

FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-12947

DORIAN FRANK O'KELLEY,

Petitioner-Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 4:15-cv-00104-WTM

Before ROSENBAUM, NEWSOM, and BRASHER, Circuit Judges.

NEWSOM, Circuit Judge:

Dorian Frank O'Kelley, a Georgia inmate sentenced to death, appeals the denial of his petition for a writ of habeas corpus. In his petition, O'Kelly presented nine claims comprising some 60

separate subclaims. The district court dismissed six of those subclaims, several *sua sponte*, on the ground that they were insufficiently pleaded under Rule 2(c) of the Rules Governing § 2254 Cases, and then subsequently denied O’Kelley’s motion for leave to amend.

The issue before us is a narrow one. Our task isn’t to decide whether, in the abstract, it would have been preferable for the district court to notify O’Kelley of its intent to dismiss his subclaims for insufficient pleading and offer him an opportunity to correct the deficiencies. Perhaps it would have been. Instead, the sole question we must decide is whether, in the circumstances presented, the United States Constitution *required* the district court to do so. We hold that it did not. Accordingly, we affirm the denial of O’Kelley’s petition.

I

A

The Georgia Supreme Court’s decision on direct appeal recounts the particularly horrifying facts of O’Kelley’s crimes:

The evidence presented at trial shows that, shortly before midnight on April 10, 2002, O’Kelley and his co-defendant, Darryl Stinski, were observed at a convenience store by two Chatham County police officers. . . . Shortly after O’Kelley and Stinski left the store, the officers responded to a burglar alarm at a residence within walking distance of the store and discovered a broken window there. The occupant of the residence, who was not home at the time, testified

23-12947

Opinion of the Court

3

at trial that she returned to find that someone had apparently tried to kick in her back door and had broken a window and bent the curtain rod inside the home. O'Kelley admitted in his first statement to police that he and Stinski went to a residence in order to commit a theft therein on the night in question but fled after the alarm went off.

A few hours later, at approximately 5:30 a.m. on April 11, the same police officers were leaving the convenience store when they spotted a fire in the distance. Rushing to the scene, they found the Pittman residence engulfed in flames. This home was in close proximity to the residence which had been burglarized earlier. In the headlights of the police car, one of the officers again observed O'Kelley and Stinski, this time standing in a wooded area across the street from the burning house. However, they had disappeared by the time the officers exited the vehicle. Once the fire was extinguished, officials discovered the remains of the victims[: Susan Pittman and her thirteen-year-old daughter, Kimberly].

That evening, O'Kelley and Stinski brought a duffle bag to the mobile home where Stinski was staying, and O'Kelley told the group of people present that he and Stinski had stolen items from automobiles in the neighborhood. He also confided in one member of the group that he had burglarized and set fire to the Pittman residence, and he claimed to have slit Ms. Pittman's throat and to have raped Kimberly. O'Kelley then removed from his wallet a tooth in a

ziplock bag and stated that he had “busted it out of the little girl’s mouth.” After O’Kelley and Stinski left the mobile home, the group opened the duffle bag and discovered several items, including compact discs marked with Kimberly’s initials and prescription pill bottles containing oxycodone with Ms. Pittman’s name and address on the labels. A group member phoned the police and advised them of the bag’s contents and O’Kelley’s comments. After the contents of the bag were identified by a family member as belonging to the victims, O’Kelley and Stinski were arrested, and a human tooth later determined through DNA evidence to belong to Kimberly was found inside O’Kelley’s wallet.

In his second statement to police, O’Kelley confessed to killing Ms. Pittman by repeatedly beating and stabbing her, to beating and stabbing Kimberly, to setting the Pittman residence on fire while Kimberly was still alive, and to taking numerous items from the residence.

O’Kelley v. State, 670 S.E.2d 388, 392 (Ga. 2008).

Based on the evidence presented, a Georgia jury convicted O’Kelley of two counts of malice murder, as well as (among other crimes) multiple counts of burglary, arson, and cruelty to children. *Id.* at 391. The jury recommended death sentences for both murders, which the trial court imposed, and the Georgia Supreme Court affirmed. *See id.* The United States Supreme Court denied certiorari. *O’Kelley v. Hall*, 558 U.S. 840 (2009) (mem.).

23-12947

Opinion of the Court

5

O’Kelley then filed a petition for state habeas relief, which was denied. The Georgia Supreme Court subsequently denied O’Kelley’s application for a certificate of probable cause to appeal.

B

Having completed two trips through the state system, O’Kelley filed a petition for federal habeas corpus pursuant to 28 U.S.C. § 2254, raising nine general claims comprising approximately 60 subclaims. As relevant here, O’Kelley raised an ineffective-assistance-of-counsel claim (Claim I) alleging 26 separate failures, and an omnibus claim asserting 21 discrete trial errors (Claim IV).

The Warden of the Georgia Department of Corrections answered, contending that most of O’Kelley’s claims were procedurally defaulted or unexhausted. The district court ordered a bifurcated briefing schedule following discovery, directing the parties first to address whether any of O’Kelley’s claims were procedurally barred and then, depending on the resolution of the procedural issue, to address the merits of his remaining claims.

