Habeas Litigation Must Be Adversarial with No Favors Granted to Already Powerful Respondents .....	204

#### ABSTRACT

In every federal civil case, a defendant must raise its affirmative defenses in the pleading that responds to a plaintiff's complaint. According to Federal Rule of Civil Procedure 8(c), failure to properly plead, for example, a statute of limitations defense, waives the defense for good. Rule 8(c) does not exempt any category of affirmative defense, nor does it forgive unintentional omissions of certain defenses. It also does not prefer governmental defendants to others. Yet in habeas corpus cases, the most significant affirmative defenses to habeas petitions need not comply with Rule 8(c). Instead, federal courts may raise the affirmative defenses of statute of limitations, exhaustion of state remedies, procedural default and nonretroactivity *sua sponte* even if the defense would otherwise be waived pursuant to Rule 8(c).

This Article contends that habeas litigation is the worst place to grant State respondents any sort of procedural favor. Habeas cases implicate criminal convictions that are fundamentally unfair. And habeas petitioners need all the help they can get—since the passage of

the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), the odds of winning habeas relief are akin to the odds of winning the lottery.

After examining the history of affirmative defenses, the Article next describes the purpose behind Rule 8(c) and argues that the rule was meant to be strictly applied. It next explains how federal courts' willingness to take *sua sponte* action on behalf of habeas respondents violates both the spirit and the letter of Rule 8(c). It further argues that the Supreme Court's reliance on comity and other policy-based justifications do not suffice to overcome the Federal Rules of Civil Procedure, which apply without regard to what sort of case is being heard. In light of the curtailed substantive paths to habeas relief, it also contends that habeas cases are the worst candidates for aggressive *sua sponte* advocacy that revives affirmative defenses at the expense of those imprisoned unfairly.

With respect to Rule 8(c), habeas respondents should be treated similarly to, not differently from, every other civil defendant. The Article concludes that assisting respondents with *sua sponte* action in habeas cases conflicts with the purpose of an adversarial system by giving an unfair advantage to defendants who need it the least.

#### INTRODUCTION

In every federal civil case, a defendant must raise its affirmative defenses in the pleading that responds to a plaintiff's complaint.<sup>1</sup> Unless granted leave to amend, failure to properly plead, for example, a statute of limitations defense, waives that defense for good.<sup>2</sup> Federal Rule of Civil Procedure 8(c) (Rule 8(c)) states this requirement in simple terms: "In responding to a pleading, a party must affirmatively state any . . . affirmative defense."<sup>3</sup> The rule does not exempt any particular defense—*res judicata* is as waivable as the defense of injury by fellow servant.<sup>4</sup> The rule does not forgive unintentional omissions of certain defenses.<sup>5</sup> Nor does the rule give preferential treatment to

---

<sup>1</sup> FED. R. CIV. P. 8(c).

<sup>2</sup> 5 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1278 (3d ed. 1998).

<sup>3</sup> FED. R. CIV. P. 8(c).

<sup>4</sup> *See id.*

<sup>5</sup> *Harris v. Sec'y, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 343 n.2 (D.C. Cir. 1997).

government defendants, even though they receive concessions elsewhere in the Rules.<sup>6</sup>

Although habeas petitions challenge criminal convictions, they are treated as civil cases in federal court and proceed through federal dockets much like other civil cases. There are some semantic differences. In habeas litigation, plaintiffs challenging their state criminal convictions—“petitioners”—sue “respondents.” Still, like any other civil defendant, respondents may answer or move to dismiss a habeas petition.<sup>7</sup> Yet, the Supreme Court has exempted the most significant affirmative defenses to habeas petitions from the strictures of Rule 8(c).

Although ordinarily the affirmative defense of statute of limitations “is forfeited if not raised in a defendant’s answer or in an amendment thereto,” this is not the case when a State is responding to a habeas petition.<sup>8</sup> Instead, federal courts may raise the defense on the State’s behalf *sua sponte* even if the State fails to raise it in its first responsive pleading.<sup>9</sup> The same is true with respect to the affirmative defenses of exhaustion of state remedies, procedural default and nonretroactivity—all survive despite a habeas respondent’s failure to comply with Rule 8(c).<sup>10</sup> As a result, affirmative defenses that would be deemed waived in any other federal civil case survive in habeas actions even when respondents fail to comply with Rule 8(c).

*Sua sponte* action of any kind is a departure from an adversarial system of litigation and risks handing an advantage to the party that benefits from the *sua sponte* act. The stakes are certainly higher in habeas than they are, for example, in copyright. Nevertheless, federal courts are less willing to raise affirmative defenses *sua sponte* in

---

<sup>6</sup> Compare FED. R. CIV. P. 12(a)(1)(B) (“A party must serve an answer to a counterclaim or crossclaim within 20 days after being served with the pleading that states the counterclaim or crossclaim.”) (emphasis added), with FED. R. CIV. P. 12(a)(2) (“The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.”) (emphasis added).

<sup>7</sup> Rules Governing Section 2254 Cases, 28 U.S.C. § 2254, R. 5 (discussing answer to habeas petition); *White v. Lewis*, 874 F.2d 599, 602 (9th Cir. 1989) (respondent may move to dismiss habeas petition).

<sup>8</sup> *Day v. McDonough*, 547 U.S. 198, 202 (2006).

<sup>9</sup> See *id.* (lower court has discretion to correct State’s error and dismiss habeas petition as untimely).

<sup>10</sup> *Id.* at 206, 208.

copyright actions than they are in habeas cases.<sup>11</sup> How can this be? In copyright, a plaintiff seeks money damages. In habeas, a petitioner seeks his freedom.

This Article will not chronicle the many ways in which habeas has been substantively curtailed.<sup>12</sup> Instead, it examines how federal courts' willingness to take *sua sponte* action on behalf of habeas respondents violates procedural rules and relies on unsound policy. Given the curtailed substantive paths to habeas relief, habeas cases are the worst candidates for aggressive *sua sponte* advocacy that revives affirmative defenses at the expense of parties seeking to void unfair convictions. At a minimum, when it comes to procedural rules like Rule 8(c), habeas respondents should be treated similarly to, not more preferentially than, every other civil defendant.

The Article begins by describing how a federal habeas petition moves through federal court much like any other federal civil case. The Federal Rules of Civil Procedure apply in habeas cases just as they do in other civil cases. Second, it traces the history of affirmative defenses in federal practice and explains how those defenses must be pled in light of Rule 8(c). Third, the Article reviews federal courts' reliance on their *sua sponte* authority and contends that *sua sponte* raising of affirmative defenses has significant consequences that upset the adversarial system.

Fourth, the Article argues that Rule 8(c) should be strictly applied in habeas actions and that the Supreme Court's jurisprudence fails to offer any sound reason—policy, practical, or otherwise—that justifies helping habeas respondents by raising their affirmative defenses *sua sponte*. The Article concludes by contending that assisting respondents with *sua sponte* action in habeas cases violates the most important aspect of American litigation's adversarial system: it gives an unfair advantage to defendants who have no need for the courts' advocacy.

---

<sup>11</sup> *E.g.*, *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1240 (11th Cir. 2010) (reversing district court's raising of affirmative defense of fair use *sua sponte* in copyright infringement case).

<sup>12</sup> A habeas petition has very little chance of succeeding in federal court since Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.), which created "a series of new procedural obstacles," including "a first-ever time limit for filing a first habeas petition; stricter barriers to review of second and successive petitions; and a new, tougher standard of review." Joseph L. Hoffmann & Nancy J. King, *Essays, Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 806 (2009).

## I

HABEAS CORPUS: SUBSTANTIVELY UNIQUE, PROCEDURALLY  
UNREMARKABLE

The volume of law review articles and seminal Supreme Court decisions attests to the fact that habeas corpus matters. The writ has a storied purpose: “[T]he protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.”<sup>13</sup> Blackstone himself labeled it “the great and efficacious writ, in all manner of illegal confinement.”<sup>14</sup> Even its nickname, “the Great Writ,” signals to every law student learning about it for the first time to pay attention.<sup>15</sup>

In granting a habeas petition brought pursuant to 28 U.S.C. § 2254, a single federal judge can overturn the judgment of a state’s highest court when the petition relates to “the application of the United States Constitution or laws to the facts in question.”<sup>16</sup> “[A]bsent suspension, the writ of habeas corpus remains available to every individual detained within the United States.”<sup>17</sup> The Supreme Court had described the “preferred place of the Great Writ in our constitutional system,”<sup>18</sup> but its efficacy has been eroded over time by substantive and procedural hurdles.

