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October 23, 2000

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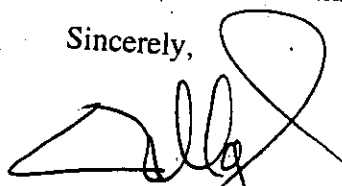
H. Fred Hoefle
1200 American Building
30 East Central Parkway
Cincinnati, Ohio 45202

RE: *Scott v. Collins*
Case No. 00-3240

Dear Fred:

Enclosed please find a copy of the Brief of Amicus Curiae Ohio Association of Criminal Defense Lawyers In Support Of Reversal and a copy of the Motion for Leave to File Brief of Amicus Curiae. If you have any questions, please feel free to contact me.

Sincerely,



William R. Gallagher

WRG/pa
Encl.

RECEIVED

NO. 00-3240

OCT 23 2000

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD GREEN, Clerk

GUY BILLY LEE SCOTT,
Petitioner-Appellant,

vs.

TERRY COLLINS, Warden,
Respondent-Appellee.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Now comes William R. Gallagher, Attorney for Amicus Curiae, Ohio Association of Criminal Defense Lawyers, ("OACDL"), and states the following:

1. The Ohio Association of Criminal Defense Lawyers ("OACDL") is a private, non profit organization of over five hundred attorneys who represent citizens accused of crimes in State and Federal Courts. OACDL is associated with the National Association of Criminal Defense Lawyers ("NACDL"). The OACDL seeks to provide the judiciary and the legislative with the insights of its members concerning the day to day operations of the criminal justice system and how it affects citizens living with this circuit. Over the past decade, the OACDL has participated as a friend of the Court in over 30 cases, including *Ohio v. Robinette* 91996), 117 S.Ct. 417, 136 L.Ed.2d 347 and *State v. Murnahan* (1992), 63 Ohio St.3d 54, 636 N.E.2d 319.

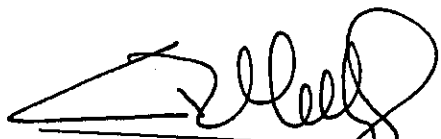
2. Amicus members are committed to the preservation of the Writ of Habeas Corpus in Federal Court. The passage of the AEDPA in 1996 has placed substantial limitations on a prisoner's access to an independent review of state convictions involving constitutional violations. The subject of the instant appeal

raises a grave concern to us: Should a Court assert itself on behalf of the State by raising a defense waived by the State?

3. Amicus believes this action causes serious damage to the principle that a court should remain impartial and not substitute its view on how a case should be defended for that of a party.

Counsel received oral consent to file this Amicus from counsel for Appellee on October 17, 2000.

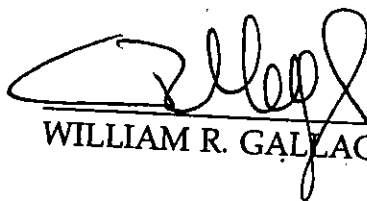
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by regular U.S. Mail to Thelma Price Thomas, Assistant Attorney General, Corrections Litigation Section, 140 East Town Street, 14th Floor, Columbus, Ohio 43215-6001, counsel for Respondent, and H. Fred Hoefle, Attorney for Petitioner-Appellant, 1200 American Building, 30 East Central Parkway, Cincinnati, Ohio 45202-1117 this 03 day of October, 2000.



WILLIAM R. GALLAGHER (0064683)

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NO. 00-3240

OCT 23 2000

IN THE
LEONARD GREEN, Clerk UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GUY BILLY LEE SCOTT,
Petitioner-Appellant

-VS-

TERRY COLLINS, Warden,
Respondent-Appellee

Appeal from the United States District Court for the Southern District of Ohio
Western Division, Case No. 99-CV-50
Judge Spiegel

**BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS IN SUPPORT OF REVERSAL**

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

	PG(S)
Table of Authorities	ii
Statement of The Identity Of The Amicus Curiae	1
Argument	2
Conclusion	10
Certificate of Service	10
Certificate of Compliance	11

believes this action causes serious damage to the principle that a court should remain impartial and not substitute its view on how a case should be defended for that of a party.

Amicus, for these reasons and those argued below, urge this Court to reverse the order of the District Court and remand the matter for consideration on the merits.

Counsel received oral consent to file this Amicus from counsel for Appellee on October 17, 2000.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT ASSERTED A DEFENSE ON BEHALF OF COLLINS WHICH COLLINS HAD WAIVED BY FAILING TO RAISE IT, DESPITE AN ORDER BY THE DISTRICT COURT EXPRESSLY DEMANDING IT BE RAISED IF COLLINS INTENDED TO ASSERT IT.