In his procedural briefing, the Warden once again argued that many of the claims in O’Kelley’s petition were unexhausted or defaulted, and—for the first time—also asserted that one of O’Kelley’s general claims and at least 39 subclaims failed to satisfy the fact-pleading requirements of Rule 2(c) of the Rules Governing § 2254 Cases (hereinafter, the “Habeas Rules”)—which, as relevant here, requires that a habeas petition both “(1) specify all the grounds for relief available to the petitioner” and “(2) state the facts

supporting each ground.” In his seven-page reply, O’Kelley didn’t address the Warden’s Rule 2(c) argument.

Following the completion of briefing, the district court “conducted a claim by claim analysis to determine which of [O’Kelley’s] claims he would be permitted to brief on the merits.” Order on Mot. for Recons. at 3, Dkt. No. 122. As relevant here, the court dismissed six subclaims as insufficiently pleaded under Rule 2(c): I(i), I(p), I(q), I(y), IV(a), and IV(q). The details of those subclaims aren’t particularly germane to the resolution of the lone question before us; it suffices to say that they alleged various failures of O’Kelley’s trial counsel (to prepare witnesses, file motions, etc.) and trial-court errors (in conducting voir dire, conducting penalty-phase proceedings, etc.).¹

This part does matter: The Warden had challenged only three of the six subclaims that the district court dismissed, and only two of those as insufficiently pleaded. Specifically, the Warden had argued that subclaims I(i) and I(p) failed to satisfy Rule 2(c)’s fact-pleading requirements because O’Kelley “failed to connect the law with any specific facts.” As for the third subclaim, IV(a), the Warden challenged it as partially procedurally defaulted. The Warden hadn’t challenged the other subclaims—I(q), I(y), and IV(q)—on any basis.

¹ The district court, in an alternative holding, also dismissed subclaim I(i) as unexhausted and subclaims IV(a) and IV(q) as procedurally defaulted.

23-12947

Opinion of the Court

7

O’Kelley moved the district court to reconsider its dismissal order. In particular, he contended that the court shouldn’t have dismissed any of the six claims as insufficiently pleaded because, he said, they satisfied Rule 2(c)’s fact-pleading standard. O’Kelley also argued that he lacked notice that his pleadings were deficient because the Warden hadn’t challenged any of his claims or subclaims as insufficiently pleaded in his initial answer and, even three years later, had challenged only two subclaims on fact-pleading grounds.

In the alternative, O’Kelley asserted that the court should, at a minimum, grant him leave to amend the insufficiently pleaded subclaims. Both the Habeas Rules and Federal Rules of Civil Procedure, he said, contemplated an opportunity to correct pleading deficiencies. See 28 U.S.C. § 2242 (stating that a habeas petition “may be amended or supplemented as provided in the rules of procedure applicable to civil actions”); Fed. R. Civ. P. 15(a)(2) (“The court should freely give leave [to amend] when justice so requires.”). Finally, and as particularly relevant here, O’Kelley argued that the Due Process Clause required the court to give him an opportunity to amend before it *sua sponte* dismissed any of his subclaims. O’Kelley attached to his reconsideration motion amendments that he proposed to make to his habeas petition.

The district court denied reconsideration. In doing so, the court rejected O’Kelley’s argument that he hadn’t received due process in connection with the dismissals: “Even if [the Warden] did not specifically describe each deficient claim, [O’Kelley] cannot ignore the pleading requirements of Rule 2(c).” Order on Mot. for

Recons. at 9. The court further emphasized that the “case ha[d] been actively litigated for several years, and, throughout those years, [O’Kelley] had knowledge of Rule 2(c)’s heightened pleading requirements.” *Id.* And all the while, the court continued, O’Kelley “had access to the evidence necessary to supplement his claims with the requisite facts.” *Id.*

The district court also denied O’Kelley’s request for leave to amend. The court didn’t read the Habeas Rules as requiring it to permit O’Kelley to correct what it deemed to be facially insufficient subclaims. Additionally, the court emphasized that it had discretion to grant or deny leave to amend under Federal Rule of Civil Procedure 15. The court acknowledged the principle, grounded in *Foman v. Davis*, 371 U.S. 178 (1962), that “[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’” *Id.* at 16. But, the court said, O’Kelley had “unduly delayed requesting leave to supplement his claims with the requisite factual support.” *Id.*

The parties then briefed the merits of the surviving claims and subclaims, which the district court ultimately rejected. The court also denied O’Kelley a certificate of appealability on any of his claims or subclaims. O’Kelley then moved this Court to certify several questions for appeal.

23-12947

Opinion of the Court

9

We granted a certificate of appealability (COA) on the question “[w]hether the district court abused its discretion in dismissing several of O’Kelley’s claims as insufficiently pleaded without providing notice and an opportunity to respond.”² In so doing, we noted that the facts and procedural history in O’Kelley’s case were similar to those underlying a recent unpublished decision that had divided the panel 2–1, *Williams v. Warden, GDCP*, No. 22-10249, 2024 WL 4439968 (11th Cir. Oct. 8, 2024). Both cases were handled by the same district court judge, who in both cases had *sua sponte* dismissed some claims as insufficiently pleaded.