The Great Writ has come under fire in recent decades. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which implemented significant changes to the manner in which habeas petitions may be brought and on what grounds habeas challenges may be raised. “AEDPA imposed strict time limits on the filing of federal habeas corpus actions, gave

---

<sup>13</sup> Jones v. Cunningham, 371 U.S. 236, 243 (1963).

<sup>14</sup> Harris v. Nelson, 394 U.S. 286, 291 (1969) (quoting 3 W. BLACKSTONE, COMMENTARIES 131 (Lewis ed., 1902)).

<sup>15</sup> Law students are likely introduced to habeas through a discussion of *Ex parte Milligan*, 71 U.S. (2 Wall.) (1866), in which “the Court struck down military commissions convened unilaterally by President Lincoln during the Civil War largely as a violation of the defendant’s Fifth and Sixth Amendment rights, rejecting the government’s argument that the Habeas Corpus Act of 1863 had effectively authorized President Lincoln’s actions.” Stephen I. Vladeck, Book Review, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 963 (2011); see also Parisi v. Davidson, 405 U.S. 34, 46–47 (1972) (Douglas, J. concurring) (“[H]abeas corpus is an overriding remedy to test the jurisdiction of the military to try or to detain a person” and “[t]he classic case is *Ex parte Milligan* . . . where habeas corpus was issued on behalf of a civilian tried and convicted in Indiana by a military tribunal.”).

<sup>16</sup> Sumner v. Mata, 449 U.S. 539, 543–44 (1981).

<sup>17</sup> Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) (citing U.S. CONST., art. I, § 9, cl. 2).

<sup>18</sup> Parisi, 405 U.S. at 47 (Douglas, J., concurring).

preclusive effect to orders denying habeas relief, and essentially limited habeas corpus relief to bad faith or patently unreasonable state court errors.”<sup>19</sup> Following AEDPA, Supreme Court decisions “reflect a general preference towards substantial deference to lower court findings, limits on review in the interest of finality, and general limitations on the application of constitutional rules to state prisoners.”<sup>20</sup>

The literature addressing the narrowed path to habeas relief examines the impact of habeas-specific statutes, rules, and policy. The message in that line of scholarship is, essentially, that habeas is “different.” But missing is an acknowledgement of the many ways in which habeas cases are so much like other federal civil cases.

A prisoner’s federal habeas petition progresses procedurally much like all federal civil cases. Even though habeas corpus petitions challenge criminal convictions, they are processed as civil cases and assigned a civil docket number.<sup>21</sup> The analog to a complaint in the habeas context is an “application,” which, like a complaint, commences the action.<sup>22</sup>

The Federal Rules of Civil Procedure apply by default “to the extent that they are not inconsistent with the Habeas Corpus Rules.”<sup>23</sup> For example, Rule 12(b)(6) applies to States’ motions to dismiss petitions brought pursuant to section 2254.<sup>24</sup> And motions to amend a State’s answer to a habeas petition are governed by Rule 15(a).<sup>25</sup> In theory, if “a statutory time limitation is forfeited if not raised in a

---

<sup>19</sup> Stephen F. Smith, Articles, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 301 (2008).

<sup>20</sup> Jordon T. Stanley, “Deference Does Not Imply Abandonment or Abdication of Judicial Review”: *The Evolution of Habeas Jurisprudence Under AEDPA and the Rehnquist Court*, 72 UNIV. MO. KAN. CITY L. REV. 739, 745 (2004).

<sup>21</sup> Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 317 n.53 (2002).

<sup>22</sup> *McFarland v. Scott*, 512 U.S. 849, 866 n.2 (1994) (Thomas, J., dissenting).

<sup>23</sup> *Id.* (citing Rules Governing Section 2254 Cases, 28 U.S.C. § 2254 R. 11; FED. R. CIV. P. 81(a)(2) (current version at FED. R. CIV. P. 81(a)(4)); *see also* *Slack v. McDaniel*, 529 U.S. 473, 489 (2000).

<sup>24</sup> *Walker v. Kelly*, 589 F.3d 127, 139 (4th Cir. 2009).

<sup>25</sup> *See, e.g., Waldrip v. Hall*, 548 F.3d 729, 732 (9th Cir. 2008) (applying Rule 15(a) to a motion for leave to amend answer to habeas petition, and stating that “[c]ourts may freely grant leave when justice so requires, and public policy strongly encourages courts to permit amendments” (citations omitted)).

defendant's answer or in an amendment thereto" pursuant to Rules 8(c), 12(b), and 15(a),<sup>26</sup> the same should be true in habeas.

For a limited period of time at the beginning of a habeas case, habeas procedure varies from the procedure in other civil cases. Rule 4 of the habeas rules (applicable in section 2254 cases) provides that a court assigned a habeas petition "must promptly examine it," and "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner."<sup>27</sup> However, if the judge does not dismiss the petition, the court will order the respondent to answer or move to dismiss.<sup>28</sup> As a result, unlike any other civil case, in habeas, a district court may act to dismiss a frivolous pleading before the defendant has to answer or move to dismiss.<sup>29</sup>

Yet with the exception of the pre-answer review described above, a habeas petition should progress procedurally just as any other federal civil action does. With respect to procedure, habeas is *like* other civil cases, not different.

## II

### AFFIRMATIVE DEFENSES: WHAT THEY ARE, AND HOW THEY ARE PLED

To understand why affirmative defenses to habeas corpus petitions should be treated like any other affirmative defense, it is useful to understand exactly what an affirmative defense is, and why affirmative defenses are governed by specific pleading standards.

#### *A. Affirmative Defenses Under the Federal Rules*

In the context of habeas corpus petitions, the defenses of statute of limitations, exhaustion of state remedies, procedural default, and nonretroactivity are all affirmative defenses.<sup>30</sup> But what makes a defense an affirmative defense?

---

<sup>26</sup> Day v. McDonough, 547 U.S. 198, 202 (2006).

<sup>27</sup> Rules Governing Section 2254 Cases, 28 U.S.C. § 2254 R. 4.

<sup>28</sup> *Id.*

<sup>29</sup> See, e.g., Kiser v. Johnson, 163 F.3d 326, 328 (5th Cir. 1999). *Kiser* also holds that Rule 8(c) "does not bar *sua sponte* consideration of the AEDPA's statute of limitations provision" because Rule 8(c) is inconsistent with Rule 4 of the habeas rules. *Id.* at 329.

<sup>30</sup> Day, 547 U.S. at 208.

Civil defendants can avoid liability in a number of ways. If a doctor is sued for medical malpractice with respect to a patient he never treated, the doctor might reply to the patient's complaint with emphatic factual denials. In so doing, the doctor will attack the patient's *prima facie* case by way of a "negative defense."<sup>31</sup> In response to plaintiff's allegations, the doctor essentially says "no."

But a doctor sued by a patient he did treat may accept all of the patient's allegations as true and still win if he asserts an affirmative defense. An affirmative defense based on, for example, assumption of risk, does not require the doctor to deny any of the plaintiff patient's factual allegations, but may still result in a victory for the doctor.<sup>32</sup> "An affirmative defense is one that admits the allegations in the complaint, but avoids liability, in whole or in part, by new allegations of excuse, justification or other negating matters."<sup>33</sup> It "raises matters extraneous to the plaintiff's *prima facie* case."<sup>34</sup> An affirmative defense sets forth "new allegations," and therefore, a defendant acts affirmatively in pleading it.<sup>35</sup> In asserting an affirmative defense, the doctor's response to a patient's allegations is not "no," but rather, "yes, but . . ."