Amicus strongly urges this Court to reject the flawed reasoning asserted by *Acosta v. Artuz*, 221 F.3d 117 (2nd Cir. 2000), and the Fifth and Tenth Circuit Court of Appeals. The reasoning is not consistent with the Article III duties of Federal Courts to avoid the appearance of partiality and bias.

Instead, this Court should embrace the words of Justice Scalia:

"The Rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States v. Burke*, 504 U.S. 229, 112 S.Ct. 1867 (1992).

The courts and decisions cited in *Acosta*, rely on Rules Governing §2254 cases, Rule 4, as the authority for a Federal Court to *sua sponte* hold that a state prisoner's Habeas petition was filed outside of the time period allowed by the provisions of 28 U.S.C. §2254(d). Yet, traditionally, Rule 4 has not extended

v. *Sain*, 372 U.S. 293 (1963). Whether or not a petitioner is entitled to equitable tolling of the one year statute of limitations would be such a factual issue.

Habeas Rule 5 sets forth an affirmative duty upon the respondent State to raise and assert affirmative defenses. All of the defenses discussed in *Acosta* and the authorities cited to therein as showing that it is proper for the Court to sua sponte dismiss on untimely petition, have, at one time or the other, been found as "waived" by respondent states. See, e.g., *Helton*, *supra*; *Gray v. Netherland*, 116 S.Ct. 2075, 2082 (1996) (State by failing to assert procedural default waives defense); *Trest v. Cain*, 118 S.Ct. 478 (1997); *U.S. v. Allen*, 16 F.3d 377 (10th Circuit 1994) (same); *Fagon v. Washington*, 942 F.2d 1155 (7th Cir. 1991); *Jenkins v. Anderson*, 100 S.Ct. 2124, 2127 n.1 (1980). Abuse of Writ is waiveable. *Sanders v. United States*, 373 U.S. 1, 11 (1963) (State has duty to raise abuse of writ with "clarity and particularity." *Id.* at 11).

The error in logic in the decision in *Acosta* is the assumption that the failure of a state prisoner to file within the one year time limit "substantially implicates non party interests sufficiently weighty to permit sua sponte judicial review." *Id.* at 123 (quoting *Herdiman v. Reynolds*, 971 F.2d 500, 509 (10th Cir. 1992).)

As repeatedly stated in all decisions reviewing the question of the propriety of a sua sponte dismissal based on failure to file within the statute of limitations set forth in 28 U.S.C. §2244 (d)(1), the "interest" is the State's interest in finality of its' convictions.

This is not a "non-party" interest. This "interest" is then considered subsumed in the secondary reasons of "judicial economy and efficiency." The problem is that this is mixing oil and water. A State's interest in finality cannot trigger a federal Habeas court's interest in judicial efficiency and economy where the assimilation of that interest into the "economy" of the federal court has no bearing on the federal court's duty to adjudicate a federal habeas petition.

Given Congress is presumed to be aware of existing case law (Norman J. Singer, 2A Sutherland's Statutes and Statutory Construction, Section 45.12 at 62 (5th Ed. 1992), the congressional choice to limit the changes of waiver law to those made in 28 U.S.C. §2254 (b)(3), signals Congress's desire to maintain the practice of finding waiver by default with respect to other state defenses. See Federal Habeas Corpus Practice and Procedure, 3rd Ed. 1998, by James S. Liebman and Randy A. Hertz, published by Lexis Law Publishing, Section 22.1, p. 852 text and notes. *Lindh v. Murphy*, 521 U.S. 320, 343-44 (1997); *Henderson v. Frank*, 155 F.3d 159, 163-64 (3rd Cir. 1998) (finding waiver by State of Statute of Limitations defense in habeas proceeding under AEDPA for failure to assert defense.)

The real question at issue is whether or not State Habeas petitioners are facing a State Attorney General in an adversarial proceeding administered by an impartial judge, or facing a State Attorney General and a judge who acts as co-counsel for the State?

The procedural burdens of Habeas litigation greatly favor the respondent State in all aspects. The "playing field" is already so tilted in favor of the respondent State that less than 1% of all Habeas petitioners receive relief. The great majority of

Habeas claims are already dismissed on procedural defaults or on the basis of comity concerns. If a review is reached on the merits, the State received a greatly enhanced standard of error requiring relief. 28 U.S.C. §2254 (d)(1) and (2).

Procedural defenses to state procedural defaults are seldom-if ever-invoked *sua sponte* on the part of the Habeas petitioner. This leads to the appearance of bias and prejudice on the part of the federal judiciary for the respondent State, and against the prisoner petitioner. It raises questions as to the integrity of the Courts.