² We subsequently granted O’Kelley’s motion to expand the COA to include the following issues:

- (1) Did the district court issue an alternative holding dismissing Claims IV(a) and IV(q) on the ground that Appellant failed to exhaust them in state court?
- (2) Did Appellee concede in the district court that Appellant properly exhausted Claims IV(a) and IV(q), and, if so, has Appellee waived or forfeited any exhaustion defense?
- (3) Did Appellant properly exhaust Claims IV(a) and IV(q) in state court?

Given our resolution of the issue on which the COA was originally granted, we needn’t address any of these downstream issues.

II

We review de novo a district court’s grant or denial of a habeas corpus petition. *McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005).

For good measure, we’ll reiterate here what we said at the outset: The question before us is not whether, on balance, the district court *should* have given O’Kelley notice of its intent to dismiss some of his subclaims as insufficiently pleaded or whether it *should* have given him an opportunity to cure the deficiencies. Maybe it should have—perhaps that would have been better, even fairer. Rather the sole question before us is whether the United States Constitution *required* the district court to do either or both of those things. We hold, in the particular circumstances presented by this case, that it did not.

A

Before we dive in, two housekeeping items. First, O’Kelley asserts that the question on which we granted a certificate of appealability actually encompasses more than just the due-process issue. The reason, he says, is that the question specified in the COA uses the phrase “abuse of discretion”—which, he contends, brings in the ordinary, subconstitutional procedural rules governing pleadings, amendments, and the like. That is incorrect, for multiple reasons. For one, we have long held that the issue specified in a COA should be understood in the light of “the pleadings and other parts of the record.” *Murray v. United States*, 145 F.3d 1249,

1251 (11th Cir. 1998). Here, that includes, most notably, (1) O’Kelley’s own COA motion, which framed the issue presented as one sounding in “due process” and cited *Williams* as evidence that the constitutional issue was one on which reasonable jurists could disagree, , and (2) our order granting the COA, which cited the divide in *Williams* as the reason for allowing O’Kelley to appeal.³ For another, the governing statute authorizes the issuance of a COA “only if the applicant has made a substantial showing of the denial of a *constitutional* right.” 28 U.S.C. § 2253(c)(2) (emphasis added). Needless to say, mine-run pleading- and amendment-related determinations made pursuant to ordinary procedural rules don’t usually implicate “constitutional right[s].”⁴ Accordingly, we limit our

³ O’Kelley’s persistent focus on the Due Process Clause and *Williams* is both understandable and seemingly strategic, as only a constitutional rule would even plausibly enable him to avoid the tall task of demonstrating that the district court’s dismissal caused him prejudice. See, e.g., Br. for Appellant at 6 (emphasizing the *Williams* majority’s statement that “the complete denial of the opportunity to be heard on a material issue is a violation of due process which is never harmless error,” 2024 WL 4439968, at *7 (quoting *United States v. Smith*, 30 F.4th 1334, 1338 (11th Cir. 2022)); Reply Br. at 1 (same).

⁴ O’Kelley might have been able to solve for the second difficulty by making the required “substantial showing” in his motion regarding one of his underlying constitutional claims—e.g., that his counsel was so deficient that he rendered constitutionally ineffective assistance. Tellingly, though, he didn’t attempt to do so.

consideration here to the question whether the district court’s dismissal of O’Kelley’s six subclaims violated the Due Process Clause.

Second logistical issue: Recall that of the six subclaims the district court rejected on Rule 2(c) grounds, it dismissed two at the state’s urging—I(i) and I(p)—and four others *sua sponte*—I(q), I(y), IV(a), and IV(q). Because the *sua sponte* dismissals clearly present the more serious due-process question, we focus our analysis on them.

B

In pertinent part, the Fifth Amendment provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.⁵ The Supreme Court has long emphasized that “due process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

“The essential requirements of due process . . . are [1] notice and [2] an opportunity to respond.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (citation modified). We will consider first whether O’Kelley was given constitutionally adequate notice that his claims were subject to *sua sponte* dismissal for

⁵ To be clear, the Fifth Amendment, not the Fourteenth, is the governing provision here because it is a federal (not state) court that O’Kelley contends violated his due-process rights.

23-12947

Opinion of the Court

13

insufficient pleading, and then whether he received a constitutionally adequate opportunity to be heard.

1

First up, notice. Due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties” of a rule or action that may affect their rights. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Importantly here, it is well settled that constitutionally sufficient notice can be established by “generally available . . . statutes and case law” as well as “publicly available document[s],” like the Habeas Rules. *City of W. Covina v. Perkins*, 525 U.S. 234, 241–42 (1999); *see also Arrington v. Helms*, 438 F.3d 1336, 1351 (11th Cir. 2006). The question for us is whether the applicable rules, understood in conjunction with our case law interpreting and applying them, gave O’Kelley constitutionally adequate notice of both the fact-pleading requirement and the district court’s authority to *sua sponte* dismiss claims that fail to satisfy that requirement. They did.