To plead the affirmative defense of assumption of risk, the defendant doctor would have to assert that the plaintiff "voluntarily assume[d] a risk of harm arising from the negligent or reckless conduct of the defendant."<sup>36</sup> Assumption of risk is an affirmative defense because it "comes into question only where there would otherwise be a breach of some duty owed by the defendant to the plaintiff," and "relieves the defendant of the liability to which he would otherwise be subject."<sup>37</sup>

Affirmative defenses are descendants of the common law plea of "confession and avoidance." At common law, confession and avoidance "permitted a defendant who was willing to admit that the

---

<sup>31</sup> *Riemer v. Chase Bank USA, N.A.*, 274 F.R.D. 637, 639 (N.D. Ill. 2011).

<sup>32</sup> See FED. R. CIV. P. 8(c).

<sup>33</sup> *Riemer*, 274 F.R.D. at 639.

<sup>34</sup> *In re Rawson Food Service, Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) (quoting *Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 546 (6th Cir. 1986)).

<sup>35</sup> Technically, "[a]n affirmative defense is . . . [a] defendant's assertion [which] rais[es] new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true." *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003) (quoting BLACK'S LAW DICTIONARY 430 (7th ed.1999)); see also *Gwin v. Curry*, 161 F.R.D. 70, 71 (N.D. Ill. 1995).

<sup>36</sup> RESTATEMENT (SECOND) OF TORTS § 496A (1965).

<sup>37</sup> *Id.* § 496G cmt. c.

plaintiff's declaration demonstrated a prima facie case to then go on and allege additional new material that would defeat the plaintiff's otherwise valid cause of action."<sup>38</sup>

*B. Federal Rule of Civil Procedure 8(c)'s Affirmative Defense Pleading Standard*

Rule 8 of the Federal Rules of Civil Procedure and its subsections govern pleading standards. Rule 8(a) controls how claims must be pled,<sup>39</sup> while Rule 8(c) controls how a party is to plead affirmative defenses, providing that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense," including: "accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver."<sup>40</sup>

Although Rule 8(c) is a subsection of a rule very clearly pertaining to pleading standards, it is often described as a substantive rule about affirmative defenses. An oft-repeated quote from the venerable Wright & Miller treatise describes Rule 8(c) as a "lineal descendent of the common-law plea in 'confession and avoidance,' which permitted a defendant who was willing to admit that plaintiff's declaration demonstrated a prima facie case to then go on and allege additional new material that would defeat plaintiff's otherwise valid cause of action."<sup>41</sup> This is not entirely accurate, and treating Rule 8(c) as anything but a pleading standard robs it of its bite.

First, the Federal Rules treat affirmative defenses differently than the common law treated confession and avoidance. Under the common law, a defendant "could not both deny the elements of the plaintiff's substantive claim and use a confession and avoidance."<sup>42</sup> The Federal Rules of Civil Procedure eliminate the "imposed election between the pleader's right to deny the allegations in the complaint

---

<sup>38</sup> WRIGHT, MILLER & KANE, *supra* note 2, § 1270.

<sup>39</sup> See FED. R. CIV. P. 8(a).

<sup>40</sup> FED. R. CIV. P. 8(c).

<sup>41</sup> *Middle East Eng'g & Dev. Co. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, No. 86 Civ. 834 (MGC), 1987 WL 17419, at \*2 (S.D.N.Y. 1987) (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1270 (2d ed. 1969 & West Supp. 1987)) (internal quotation marks omitted).

<sup>42</sup> 5 WRIGHT, MILLER & KANE, *supra* note 2, at § 1270.

and the right to interpose other defensive matter,” by virtue of Rule 8(e), “which allows alternative and hypothetical pleading.”<sup>43</sup>

Second, Rule 8(c) does not codify the common law confession and avoidance defenses. In common law pleading, matters in confession and avoidance were matters which said “yes”—that is, they admitted the complaint’s allegations—and also said “but”—that is, they “suggest[ed] some other reasons why there was no right.”<sup>44</sup> Rule 8(c), unlike the common law, “makes no attempt to define the concept of affirmative defense.”<sup>45</sup> The rule lists nineteen defenses, some of which would not have been considered matters in confession and avoidance, re-labels them affirmative defenses, and further states that those affirmative defenses, along with any other affirmative defenses not expressly listed, must be asserted in a defendant’s responsive pleading.<sup>46</sup> The drafters did not intend for Rule 8(c) to be a substantive rule; rather, it was meant to require that “certain regularly occurring matters” be set forth in the affirmative before the district court considers them to be part of the case.<sup>47</sup>

In sum, Rule 8(c) is a pleading standard, not a substantive rule, and certainly not a lineal descendant of common law defenses.

### C. Rule 8(c) Is A Waiver Rule With No Exceptions

Rule 8(c) is clear with respect to a defendant’s pleading burdens: “In responding to a pleading, a party *must* affirmatively state any avoidance or affirmative defense.”<sup>48</sup> The Supreme Court has described Rule 8(c) in absolute terms: the rule “identifies a nonexhaustive list of affirmative defenses that *must* be pleaded” in response to a complaint.<sup>49</sup> Moreover, Rule 8(c), and all “the Federal Rules of Civil Procedure are ‘as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard

---

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (quoting AM. BAR. ASS’N, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 49 (Edward H. Hammond ed., 1939) (statement of Hon. Charles Clark) [hereinafter PROCEEDINGS]).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> FED. R. CIV. P. 8(c)(1) (emphasis added).

<sup>49</sup> *Jones v. Bock*, 549 U.S. 199, 212 (2007) (emphasis added).

the Rule[s] . . . than they do to disregard constitutional or statutory provisions.”<sup>50</sup>

Several policy reasons support strict application of Rule 8(c). First, there is nothing unfair about strict compliance with Rule 8(c): “Rule 8(c) . . . place[s] the opposing parties on notice that a particular defense will be pursued so as to prevent surprise or unfair prejudice.”<sup>51</sup> The rule’s mandatory provision regarding affirmative defenses was intended to be “definite and certain,” as well as fair to the plaintiff, who is provided with notice at a case’s inception as to what affirmative material will be raised against it.<sup>52</sup> Under the rule, “[a] general assertion that the plaintiff’s complaint fails to state a claim is insufficient to protect the plaintiff from being ambushed with an affirmative defense.”<sup>53</sup> Rather, defenses must be affirmatively stated.

Furthermore, “our legal system is replete with rules requiring that certain matters be raised at particular times.”<sup>54</sup> Rule 8(c) is one of those rules. In this respect, however, Rule 8(c) stands apart from the Federal Rules of Civil Procedure as a whole, which were intended to render procedure subservient to the merits.<sup>55</sup> Rule 8(c) is a rule that, if not followed, permits procedure to trump substance. As explained below, this divergence was intentional.

In 1939, one year after the rules went into effect, Honorable Charles E. Clark, the Reporter to the Supreme Court’s Advisory Committee on Rules for Civil Procedure and the rules’ principal draftsman, described Rule 8(c) as follows:

---

<sup>50</sup> *Chambers v. NASCO, Inc.*, 501 U.S. 32, 66 (1991) (Kennedy, J., dissenting) (alteration in original) (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988)).

<sup>51</sup> *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003).

<sup>52</sup> 5 WRIGHT, MILLER & KANE, *supra* note 2, § 1270 (quoting PROCEEDINGS, *supra* note 44, at 49).

<sup>53</sup> *Saks*, 316 F.3d at 350.

<sup>54</sup> *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011).

<sup>55</sup> Honorable Charles E. Clark was one of the greatest influences on the Federal Rules of Civil Procedure. “After nearly 15 years at the Yale Law School spent teaching and writing on civil procedure, Clark was appointed Reporter to the Supreme Court’s Advisory Committee on Rules for Civil Procedure.” Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976). Clark was “the nation’s foremost authority on code procedure, and he seized the opportunity to embed throughout the federal rules his philosophy that procedural rules should be subservient to trials on the merits.” Douglas D. McFarland, *Seeing the Forest for the Trees: The Transaction or Occurrence and the Claim Interlock Civil Procedure*, 12 FLA. COASTAL L. REV. 247, 251 n.25 (2011) (citing Charles E. Clark, *The Handmaid of Justice*, 23 WASH U. L. Q. 297, 297 (1938)).