As stated in *Liegakos v. Cooke*, 106 F.3d 1381 at 1385 (7th Cir. 1997), "An obligation to turn square corners applies across the board." *Id.*, See FHCPP, Section 22.1, n.47, p. 855-56. "The lawyers employed by a state attorney general should be masters" of federal habeas corpus law and defenses, and because state's attorneys are better placed than federal judges to know when a State's federalism and comity interests are at stake, those attorneys at the least should be held to procedural standards that are no less exacting than those applied to *pro se* prisoners." *Id.* at 856.

Concerns of federalism and respect for a state's criminal judgment are marginal [in a state waiver situation]...because the state brought the problem on itself. *Boardman v. Estelle*, 957 F.2d 1523, 1534-37 (9th Cir. 1992).

The United States District Courts for the Southern District of Ohio have amended their "Show Cause" order to include specifically requesting the State of Ohio to affirmatively address whether or not the petition is filed within the one year time limit. If the State experts choose not to assert an affirmative

defense, then the Court should consider it waived in normal circumstances. This notice itself is questionable as constituting advocacy on the part of the Court upon the State to address a waiveable affirmative defense and should be halted.

To then further allow a District Court to raise and advocate this affirmative defense for the State *sua sponte*, indicates the abandonment of the adversarial process for an inquisitorial proceeding. *United States v. Burke*, supra., at 1877 (Scalia, J., concurring.)

In *Helton v. Singletary*, supra at 1327-28, the Court observed that it was not a case of laziness or recalcitrance on the petitioner's part, but rather a case of relying on advice of counsel. In Note 4, the Court observed that this was not a claim of "cause and prejudice" raising ineffective counsel in collateral proceedings to which the right to counsel did not attach-but an equitable argument made where the petitioner had litigated his state claims with all due diligence. *Id.*

The purpose of the statute of limitations as enacted by Congress cannot be read in "days" of delay. The purpose was to prevent prisoners of the states from "resting on their laurels" for unreasonable amounts of time prior to seeking finality.

Rule 9 of the Rules Governing Habeas cases must be read in *pari materia* with the statute, as it was neither amended nor repeated by Congress when the 1996 AEDPA was enacted. Rule 5 still places an affirmative duty on the Respondent State to assert affirmative defenses. While Congress specifically changed the requirements regarding the waiver of exhaustion defense to exclude a waiver by default-it failed, presumably intentionally, to prohibit a waiver by default of the other procedural defenses

available to the states.

"Where Congress includes particular language in one section of a statute but omits it from another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in that disparate inclusion or exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (per curiam) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Furthermore, it cannot be read into the statute that Congress intended for federal courts to demand assertion of this affirmative defense in the Show Cause Order-or if not asserted-for the Court to *sua sponte* assert the defense on the behalf of the Respondent.

To assume so would be to undermine the fact that the one year time limit is an affirmative defense subject to default, and not a jurisdictional defect, as Congress could well have made it.

Petitioner asserts that in the plain meaning and intent of the statute governing the one year time limit, discerned from reading Habeas Rule 5 and 9 plus the controlling precedent on state waiver in existence at the time the AEDPA was passed that the District Court abused its discretion under the facts of this case in *sua sponte* invoking the one year time limit.

The diligence exhibited by Scott's continuous pending petitions in the State courts, coupled with counsel's erroneous advice to Scott as to when he had to file his Petition, indicate Scott has complied with the spirit and intent behind the law as regards to timeliness.

To penalize him for good faith and diligent efforts is inequitable and unjust. To penalize him for relying on licensed counsel's erroneous advice is unfair, when that penalty is the

loss of his privilege of the Great Writ. *Helton, supra.* To then allow that penalty to be invoked *sua sponte* by the Court, under the facts and circumstances of this case, adds insult to injury.

If the circumstances were different, if Scott was several years past the filing date and his state court proceedings were stale, justification for *sua sponte* invocation of the limitational bar could be seen as warranted in the interests of judicial economy and the court's inherent power to control its docket. *Acosta* at 122.

But in this case, with all due respect to the Court, the appearance is that the Court entered into active advocacy on behalf of the State by *sua sponte* invoking an affirmative defense, and demanding in the Show Cause Order that the State assert a waiveable affirmative defense. Had the same actions been taken by the Court in a private civil tort action-this Court would not hesitate to intervene.

The integrity and availability of a level playing field is a requirement of ordered justice. Habeas petitioners must already maneuver through a procedural minefield. To allow them to face both a State Attorney General and a District Court in a forum that protects the State from committing any procedural errors themselves, to the injury of the Petitioner, is to face an inquisitorial court repugnant to the Constitution of the United States and the concept of Due Process.

Wherefore, this Court is respectfully urged to reject the reasoning in *Acosta, supra*, and similar opinions issued by the other circuits.

This Court is urged under the limited facts of this case, *Scott*, to adopt the reasoning in *Helton v. Singletary, supra*, and