Start with the rules themselves. It is well settled that “[h]abeas corpus petitions must meet heightened pleading requirements” *McFarland v. Scott*, 512 U.S. 849, 856 (1994). Unlike the Federal Rules of Civil Procedure, which permit what has come to be called “notice pleading,” the Habeas Rules require “fact pleading.” *Hittson v. GDCP Warden*, 759 F.3d 1210, 1265 (11th Cir. 2014) (citation modified). In particular, as already noted, Rule 2(c) of the Habeas Rules requires that a habeas petition “(1) specify all the grounds for relief available to the petitioner” and “(2) state the

facts supporting each ground.” Rule 2(c). Rule 2 goes on to state that an inmate’s petition “must substantially follow” a standard form. Rule 2(d), Rules Governing § 2254 Cases. The instructions for that form, which is appended to the rules, contains a bold-face paragraph labeled “**CAUTION.**” Rules Governing § 2254 Cases, Appendix of Forms, Instructions ¶ 9. Among the warnings there: “[Y]ou must state the facts that support each ground.” *Id.* For good measure, the body of the form reiterates that the petitioner must “[s]tate the facts supporting each ground” on which he seeks relief—notably underlining the word “facts.” *Id.* Appendix of Forms, Petition ¶ 12. Then, for better measure still, in each of several sections of the form in which the petitioner is invited to allege a ground for relief (e.g., “GROUND ONE”), an instruction once again underscores the fact-pleading requirement: “Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim).” *Id.* Appendix of Forms, Petition ¶ 12(a).⁶

Given the substance of the rules, it’s no surprise that this Court has repeatedly emphasized the heightened pleading burden that habeas petitioners face. In *Borden v. Allen*, for instance, we explained that “[t]he § 2254 Rules . . . mandate ‘fact pleading’ as opposed to ‘notice pleading,’ as authorized under Federal Rule of Civil Procedure 8(a).” 646 F.3d 785, 810 (11th Cir. 2011). And, we

⁶ The standard form provided to habeas petitioners by the U.S. District Court for the Southern District of Georgia is materially identical to the stock form appended to the Habeas Rules. See Southern District of Georgia, Application for Habeas Corpus under 28 U.S.C. Section 2254.

23-12947

Opinion of the Court

15

continued, “[c]oupled with the form petition . . . , the federal rules give the petitioner . . . ample notice of the difference.” *Id.*; *see also*, *e.g.*, *Hittson*, 759 F.3d at 1265 (explaining that a petitioner’s generalized allegations in a motion for leave to amend were insufficient under Rule 2(c)). We have explained that the reason for the distinction—and for the heightened standard that habeas petitioners face—is “obvious”: “Unlike a plaintiff pleading a case under Rule 8(a), the habeas petitioner ordinarily possesses, or has access to, the evidence necessary to establish the facts supporting his collateral claim; he necessarily became aware of them during the course of the criminal prosecution or sometime afterwards.” *Borden*, 646 F.3d at 810.

Accordingly, there can be little doubt that the Habeas Rules and our follow-on precedent gave O’Kelley sufficient notice that he bore an obligation to specify the facts supporting each of his claims.

The ensuing question is whether O’Kelley had the requisite notice that if he didn’t properly plead particular facts, the district court could dismiss his petition *sua sponte*. We hold that he did. Rule 4 of the Habeas Rules provides:

The clerk must promptly forward the petition to a judge under the court’s assignment procedure, and the judge must promptly examine it. *If 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.* If the petition is not dismissed, the judge must order the respondent to file an answer, motion,

or other response within a fixed time, or to take other action the judge may order.

Rule 4, Rules Governing § 2254 Cases (emphasis added).

On its face, Rule 4’s second sentence plainly empowers the district court to dismiss a habeas petition *sua sponte* in *some* circumstances. O’Kelley seeks to confine that authority in two ways. Respectfully, neither persuades us. First, O’Kelley asserts that a district court’s *sua sponte* dismissal authority extends only to a petition that is legally meritless or frivolous on its face—not, by extension, to one that fails Rule 2(c)’s fact-pleading requirement. *See* Oral Arg. at 4:40-5:07. His argument, we think, is foreclosed twice over. One, we have effectively collapsed the law-fact distinction that O’Kelley seemingly wants to draw. In *Paez v. Secretary, Florida Department of Corrections*, we observed that “[i]f a petition does not set forth a sufficient factual basis for habeas relief, the petition is ‘legally insufficient on its face,’ and the district court must dismiss it.” 947 F.3d 649, 653 (11th Cir. 2020) (emphasis added) (quoting *McFarland*, 512 U.S. at 856). Two, in *Borden*, having expounded on the fact-pleading requirement prescribed by Rule 2 and its accompanying standard forms, we went on to emphasize that “Rule 4 of the § 2254 Rules puts the petitioner on notice of what is likely to happen if his petition fails to comply with the fact pleading requirements of Rule 2(c) and (d).” 646 F.3d at 810. Quoting Rule 4’s critical second sentence, we said, in no uncertain terms: “The judge acts *sua sponte*.” *Id.*