[Rule 8(c)] is an attempt to handle specifically a question which has raised a great deal of difficulty in pleading generally, and particularly in the codes of the country. It seems to be considered only fair that certain types of things which in common law pleading were matters in confession and avoidance—*i.e.*, matters which seemed more or less to admit the general complaint and yet to suggest some other reasons why there was no right—*must be specifically pleaded in the answer*, and that has been a general rule.<sup>56</sup>

Clark described the waiver rule as “fair”—the waiver rule is necessary in order to counterbalance the effect of permitting defendants to raise defenses “which seemed more or less to admit the general complaint and yet to suggest some other reasons why there was no right.”<sup>57</sup> It is a privilege, Clark seemed to be saying, to allow defendants to raise affirmative defenses. Therefore, if defendants are to be afforded that privilege, the consequences of permitting affirmative defenses in general will be counterbalanced by requiring that they be pled in a particular way. For that reason, there is only one protection against the waiver rule’s severity: the freedom to amend safeguards any defense that might otherwise be waived by virtue of Rule 8(c).<sup>58</sup>

Despite its express language and singular purpose, in practice, Rule 8(c) begins to look more like a suggestion. By 1975, the Second Circuit described Rule 8(c)’s waiver provision as “[t]he *ordinary* consequence of failing to plead an affirmative defense.”<sup>59</sup> Only ordinarily would a defense’s forced waiver exclude the defense from the case. “In the real world, however, failure to plead an affirmative defense will rarely result in waiver.”<sup>60</sup> Even Wright and Miller describe the rule with a touch of irony:

It is a frequently stated proposition . . . that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case. . . . [A]s a practical matter there are numerous exceptions to it based on the circumstances of particular cases.<sup>61</sup>

---

<sup>56</sup> 5 WRIGHT, MILLER & KANE, *supra* note 2, § 1270 (quoting PROCEEDINGS, *supra* note 44, at 49) (emphasis added).

<sup>57</sup> *Id.*

<sup>58</sup> PROCEEDINGS, *supra* note 44, at 74.

<sup>59</sup> Jakobsen v. Mass. Port Auth., 520 F.2d 810, 813 (1st Cir. 1975) (emphasis added).

<sup>60</sup> Bobbitt v. Victorian House, Inc., 532 F. Supp. 734, 736 (N.D. Ill. 1982) (“[F]ailure to advance a defense initially should prevent its later assertion only if that will seriously prejudice the opposing party.”).

<sup>61</sup> 5 WRIGHT, MILLER & KANE, *supra* note 2, § 1278.

Nevertheless, because Rule 8(c), like any other Federal Rule, is binding, and because it was intended to stand apart as a procedural rule with bite, no federal court has authority to *sua sponte* cast it aside.

### III

#### *SUA SPONTE* ACTION: WHEN COURTS RAISE CLAIMS AND DEFENSES NORMALLY RAISED BY THE PARTIES

The federal system is an adversarial system of justice. If the system functions normally, “courts are generally limited to addressing the claims and arguments advanced by the parties.”<sup>62</sup> “[T]he parties are obliged to present facts and legal arguments before a neutral and relatively passive decision-maker.”<sup>63</sup> But the system does not always function according to plan. When courts take action *sua sponte* by raising claims or defenses without prompting from any of the parties, they act according to their inherent authority.<sup>64</sup> Courts are required to take certain action *sua sponte*. A familiar form of *sua sponte* action is a court’s *sua sponte* invocation of the defense of lack of subject matter jurisdiction.<sup>65</sup>

Once a defense is branded as one that affects a court’s subject matter jurisdiction, a court *must* raise the defense *sua sponte*.<sup>66</sup> Because jurisdictional defenses are never waived, they may be raised at any moment throughout litigation, *sua sponte* or otherwise—even after a district court has held a trial and reached a decision on the merits.

As a result, whether a defense goes to a court’s subject matter jurisdiction is not merely a semantic question, but one of “considerable practical importance” for both judges and litigants.<sup>67</sup> The Supreme Court has cautioned that mislabeling a defense as one that implicates subject matter jurisdiction may waste judicial resources and unfairly prejudice litigants who have litigated the matter without knowledge of the defense’s applicability.<sup>68</sup> The

---

<sup>62</sup> Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011).

<sup>63</sup> Eriline Co. S.A. v. Johnson, 440 F.3d 648, 654 (4th Cir. 2006).

<sup>64</sup> See, e.g., Hooper v. City of Montgomery, 482 F. Supp. 2d 1330, 1338 (M.D. Ala. 2007).

<sup>65</sup> Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012) (citing United States v. Cotton, 535 U.S. 625, 630 (2002)).

<sup>66</sup> Henderson, 131 S. Ct. at 1202.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

consequences that attach to the jurisdictional label may be so drastic that the Court has tried to limit the use of the term “jurisdictional.”<sup>69</sup>

Absent *sua sponte* intervention, the “normal operation” with respect to affirmative defenses is Rule 8(c)’s waiver rule, which requires a defendant, and not the court, to plead a statute of limitations defense, along with any other affirmative defense, in its answer to the complaint.<sup>70</sup> The Fourth Circuit has held that in “ordinary” civil cases, district courts may *not* raise and consider a defense of statute of limitations *sua sponte*.<sup>71</sup> The court explained that the statute of limitations is a defense “waivable by the inaction of a party;” it “bears the hallmarks of our adversarial system of justice,” one that is notable in that the parties present the facts and legal arguments before a neutral and, ideally, passive court.<sup>72</sup>

In addition, the Supreme Court has warned federal courts raising otherwise waivable affirmative defenses *sua sponte* to be cautious.<sup>73</sup> Why? Because raising an affirmative defense *sua sponte* “erod[es] the principle of party presentation so basic to our system of adjudication.”<sup>74</sup> That is, in a neutral system, a defendant should be the party pointing out the weaknesses of a plaintiff’s claim. If the Court raises this argument on the defendant’s behalf, the system is no longer neutral, and the Court has become the defendant’s representative. These are the same concerns courts have when they convert a defense into one that implicates subject matter jurisdiction: the practice “alters the normal operation of our adversarial system,” under which “courts are generally limited to addressing the claims and arguments advanced by the parties.”<sup>75</sup>

Altering the normal course of our adversarial system makes sense in the context of subject matter jurisdiction. Though a subject matter

---

<sup>69</sup> *Id.* at 1203 (stating that “‘claim-processing rules.’ . . . [T]hat seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times” should not be deemed jurisdictional). For a discussion of the many risks inherent in converting administrative exhaustion, a non-jurisdictional affirmative defense in Title VII cases, into a defense that implicates subject matter jurisdiction, see Katherine A. Macfarlane, *The Improper Dismissal of Title VII Claims on “Jurisdictional” Exhaustion Grounds: How Federal Courts Require That Allegations Be Presented to an Agency Without the Resources to Consider Them*, 21 GEO. MASON U. C.R. L.J. 213 (2011).

<sup>70</sup> *Venters v. City of Delphi*, 123 F.3d 956, 968 (7th Cir. 1997).

<sup>71</sup> *Erline Co. S.A. v. Johnson*, 440 F.3d 648 656–57 (4th Cir. 2006).

<sup>72</sup> *Id.* at 654.

<sup>73</sup> *Arizona v. California*, 530 U.S. 392, 412–13 (2000).