Second, and separately, O’Kelley contends that a district court’s Rule 4 *sua sponte* dismissal authority is time-limited. A district court may dismiss a petition on its own motion for facial insufficiency, he says, only during its “prompt” preliminary review of a case and at the screening stage, and not thereafter. *See* Br. of Appellant at 4. But the Supreme Court rejected a similar argument in *Day v. McDonough*, 547 U.S. 198 (2006). There, the Court considered the question “whether a federal court lacks authority, on its own initiative, to dismiss a habeas petition as untimely, once the State has answered the petition without contesting its timeliness.” *Id.* at 202. The habeas petitioner sought to impose on Rule 4 the same sort of temporal limitation that O’Kelley posits here—“the court loses authority” to dismiss a petition *sua sponte*, the petitioner there asserted, “[o]nce an answer has been ordered and filed.” *Id.* at 207. The Supreme Court rejected that narrow reading of Rule 4 and affirmed the *sua sponte* dismissal of a habeas petition entered after the state had filed its answer. *See id.* at 209.

Our own post-*Day* precedent, if anything, makes even more clear that nothing in the Due Process Clause artificially time-constrains a district court’s Rule 4 dismissal authority. In *McNabb v. Commissioner Alabama Department of Corrections*, we upheld a Rule 4 dismissal entered “approximately four years” after a habeas petition had been filed. 727 F.3d 1334, 1340 (11th Cir. 2013). In that case, the district court had issued a scheduling order stating—or at the very least strongly implying—that it wouldn’t rule on the merits without giving the petitioner an opportunity to brief the case.

Id. at 1339. Then, having “permitted the case to languish for approximately four years,” it did it exactly that—summarily rejecting the petitioner’s claims on the merits. *Id.* at 1340. There, the district court deprived the petitioner of what was, in effect, a legitimate expectation—if not quite a vested right, *per se*—and, indeed, we lamented that, in all fairness, the petitioner “should have been able to rely upon the court’s scheduling order.” *Id.* at 1339. Even so, we assiduously maintained the distinction that O’Kelley’s position blurs—namely, between what may be “good” in some abstract sense and what is constitutionally required. “We may not fully condone [the district court’s] procedure,” we said, “but neither can we say it amounted to a due process violation.” *Id.* at 1340; *accord id.* at 1339 (noting that although the petitioner had reasonably relied on the district court’s representations, “the failure of the district court to give notice to the parties that it would decide the merits of the claims without briefing does not rise to the level of a due process violation”); *id.* at 1340 (“Although adversarial briefing is vital to the court’s decision-making process, a petitioner has no right to briefing in his habeas proceeding. Accordingly, we conclude that the district court did not violate [the petitioner’s] due process rights in this circumstance.”).

★ ★ ★

We hold that between the plain text of Habeas Rules 2 and 4, the standard forms that accompany them, and the relevant case law, O’Kelley had constitutionally adequate notice both (1) that he had an obligation to plead specific facts supporting each of his

23-12947

Opinion of the Court

19

claims for relief and (2) that if he failed to do so the district court could dismiss his petition *sua sponte*.

B

Notice, of course, is only half the due-process equation; the Fifth Amendment also requires “an opportunity to respond,” *Loudermill*, 470 U.S. at 546—or, to use the more common formulation, “an opportunity to be heard,” *Richards v. Jefferson County*, 517 U.S. 793, 797 n.4 (1996). We hold that O’Kelley had the requisite opportunity.

O’Kelley’s first such opportunity was in his habeas petition itself. For reasons already explained in detail, the Habeas Rules, the accompanying forms, and our explanatory case law gave O’Kelley ample notice of both (1) the need to plead specific facts and (2) the consequences of failing to do so. Against that backdrop, O’Kelley had every occasion—and incentive—to submit a compliant habeas petition. His petition, which he filed with the assistance of counsel, spanned some 40 pages and alleged nine claims comprising some 60 subclaims.

O’Kelley’s second opportunity—this time, to correct the court-identified deficiencies that had led to his petition’s dismissal—was in his motion for reconsideration. *Cf. Turner v. Secretary, Dep’t of Corrs.*, 991 F.3d 1208, 1212 (11th Cir. 2021) (holding that a habeas petitioner had a sufficient opportunity to contest a district court’s *sua sponte* dismissal on statute-of-limitations grounds where the court explained that he could “move to reopen the action if ‘he

believe[d] that he c[ould] show [] that the determination of untimeliness [wa]s incorrect”). In his motion to reconsider, O’Kelley addressed head on the district court’s order, arguing that he “did, in fact, meet the fact-pleading requirements under Rule 2(c)” and that he rightfully presumed that the court considered his pleading adequate because the “case proceeded for years without any notice from [the state] or the [c]ourt that they deemed claims in the petition to be insufficiently pled.” Mot. for Recons. of Procedural Default Order at 8, Dkt. No. 113.

The district court properly treated O’Kelley’s motion as a request to reconsider its interlocutory order under Federal Rule of Civil Procedure 54(b). See Order on Mot. for Recons. at 5 (“[T]he Court’s prior order dismissing many, but not all, of Petitioner’s claims was an interlocutory order and, therefore, may be revised pursuant to Rule 54(b).”); see also Fed. R. Civ. P. 54(b) (stating that “any order . . . that adjudicates fewer than all the claims . . . may be revised at any time before the entry of judgment adjudicating all the claims”). And that characterization matters, as a court deciding a Rule 54(b) motion has “plenary authority ‘to reconsider, revise, alter or amend’ a non-final order before the entry of final judgment” and isn’t bound by the “significantly higher showing for reconsideration” that governs “Rule 59(e) or 60(b)” motions. *Hornady v. Outokumpu Stainless USA, LLC*, 118 F.4th 1367, 1379–81 (11th Cir. 2024) (quoting *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1315 (11th Cir. 2000)). Although the district court here once recited the standard applicable under Rules 59(e) and 60(b), the balance of its order makes clear that it in fact exercised its “plenary

authority” to evaluate all of O’Kelley’s reconsideration arguments afresh. See Order on Mot. for Recons. at 5 & n.2 (noting that Rule 54(b) “gives district courts discretion to reconsider interlocutory orders” and rejecting the state’s argument that O’Kelley’s motion was governed by Rule 59(e)); *id.* at 6–10 (addressing in detail each of O’Kelley’s arguments).

For the proposition that the Due Process Clause required that he be given yet *another* opportunity to address the deficiencies in his petition, O’Kelley points to the Supreme Court’s decision in *Day v. McDonough*, already discussed. As explained, the Court there considered the question whether a district court could *sua sponte* dismiss a habeas petition as time-barred where the state’s answer hadn’t raised the statute of limitations in its answer and the court had noticed the timeliness issue on its own. 547 U.S. at 202. The Court held that “the federal court had discretion to correct the State’s error and, accordingly, to dismiss the petition as untimely under AEDPA’s one-year limitation.” *Id.* To the end of its opinion, though, the Court appended the following coda, which O’Kelley makes the centerpiece of his opportunity-to-be-heard argument: “Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions.” *Id.* at 210 (citing *Acosta v. Artuz*, 221 F.3d 117, 124–125 (2d Cir. 2000), and *McMillan v. Jarvis*, 332 F.3d 244, 250 (4th Cir. 2003)). Those protections had been observed in the case before it, the Court noted, when the district court “noticed the State’s computation error and ordered Day to show cause why his federal habeas petition should not be dismissed as untimely.” *Id.* at 204; see *id.* at

210. “[N]othing in the record,” the Court added, “suggest[ed] that the State ‘strategically’ withheld the defense [limitations] or chose to relinquish it.” *Id.* at 211.

So too here, O’Kelley insists, the district court was constitutionally obliged to issue a show cause order or otherwise alert him to the pleading deficiency and prompt him to respond. We disagree. *Day* is different from this case in an important respect: It dealt with a dismissal based on an affirmative defense—namely, that the applicable statute of limitations had run—rather than the petition’s facial insufficiency.⁷ That distinction matters, for multiple reasons. First, and most obviously, the state bears the burden to plead and prove an affirmative defense to a habeas petition. *See* Rule 5(b), Rules Governing § 2254 Cases; Fed. R. Civ. P. 8(c)(1). And correlatively, as the *Day* Court itself emphasized, the state can forfeit or even strategically waive a timeliness defense. *See* 547 U.S. at 202 (noting 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” and that “we would count it an abuse of discretion to override a State’s deliberate waiver of a limitations defense”). In that circumstance, *sua sponte* action makes little sense, in that there’s scant justification for the court making the state’s case for it. Here, by contrast, it is the petitioner’s obligation to

⁷ We’ll assume for present purposes that *Day*’s coda was grounded in constitutional due-process principles, although the Court never said as much in so many words.

comply with Rule 2’s fact-pleading requirement—the court need only enforce it.

Second, a statute-of-limitations defense will often entail inquiries into facts that both aren’t evident on the face of the petition and are within the state’s, rather than the petitioner’s, knowledge, possession, or control. As the Supreme Court itself said in *Day*, “information essential to the time calculation is often absent—as it was in this case—until the State has filed, along with its answer, copies of documents from the state-court proceedings.” 547 U.S. at 207 n.6. And, of course, the potential application of equitable tolling adds still another wrinkle; the facts pertinent to a tolling determination might well also be indiscernible from the petition itself. *See Holland v. Florida*, 560 U.S. 631, 634 (2010) (holding that the timeliness provision in the federal habeas statute applicable to state prisoners, 28 U.S.C. § 2244(d), is subject to equitable tolling).

All told, it thus makes sense why the Supreme Court would have directed district courts to give habeas petitioners notice and an opportunity to be heard before summarily dismissing their claims based on affirmative defenses. In the context of a limitations-based dismissal, “[a] notice requirement gives petitioners the opportunity to bring essential information not evident from the face of the motion to the court’s attention, including the possibility that equitable tolling applies.” *Shelton v. United States*, 800 F.3d 292, 295 (6th Cir. 2015). But the considerations that underlie that rule don’t translate to a case like this, in which the fact-pleading failure

(1) runs to an issue on which the petitioner bears the burden and (2) is evident from the face of the petition.⁸

We'll conclude this discussion with a variation on what has become a consistent theme: The question here isn't whether it would have been preferable for the district court to issue an order to show cause notifying O'Kelley of the deficiencies in his petition and allowing him to respond or amend. It might well have been. Rather, we are tasked here only—and narrowly—with deciding

⁸ Tellingly, we think, O'Kelley hasn't cited any cases in which courts have required express notice to habeas petitioners before their petitions are dismissed for failure to comply with Rule 2's fact-pleading requirement; rather, all of his cases (like *Day*) involve dismissals based on affirmative defenses.