<sup>74</sup> *Id.*

<sup>75</sup> *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011).

jurisdiction defense may benefit one party over another, it more importantly protects the courts' own interests: "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction."<sup>76</sup> Therefore, "they must raise and decide jurisdictional questions that the parties either overlook[ed] or elect[ed] not to press."<sup>77</sup>

But if a court is dealing with a non-jurisdictional affirmative defense, it has no Article III-based obligation to raise the defense and little reason to upset the normal course of operation. Nevertheless, federal courts have been exceedingly willing to raise affirmative defenses *sua sponte* in habeas actions. This is the case even though the defenses have the effect of defeating claims that, absent the application of the defenses, might have succeeded in overturning wrongful imprisonments.<sup>78</sup>

#### IV

##### THE SPECIAL CONCERN OF HABEAS CASES: RAISING AFFIRMATIVE DEFENSES TO DEFEAT A PETITIONER'S APPLICATION TO BE FREED

Habeas cases are frequently exempted from the category of "ordinary" cases in which Rule 8(c) applies. According to the Fourth Circuit, defenses raised in habeas cases implicate "important judicial and public interests," and the courts adjudicating habeas petitions have a "quasi-inquisitorial role . . . to screen initial filings."<sup>79</sup> Therefore, according to the Fourth Circuit, the very nature of a habeas action justifies departure from the general rule that a defendant "must either timely raise a statute of limitations defense or waive its benefits."<sup>80</sup>

The Fourth Circuit's position is not extreme. At all levels of federal court adjudication, from reports and recommendations issued by magistrates on motions to dismiss, to Supreme Court decisions regarding the scope of a petition for certiorari, federal courts bend over backwards to raise affirmative defenses on behalf of habeas respondents. In the context of habeas, the courts have abandoned any

---

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Day v. McDonough*, 547 U.S. 198, 209–10 (2005). "Normally, the only proper defendant in a habeas case is the petitioner's 'immediate custodian'—that is, the warden of the facility in which the petitioner is incarcerated at the time he files the habeas petition." *Fletcher v. Reilly*, 433 F.3d 867, 875 (D.C. Cir. 2006).

<sup>79</sup> *Eriline v. Johnson*, 440 F.3d 648, 657 (2006).

<sup>80</sup> *Id.*

concern for the adversarial process and Rule 8(c) by raising the most significant affirmative defenses *sua sponte*. When courts take such unwarranted action, they are more advocate than neutral decisionmaker.

The defenses subject to *sua sponte* action in habeas cases are numerous. As explained below, district courts may consider a statute of limitations defense to habeas *sua sponte* so long as the government did not purposefully omit it from its answer or motion to dismiss.<sup>81</sup> Exhaustion may also be raised *sua sponte*.<sup>82</sup> A court may apply the nonretroactivity rule announced in *Teague v. Lane*<sup>83</sup> *sua sponte*.<sup>84</sup> Although procedural default is not a jurisdictional defense, and Rule 8(c) mandates that it should be waived if it does not appear in the respondent's answer, courts nevertheless do not hesitate to raise the defense *sua sponte*.<sup>85</sup>

*Day v. McDonough* is the Supreme Court's most recent ruling on which defenses may be raised *sua sponte* in habeas. While expanding the category of defenses that may be raised *sua sponte*, the Court paradoxically noted that district judges "have no obligation to assist attorneys representing the State."<sup>86</sup> Yet no heed is paid to this warning. There is a competing principle throughout federal habeas precedent: habeas relief, for some reason, is "different," and those opposing habeas petitions deserve a helping hand from the courts. As explained below, by raising affirmative defenses *sua sponte*, courts provide significant, case-dispositive assistance to attorneys representing the State—at the expense of those unjustly behind bars.

#### A. Granberry v. Greer: Appellate Courts May Raise Exhaustion Sua Sponte

In *Granberry*, a state prisoner applied to the Southern District of Illinois for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.<sup>87</sup> The district court dismissed the petition pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.<sup>88</sup> On appeal, the State of Illinois for the first time raised an exhaustion defense—that is, it argued in

---

<sup>81</sup> *Day*, 547 U.S. at 209–10.

<sup>82</sup> *Granberry v. Greer*, 481 U.S. 129, 133 (1987).

<sup>83</sup> *Teague v. Lane*, 489 U.S. 288, 310 (1989).

<sup>84</sup> *Day*, 547 U.S. at 206.

<sup>85</sup> *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

<sup>86</sup> *Day*, 547 U.S. at 210.

<sup>87</sup> 481 U.S. at 130.

<sup>88</sup> *Id.*

support of the lower court's dismissal on the new grounds that the petitioner had failed to exhaust his state remedies.<sup>89</sup> Pursuant to Rule 8(c), the State should have raised the defense in its responsive pleading; instead, the State moved for dismissal for failure to state a claim. But the court of appeals rejected petitioner's argument that the State waived the defense by not raising it at the district court level.<sup>90</sup> In considering this defense, the court of appeals also overlooked the general rule that a federal appellate court "does not consider an issue not passed upon below."<sup>91</sup>

In reviewing whether the appellate court could address the issue even though the State had failed to raise it at the district court level, the Court acknowledged that, unlike a subject matter jurisdiction defense, "failure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application."<sup>92</sup> Therefore, the court was not required to raise the defense of exhaustion *sua sponte* in order to preserve its own interests. The Court also reviewed precedent in which it had "expressed [its] reluctance to adopt rules that allow a party to withhold raising a defense until after the 'main event'—in this case, the proceeding in the District Court—is over."<sup>93</sup>

The Court chose a middle ground, declining to require that appellate courts raise nonexhaustion *sua sponte*, and also declining to hold that the State's omission of the defense waived it for good. Instead, the Court held that appellate courts may, but are not required to, consider the defense of failure to exhaust even if the State failed to raise the defense before the district court.<sup>94</sup>

In so holding, the Court relied upon the history and purpose of the exhaustion of state remedies defense. First, it noted that the defense was long-standing, applied even before Congress codified it in 1948; as early as 1886, the Court wrote that "federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act."<sup>95</sup> Second, the exhaustion doctrine is justified by comity to state courts: "federal courts . . . will interfere with the administration of justice in the state courts only in rare cases

---

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 130.

<sup>91</sup> Singleton v. Wulff, 428 U.S. 106, 120 (1976).

<sup>92</sup> Granberry, 418 U.S. at 131.

<sup>93</sup> *Id.* at 132 (quoting Wainwright v. Sykes, 433 U.S. 72, 89–90 (1977)).

<sup>94</sup> Day v. McDonough, 547 U.S. 198, 206 (2006).

<sup>95</sup> Granberry, 481 U.S. at 133 (quoting Rose v. Lundy, 455 U.S. 509, 515 (1982)).

where exceptional circumstances of peculiar urgency are shown to exist.”<sup>96</sup>

Third, even though the State “has a duty to advise the district court whether the prisoner has . . . exhausted all available state remedies” in its answer, when the state fails to do so, it may be appropriate “for the court of appeals to take a fresh look at the issue.”<sup>97</sup> Comity is also a concern for appellate courts: at the appellate level, courts are to “determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner’s claim.”<sup>98</sup>

According to *Granberry*, raising the exhaustion defense *sua sponte* is appropriate in at least two instances. First, raising the defense on the State’s behalf is appropriate where exhaustion may address an unresolved question of law or fact.<sup>99</sup> Therefore, once exhaustion is completed, the Court need only review the issues that truly require federal review, an approach that serves both “both comity and judicial efficiency.”<sup>100</sup> Second, if the habeas petition clearly does not raise a colorable federal claim, then the parties’ interests, as well the Court’s interests, are well-served by affirming the district court’s dismissal on exhaustion grounds.<sup>101</sup>

The prior justifications hinge on an outcome in which the petition is without merit. The Court found that, by contrast, where the district court has held a trial on the merits and finds that there was a miscarriage of justice, then the appellate courts should, in those instances, find that the exhaustion defense has been waived.<sup>102</sup> Otherwise, the Court would “delay in granting relief that is plainly warranted.”<sup>103</sup>

*Granberry* is severe: “the asserting of an exhaustion issue for the first time on appeal can result in the loss of an entire lawsuit.”<sup>104</sup> Also, “[a] rule requiring dismissal when the defense of nonexhaustion

---

<sup>96</sup> *Id.* at 134 (quoting *Rose*, 455 U.S. at 515–16) (second internal quotation marks omitted).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 134–35.