One final point: The *Day* Court's own citations boomerang back around to undermine O'Kelley's position. As already noted, in support of its directive that "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions," the Supreme Court pointed to the Second Circuit's decision in *Acosta v. Artuz*, 547 U.S. at 210. In that case—indeed, in the particular passage to which the Supreme Court adverted—the Second Circuit had drawn the very distinction that O'Kelley's position here blurs: "Where the dismissal is based on procedural grounds (i.e., failure to show cause why the issue was not raised in an earlier petition), the district court must provide notice and an opportunity to be heard prior to dismissal; where the dismissal is based on the merits (i.e., lack of actual prejudice), no prior notice is required . . ." *Acosta*, 221 F.3d at 124. And we have previously said that a dismissal for facial insufficiency—including one based on a failure to satisfy Rule 2's fact-pleading requirement—"constitutes a ruling on the merits of a petitioner's . . . claims." *Borden*, 646 F.3d at 810. Accordingly, under the rule adopted in *Acosta*—and thereafter noted in *Day*'s key passage—the district court here wasn't required to issue an order to show cause or otherwise prompt O'Kelley to defend his sufficiency of his pleading.

23-12947

Opinion of the Court

25

whether the United States Constitution *required* the district court take one or more of those protective or remedial steps. We hold that it did not.⁹

III

For the foregoing reasons, we affirm the denial of O’Kelley’s petition for a writ of habeas corpus.

AFFIRMED.

⁹ Because we conclude that O’Kelley’s claims were properly dismissed for facial insufficiency, we need not reach the other issues which we granted COA on.

23-12947

BRASHER, J., Concurring

1

BRASHER, Circuit Judge, Concurring:

I concur in the Court’s opinion. The Court’s opinion concludes that O’Kelley’s constitutional claim fails, but it does not address whether the district court erred under other “procedural rules governing pleadings, amendments, and the like.” I write separately to explain why, even under these due-process-adjacent rules, the district court did not commit reversible error when it dismissed these claims in O’Kelley’s petition.

Our precedents reflect that it is a better practice for a court to solicit the input of the parties before acting on its own initiative. In civil cases, we have held that a court may “dismiss an action on its own motion” only if “the procedure employed is fair.” *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1336 (11th Cir. 2011) (citation modified). The default rule in cases like this one is that a court should provide notice and an opportunity to be heard before acting *sua sponte*. So, ordinarily, the rule is that, “[p]rior to dismissing an action on its own motion, a court must provide the plaintiff with notice of its intent to dismiss and an opportunity to respond.” *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1248 (11th Cir. 2015) (emphasis added).

We have recognized, however, that defective pleadings can sometimes be dismissed without giving the affected party a pre-dismissal opportunity to dispute or remedy the defect. For example, in *Tazoe*, we explained that “[t]here is an exception to our general rule against dismissal without notice if [a] complaint is patently frivolous or if reversal would be futile.” 631 F.3d at 1336 (citation

modified). Likewise, in *Byrne v. Nezhat*, we said that “[r]eversal of a *sua sponte* dismissal without notice may not be mandated if amendment of the complaint would be futile or if it is patently obvious that the plaintiff could not prevail.” 261 F.3d 1075, 1127 n.99 (11th Cir. 2001) (citation modified). And in *American United Life Insurance Company v. Martinez*, we said that “a *sua sponte* dismissal . . . will not stand where: 1) the defendant has not filed an answer and the plaintiff still ha[s] a right to amend his complaint . . . ; 2) the plaintiff has brought his claim in good faith; and 3) the district court has failed to provide the plaintiff with notice of its intent to dismiss or an opportunity to respond.” 480 F.3d 1043, 1069 (11th Cir. 2007).

The basic rule reflected by these decisions is that a court can dismiss defective pleadings without notice if the defect cannot be remedied. If the defect cannot be remedied—whether because the pleading is clearly frivolous or because amendment is unavailable or would be ineffective—then it would be futile to give the plaintiff notice and an opportunity to make an amendment. Likewise, to justify reversal, a district court’s error must be prejudicial. So, as an appellate court, we should reverse a dismissal without notice only if notice would have affected the outcome. Put another way, we need not reverse a *sua sponte* dismissal if “reversal would be futile.” *Tazoe*, 631 F.3d at 1336.

Applying these precedents to this case, I don’t see how the district court’s decision to dismiss without notice was prejudicial. The district court dismissed O’Kelley’s claims because he didn’t plead sufficient facts to justify the relief he requested, and O’Kelley

23-12947

BRASHER, J., Concurring

3

does not challenge that conclusion on appeal. The only way to remedy the defect correctly identified by the district court would be through an amendment to O’Kelley’s petition. But, when O’Kelley asked for that very remedy and moved to amend his petition in response to the district court’s order, the district court said that no amendment was available and denied the motion to amend on the grounds that O’Kelley had “unduly delayed requesting leave to supplement his claims with the requisite factual support.”