<sup>100</sup> *Id.* at 135.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Ybarra v. Sumner*, 678 F. Supp. 1480, 1483 (D. Nev. 1988).

is raised at the appellate level for the first time . . . would never operate to the prisoner's benefit."<sup>105</sup> If the prisoner wins in district court, then the State could raise the defense on appeal.<sup>106</sup> If the prisoner loses in the district court and appeals, "the rule requiring dismissal would not result in reversal of the denial of habeas relief."<sup>107</sup>

*B. Caspari v. Bohlen: Federal Courts May Raise Nonretroactivity Sua Sponte*

In *Caspari*, the Court addressed whether the Double Jeopardy Clause prohibited a court from subjecting a defendant to multiple noncapital sentence enhancement proceedings.<sup>108</sup> The state trial court sentenced Bohlen as a prior offender, but the Missouri Court of Appeals reversed because there were no factual findings to establish that he held that status.<sup>109</sup> On remand, Bohlen argued that permitting the State another opportunity to prove that he qualified for the sentence enhancement violated the Double Jeopardy Clause.<sup>110</sup> The Court concluded that, at the time of Bohlen's conviction and sentence, the Double Jeopardy Clause did not apply to noncapital sentencing.<sup>111</sup>

As a result, Bohlen's habeas claim violated the nonretroactivity rule announced in *Teague v. Lane*.<sup>112</sup> "The nonretroactivity principle prevents a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final."<sup>113</sup> Nonretroactivity does not implicate a court's jurisdiction; therefore, federal courts are not required to raise the defense *sua sponte*.<sup>114</sup> However, the Supreme Court explained that "a federal court may, but need not, decline to apply *Teague* if the State

---

<sup>105</sup> *Granberry*, 481 U.S. at 133 n.6.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Caspari v. Bohlen*, 510 U.S. 383, 386 (1994).

<sup>109</sup> *Id.* at 387.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 393.

<sup>112</sup> *Id.* at 393 ("[A] reasonable jurist reviewing our precedents at the time respondent's conviction and sentence became final would not have considered the application of the Double Jeopardy Clause to a noncapital sentencing proceeding to be dictated by our precedents.").

<sup>113</sup> *Id.* at 389.

<sup>114</sup> *Id.* (citing *Collins v. Youngblood*, 497 U.S. 37, 41 (1990)).

does not argue it.”<sup>115</sup> In so holding, the Court did not identify the policy justifying this particular departure from Rule 8(c).<sup>116</sup>

Nevertheless, the rule remains that the nonretroactivity defense may be raised *sua sponte*. In applying this rule, lower courts have paid lip service to “finality and comity,” though the Supreme Court has never stated that *Teague* should be raised *sua sponte* for those reasons.<sup>117</sup>

### *C. Appellate Courts Have Unanimously Held Procedural Default May Be Raised Sua Sponte*

Procedural default is an additional exhaustion rule. It “ensure[s] that state prisoners not only become ineligible for state relief before raising their claims in federal court, but also that they give state courts a sufficient opportunity to decide those claims before doing so.”<sup>118</sup> As the Supreme Court has explained, “[a] habeas petitioner who has concededly exhausted his state remedies must also have *properly* done so by giving the State a fair ‘opportunity to pass upon [his claims].’”<sup>119</sup> When a prisoner has not adhered to the State’s procedural rules, he has procedurally defaulted his habeas claims and can only proceed in federal court if he can demonstrate “‘cause and prejudice’” or “‘a fundamental miscarriage of justice.’”<sup>120</sup>

As a result, if state law requires that a criminal defendant challenge the composition of a grand jury in advance of trial, he must have actually challenged the grand jury in advance of trial if he wishes to raise the same challenge in a federal habeas petition. The Supreme Court justifies the procedural default rule as yet another manner in which the federal system bows in comity to state courts and their remedies.<sup>121</sup> Comity dictates, the Court has held, that a habeas petitioner “use the State’s established appellate review procedures before he presents his claims to a federal court.”<sup>122</sup>

Whether the defense may be raised *sua sponte* is an open question in the Supreme Court. Yet “the Courts of Appeals have unanimously

---

<sup>115</sup> *Id.* (citing *Schiro v. Farley*, 510 U.S. 222, 228–29 (1994)).

<sup>116</sup> *See id.*

<sup>117</sup> *See, e.g.,* *Prevatte v. French*, 459 F. Supp. 2d 1305, 1328, 1361 (N.D. Ga. 2006).

<sup>118</sup> *O’Sullivan v. Boerckel*, 526 U.S. 838, 853 (1999) (Stevens, J., dissenting).

<sup>119</sup> *Id.* at 854 (alteration in original) (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)).

<sup>120</sup> *Id.* at 854 (quoting *Murray v. Carrier*, 477 U.S. 478, 484, 495 (1986)).

<sup>121</sup> *Id.* at 853–54.

<sup>122</sup> *Id.* at 845.

held that, in appropriate circumstances, courts, on their own initiative, may raise a petitioner's procedural default."<sup>123</sup> In the courts of appeals, the justifications for raising this defense *sua sponte* range from "comity,"<sup>124</sup> concerns for the finality of criminal judgments, subjective decisions with respect to whether the defendant was "blameworthy" for failing to raise the issue, to conclusions that procedural default may be "manifest from the record and, hence," do not require further fact-finding.<sup>125</sup>

*D. Day v. McDonough: Statute of Limitations Defenses May Be Raised Sua Sponte*

Until AEDPA, there was no statute of limitations governing habeas petitions.<sup>126</sup> But since 1996, habeas petitions must be filed one year from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."<sup>127</sup> In *Day*, the State of Florida's answer to Patrick Day's habeas petition stated that the petition was timely, even though pursuant to AEDPA, it was not.<sup>128</sup>

The Court explained 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."<sup>129</sup> Moreover, ordinarily, the Court "would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense."<sup>130</sup> Yet in *Day*, the Court *did* override the State's waiver on the grounds that the State's waiver was not intelligent but rather the result of miscalculation of whether the "tight" statute of limitations had run.<sup>131</sup> Therefore, the district court had discretion to correct the miscalculation, and could dismiss the petition as untimely under AEDPA's one-year limitation period.<sup>132</sup>

The Court's holding relied first on the procedural posture of the petition. First, the Court noted that if the magistrate judge had not raised the defense *sua sponte*, the judge might have instead "informed

---

<sup>123</sup> *Day v. McDonough*, 547 U.S. 198, 207 (2006).

<sup>124</sup> *Brewer v. Marshall*, 119 F.3d 993, 999 (1st Cir. 1997).

<sup>125</sup> *Rosario v. United States*, 164 F.3d 729, 732–33 (2d Cir. 1998).

<sup>126</sup> *Day*, 547 U.S. at 202 n.1.

<sup>127</sup> *Id.* at 201 (quoting 28 U.S.C. § 2244(d)(1)(A) (2006)).

<sup>128</sup> *Id.* at 203.

<sup>129</sup> *Id.* at 202 (citing FED. R. CIV. P. 8(c), 12(b), 15(a)).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

the State of its obvious computation error and entertained an amendment to the State's answer."<sup>133</sup> Second, the Court stated that "it would make scant sense to distinguish in this regard AEDPA's time bar from other threshold constraints on federal habeas petitioners."<sup>134</sup>

Third, the court was satisfied that the magistrate judge gave Day "due notice and a fair opportunity" to oppose dismissal on the grounds that his petition was untimely.<sup>135</sup> The court was also persuaded that the State had merely committed inadvertent error.<sup>136</sup> The notice had issued some nine months after the State answered the petition, no court proceedings had occurred in the interim, and nothing else in the record suggested that the State "strategically" withheld the defense or chose to relinquish it.<sup>137</sup> Finally, the Court noted that "[a] district court's discretion is confined within these limits," and "should a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice."<sup>138</sup>

The Supreme Court recently granted certiorari in *Wood v. Milyard* to address a slight variation on the question presented in *Day*: whether appellate courts, like district courts, have the authority to raise *sua sponte* a 28 U.S.C. § 2244(d) statute of limitations defense.<sup>139</sup> The petitioner argued that only district courts, and not appellate courts, should be able to raise the defense because, essentially, district courts are better-situated to do so:

A clear requirement that the state raise any § 2244(d) limitations defense in the district court has the virtue of simplicity and ease of enforcement. It advances judicial economy by requiring that dispositive limitations defenses be raised and resolved before judicial resources are needlessly expended in deciding the merits of a case or other difficult issues of exhaustion or procedural default. Such requirement discourages sandbagging, preventing a party from initially withholding a limitations defense for strategic advantage, in the hope of prevailing on other claims or defenses. It advances the adversary and party presentation principles underlying the American judicial system, by requiring issues to be presented by the parties to the court. And, finally, it advances the judicial neutrality

---

<sup>133</sup> *Id.* at 209 (citing FED. R. CIV. P. 15(a) and 28 U.S.C. § 2243 (2006)).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 210.

<sup>136</sup> *Id.* at 210–11.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 211 n.11.

<sup>139</sup> *Wood v. Milyard*, 132 S. Ct. 1826, 1829 (2012).

and appearance of impartiality that is essential to our system of justice.<sup>140</sup>

Respondents have noted that *Granberry* involved an appellate court's *sua sponte* raising of an affirmative defense.<sup>141</sup> They have also relied on the argument that habeas is unique: "given . . . the special concerns underlying federal review of state-court convictions, the courts of appeals should have especially wide latitude to consider a forfeited issue that can terminate the appeal expeditiously."<sup>142</sup>

The Court decided *Milyard* on April 24, 2012.<sup>143</sup> The Court agreed with Respondents, holding that "courts of appeals, like district courts, have the authority—though not the obligation—to raise a forfeited timeliness defense on their own initiative."<sup>144</sup> Nevertheless, the Court reversed the Tenth Circuit's decision to raise the limitations defense *sua sponte* on the grounds that the State's waiver of the defense was a knowing waiver.<sup>145</sup> As a result, the circumstance presented to the Tenth Circuit was not the sort of extraordinary instance in which the appellate court was permitted to raise on its own an issue otherwise not raised below.<sup>146</sup>

Despite reversing the Tenth Circuit, *Milyard* did not undo the damage done in *Day*. Rather, it opened the door to broader *sua sponte* authority at the appellate level.

## V

### AFFIRMATIVE DEFENSES IN HABEAS PETITIONS SHOULD BE WAIVED IF NOT RAISED ACCORDING TO RULE 8(C)

#### *A. Rule 8(c) Applies to Habeas Cases*

The Court's reasoning for exempting affirmative defenses in habeas petitions from the harshness of Rule 8(c) is unconvincing. The reasoning in *Day v. McDonough* is conclusory: it would make "scant sense" to distinguish AEDPA's time bar from other affirmative

---

<sup>140</sup> Brief for Petitioner at 27, *Wood v. Milyard*, 132 S. Ct. 1826 (2012) (No. 10-9995).

<sup>141</sup> Brief for Respondents at 14, *Wood v. Milyard*, 132 S. Ct. 1826 (2012) (No. 10-9995).

<sup>142</sup> *Id.* at 15.

<sup>143</sup> *Milyard*, 132 S. Ct. 1826.

<sup>144</sup> *Id.* at 1834.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

defenses available to habeas respondents.<sup>147</sup> Not only is this reason conclusory, but it assumes that the Court's precedent regarding exhaustion of state remedies, procedural default, nonretroactivity, and (prior to AEDPA) abuse of the writ is reliable. But *Day* is also wrong for a simpler reason: Rule 8(c) should apply to habeas corpus defenses.

*Day* does not identify any “inconsistency between habeas corpus practice and the usual civil forfeiture rule,”<sup>148</sup> and “applying the ordinary rule of forfeiture to the AEDPA statute of limitations creates no inconsistency with the Habeas Rules.”<sup>149</sup> Rule 8(c) should have applied in *Day*, and should have stopped the Court from endorsing the district court's raising of an already waived defense *sua sponte*.

With respect to Rule 8(c), there is no reason to treat a State respondent any differently than another defendant. As explained below, Judge Clark argued for strict compliance with Rule 8(c), with no exceptions granted to defendants who happened to also be the government. He even addressed a statute of limitations defense, explaining that in cases in which the United States is the defendant, he still could not see how the defense “could properly be a jurisdictional matter” raised *sua sponte* by the courts; rather, Rule 8(c) should govern how the defense is to be raised.<sup>150</sup>

Judge Clark explained that when the Federal Rules endeavored to treat a particular litigant differently, they did so expressly. For example, when the United States is the defendant, the Federal Rules give them more time than other litigants have to answer.<sup>151</sup> However, with the exception of the time to answer, or other express provisions, “these rules apply to the United States as a litigant as much as to anyone else.”<sup>152</sup> There is no reason to treat the United States government or any State government preferentially when it comes to affirmative defenses, in habeas cases or any other kind of litigation. Even though habeas relief may be “unique,” the applicable pleading standards are routine.

---

<sup>147</sup> *Day v. McDonough*, 547 U.S. 198, 209 (2006) (Scalia, J., dissenting) (quoting majority opinion at 209).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 218.

<sup>150</sup> PROCEEDINGS, *supra* note 44, at 50–51.

<sup>151</sup> *See id.* at 50.

<sup>152</sup> *Id.* at 50.

*B. No Policy Reason Justifies Sua Sponte Revival of Affirmative Defenses*

The Supreme Court has justified its *sua sponte* precedent on the grounds of comity to state court judgments, by minimizing its procedural impact, and by citing questionable precedent. None of these justifications support overruling Rule 8(c).

*1. Comity Justifies the Existence of Certain Affirmative Defenses, But Does Not Excuse Raising Them Sua Sponte*

*Granberry* permits appellate courts to raise exhaustion *sua sponte* on several stated grounds: (1) courts have been able to do so for some time; (2) interfering with state court judgments should be a rare practice; and (3) comity and federalism require deference to state court decisions.<sup>153</sup> Similarly, the appellate court practice of raising procedural default *sua sponte* also pays lip service to finality and comity.<sup>154</sup> Both of these precedents rely on the deference supposedly due state court sentences and procedures. Yet this deference is misplaced.

First, in concluding that comity justifies permitting federal courts to raise affirmative defenses *sua sponte*, courts conflate the need for the defense itself with the need for the defense to be raised *sua sponte*. For example, *Granberry* emphasizes that “comity was the basis for the exhaustion doctrine,” and that exhaustion renders interference with state court judgments only in rare instances.<sup>155</sup> But the question presented in *Granberry* was not whether exhaustion is a viable defense. The question was whether a court should raise the defense when the defendant waives it.<sup>156</sup> Re-emphasizing the nature of the defense itself sidesteps the issue of whether there is an additional need to preserve it on a defendant’s behalf. *Granberry*’s reliance on comity is circular reasoning.

Second, invoking comity in habeas cases overlooks the very purpose of habeas: review of state court criminal judgments.<sup>157</sup> The availability of federal relief to persons in state custody “is a procedure

---

<sup>153</sup> See *supra* notes 101–04.

<sup>154</sup> See *supra* notes 123–24, 126–27.

<sup>155</sup> *Granberry v. Greer*, 481 U.S. 129, 134 (1987).

<sup>156</sup> *Id.* at 130.

<sup>157</sup> *Sylvander v. New Eng. Home For Little Wanderers*, 584 F.2d 1103, 1111 (1st Cir. 1978).

of unique potency within the federal-state framework.”<sup>158</sup> It is unique because the procedure prioritizes fixing constitutional errors over a state’s interest in finality. “Federal habeas involves a substantial thrust by the federal system into the sphere normally reserved to the states and hence a change in the federal-state balance.”<sup>159</sup>

The exhaustion requirement balances habeas’s concern for constitutional issues, but habeas in the first instance is a mechanism that does not respect comity. As a result, it makes little sense to use comity as the justification that permits a court to act on behalf of a State respondent each time it chooses to do so. Also, this reflexive reliance on comity overlooks the fact that “federal habeas . . . offers a federal forum regardless of what state proceedings have already taken place.”<sup>160</sup> Comity alone does not justify overruling Rule 8(c).

## *2. The Federal Rules Provide Adequate Safeguards for Defendants Who Waive Affirmative Defenses: There Is No Need for Additional Rules in Habeas*

In *Day*, the Court was willing to permit a magistrate judge to raise the statute of limitations defense *sua sponte* because the magistrate might have alternatively informed the State of its calculation error and granted leave to amend.<sup>161</sup> The Court stated that it saw no difference between permitting a defense to be raised *sua sponte* and the Magistrate’s ability to grant the State leave to amend after the error was noted.<sup>162</sup>

This approach disregards Rule 8(c). “If there truly were no dispositive difference between following and disregarding the rules that Congress has enacted, the natural conclusion would be that there is no compelling reason to *disregard*” Rule 8(c).<sup>163</sup> Moreover, there already exists a well-developed body of law to govern the district courts’ exercise of discretion under Rule 15(a).<sup>164</sup> That is, if the Federal Rules already provide adequate procedural safeguards, there is no compelling justification for giving State respondents any additional breaks.

---

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1111–12.

<sup>160</sup> *Id.* at 1112.

<sup>161</sup> *Day v. McDonough*, 547 U.S. 198, 209 (2006) (citing FED. R. CIV. P. 15(a)).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 216 (Scalia, J., dissenting) (internal quotation marks omitted).

<sup>164</sup> *Id.* at 216–17.

### 3. *Caspari Was Wrongly Decided: Casting Aside Rule 8(c)'s Waiver Rule With Respect to Retroactivity Has No Precedential Support*

*Caspari* was wrongly decided because it treated dicta in a prior case as applicable precedent. Relying on the holding in *Schiro v. Farley*, the Supreme Court explained that “a federal court may, but need not, decline to apply *Teague* [‘s nonretroactivity rule] if the State does not argue it.”<sup>165</sup> However, the *Caspari* court’s citation to *Schiro* misrepresents its thrust. In *Schiro*, the Court never reached the State’s *Teague* argument because it had “failed to argue *Teague* in its brief in opposition” and “a State *can* waive the *Teague* bar by not raising it.”<sup>166</sup> *Schiro* does not support the proposition that *Teague* may be raised at any stage *sua sponte*.<sup>167</sup> The *Schiro* “holding” that it could have reached the *Teague* issue *sua sponte* is dicta—it did not reach the issue.<sup>168</sup>

*Caspari* also reached the State’s nonretroactivity defense, which was not squarely raised by the certiorari petition, because it concluded that the issue “is a subsidiary question fairly included in the question presented.”<sup>169</sup> As Justice Stevens’s dissent highlighted, the nonretroactivity principle announced in *Teague v. Lane* is not a jurisdictional rule, but rather a prudential rule, and, hence, judge-made, and waivable.<sup>170</sup> Stevens would have held that the State forfeited its *Teague* defense under the Supreme Court Rule 14.1(a).<sup>171</sup>

#### CONCLUSION: HABEAS LITIGATION MUST BE ADVERSARIAL WITH NO FAVORS GRANTED TO ALREADY POWERFUL RESPONDENTS

Federal court litigation is conducted within an adversarial system of justice. Parties are responsible for developing their own strategy.<sup>172</sup> They set the scope of litigation, whereas “courts are generally limited

---

<sup>165</sup> *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994).

<sup>166</sup> *Schiro v. Farley*, 510 U.S. 222, 229 (1994) (emphasis added).

<sup>167</sup> See also Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part Two)*, 30 U. RICH. L. REV. 303, 325 (1996) (describing the mixed messages of *Schiro* and *Caspari* with respect to waiver of the nonretroactivity defense).

<sup>168</sup> See *Schiro*, 510 U.S. at 229.

<sup>169</sup> *Caspari*, 510 U.S. at 389.

<sup>170</sup> *Id.* at 397–98 (Stevens, J., dissenting).

<sup>171</sup> *Id.* Supreme Court Rule 14.1(a) provides that “[t]he statement of any question presented [in a petition for certiorari] is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”

<sup>172</sup> *United States v. Mitchell*, 518 F.3d 740, 750 (10th Cir. 2008).

to addressing the claims and arguments advanced by the parties.”<sup>173</sup> Usually, “[c]ourts do not . . . raise claims or arguments on their own.”<sup>174</sup> This divide is a hallmark of American federal litigation.

Unlike the judges of the continental legal systems of Europe, who serve in both investigative and adjudicatory capacities, American judges are informed by the parties through an adversarial method. . . . Thus, American judges play a limited role; the burden rests on the parties (both private and governmental) to ensure that offenses are prosecuted and relevant issues come to light.<sup>175</sup>

A case’s relevant issues come to light first in the pleadings. The Supreme Court’s recent pleading standard decisions, *Ashcroft v. Iqbal*<sup>176</sup> and *Bell Atlantic Corp. v. Twombly*,<sup>177</sup> highlight the Court’s willingness to effect harsh outcomes based on failure to adhere to another subsection of Rule 8.<sup>178</sup> Yet despite the case-ending implications of failure to adhere to these new pleading standards, a judge need not remind a plaintiff of the *Twombly* and *Iqbal* pleading standards before it grants a motion to dismiss. The Court has required plaintiffs to take the reins of their litigation, with respect to both substance and procedure.<sup>179</sup> There should be no hesitation to hold defendants to similar standards.

Parties must pay attention not only to their substantive strategies, but also to the procedural consequences of their litigation decisions. For example, the strategic decision to improperly plead a claim can defeat that claim at the motion to dismiss stage.<sup>180</sup> There is no question that procedural strategy can be as case dispositive as substantive strategy.

Failure to adhere to Rule 8(c) can also have dispositive outcomes. In *Day*, if the Supreme Court had not saved the otherwise waived

---

<sup>173</sup> *Henderson ex rel Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011).

<sup>174</sup> *Id.*

<sup>175</sup> *United States v. Fifield*, 485 F.3d 1053, 1056–57 (9th Cir. 2007) (O’Scannlain, J. concurring specially) (citations omitted).

<sup>176</sup> 556 U.S. 662 (2009).

<sup>177</sup> 550 U.S. 544 (2007).

<sup>178</sup> *Iqbal*, 556 U.S. at 678 (“A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” (quoting *Twombly*, 550 U.S. at 557)).

<sup>179</sup> *Cf. Fifield*, 485 F.3d at 1057 (explaining that the functional divide between judge and party is important enough to “leave some wrongs unpunished” in order to preserve it; “the doctrines of waiver and procedural default represent this willingness.”).

<sup>180</sup> A defendant’s answer or a motion to dismiss must be filed within 20 days of a plaintiff’s complaint. FED. R. CIV. P. 12(a)(1)(A)(i).

limitations defense, the petitioner's habeas application might have been granted. But Rule 8(c) was intended to be a steadfast rule with potentially severe consequences for those who did not adhere to its strictures, and it should not have been overlooked.

Habeas litigation is the last place in which courts should be disregarding Rule 8(c). *Sua sponte* action of any kind risks tipping the scales in favor of one party and against another. But raising affirmative defenses *sua sponte* in habeas is particularly unfair in light of the curtailed substantive paths to habeas relief—habeas petitioners, not State respondents, are most in need of the courts' procedural assistance.

Moreover, the procedural decision to raise certain defenses to habeas *sua sponte* cannot rely solely upon the nature of the relief sought. The Supreme Court's deference to comity in its affirmative defense cases is really a discussion of what sort of habeas defenses a court should entertain.<sup>181</sup> But procedural rules should not vary depending on the kind of substantive relief at issue. They should remain steady regardless of a judge's subjective feelings toward the importance of a particular claim or defense. Otherwise, Rule 8(c) is a rule that will always be waived depending on the circumstances. This is not what the Rule was meant to do.

Finally, to the extent procedural favors are needed in habeas cases, it is petitioners who need them. Even before AEDPA, Justice Stevens warned that the Court "has fashioned harsh rules" which "defeat substantial constitutional claims" brought in habeas petitions.<sup>182</sup> Justice Stevens argued that "[i]f we are to apply such a strict approach to waiver in habeas corpus litigation, we should hold the warden to the same standard."<sup>183</sup>

---

<sup>181</sup> See discussion *supra* Part V.B.2.

<sup>182</sup> Caspari v. Bohlen, 510 U.S. 383, 397 (1994) (Stevens, J., dissenting).

<sup>183</sup> *Id.*