Under our case law, a district court may deny an amendment for undue delay. Rule 15 of the Rules of Civil Procedure governs the amendment of a habeas petition. *See* 28 U.S.C. § 2242; Rules Governing Section 2254 Cases, Rule 12. Because leave to amend should be freely given, a district court needs some justification for denying a request to amend, “such as undue delay.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). Of particular relevance here, we have held that “[a] district court may find undue delay when the movant knew of facts supporting the new claim long before the movant requested leave to amend, and amendment would further delay the proceedings.” *Haynes v. McCalla Raymer, LLC*, 793 F.3d 1246, 1250 (11th Cir. 2015) (quoting *Tampa Bay Water v. HDR Eng’g, Inc.*, 731 F.3d 1171, 1186 (11th Cir. 2013)).

Judge Rosenbaum’s dissenting opinion suggests that undue delay should be measured from when the defendant or the district court told a plaintiff or petitioner that his allegations were insufficient to state a claim. But courts usually assess undue delay from when the party knew the facts that should have been pleaded, not

from the time that an opposing party or the district court identified a failure to plead those facts. *See, e.g., id.* In other words, leave to amend may be “denied when the moving party knew about the facts on which the proposed amendment was based but omitted the necessary allegations from the original pleading.” 6 WRIGHT & MILLER’S FEDERAL PRACTICE AND PROCEDURE § 1488 (3d ed. 2026).

Applying this standard, I cannot say that the district court abused its discretion in denying O’Kelley’s motion to amend. The district court reasoned that O’Kelley “had access to the evidence necessary to support his insufficiently pled claims and unreasonably delayed providing that factual support.” Dkt. No. 122 at 16. O’Kelley filed his habeas petition in 2015. As this Court’s opinion explains, O’Kelley had notice that it was his responsibility to plead these claims with specificity, and O’Kelley had access to the facts supporting his claims because he “necessarily became aware of them during the course of the criminal prosecution or sometime afterwards.” *Hittson v. GDCP Warden*, 759 F.3d 1210, 1265 n.63 (11th Cir. 2014) (quoting *Borden v. Allen*, 646 F.3d 785, 810 (11th Cir. 2011)). But, for the three subclaims at issue here, he alleged almost no supporting facts. The litigation sat in court for years while the district court went through O’Kelley’s petition subclaim-by-subclaim, including the roughly twenty-six different ways he alleged that his trial counsel was ineffective. But O’Kelley made no effort to supplement his pleading until after the district court ruled. In these circumstances, the district court did not abuse its discretion in finding undue delay.

23-12947

BRASHER, J., Concurring

5

In short, there is no reason to think the result in the district court would have been any different if O’Kelley had been given notice of the defects and an opportunity to ask for an amendment before the district court ruled. For these reasons, along with those articulated in the Court’s opinion, I concur.

23-12947

ROSENBAUM, J., Dissenting

1

ROSENBAUM, Circuit Judge, Dissenting:

I respectfully dissent for the reasons expressed in *Williams v. Warden, GDCP*, No. 22-10249, 2024 WL 4439968 (11th Cir. Oct. 8, 2024).

I also respectfully disagree with my colleague Judge Brasher’s separate Concurrence. That Concurrence endorses the district court’s reasoning for denying Dorian Frank O’Kelley an opportunity to amend his petition after the district court sua sponte dismissed it: that O’Kelley had “unduly delayed requesting leave to supplement his claims with the requisite factual support.” I just can’t get onboard with that reasoning here because the record simply doesn’t support it.

Yes, there was delay. But it was the district court that caused the delay in the timing of O’Kelley’s motion to amend his petition to remedy deficiencies in the specificity of his factual allegations. To be clear, I appreciate how busy our district courts are. On top of that, death-penalty habeas petitions are extremely time-consuming because they often require the district court to review years of litigation history in the state courts before they can rule on the federal claims. After all, the Antiterrorism and Effective Death Penalty Act generally requires us to defer to state-court rulings unless they are “unreasonable.” To know whether that’s the case, a court must dig into those rulings. And that takes time to do right. So I understand why it can take a relatively longer time to rule in such a case, and I take no issue with the amount of time that passed be-

tween O’Kelley’s filing of his petition and the district court’s dismissal of his subclaims. Indeed, this is not a case where the district court wasn’t diligent.

That said, holding the delay that resulted from the court’s proceedings against the petitioner is not appropriate, in my view. And that appears to have happened here.

To recap, O’Kelley filed his petition on April 23, 2015. The State responded a little over a month later, on May 28, 2015. In its answer, the State argued that most of O’Kelley’s claims were procedurally defaulted or unexhausted or were insufficiently pled. But notably, it found no fault with, among other claims, subclaims I(q), IV(a), and IV(q).

Just shy of *four years* after O’Kelley filed his petition and the State sought to dismiss several of his claims, on April 2, 2019, the district court sua sponte dismissed, among other claims, subclaims I(q), IV(a), and IV(q) as insufficiently pled—even though the State had not argued that any of these three claims were insufficiently pled.

Now, in fairness to the district court, it wasn’t sitting around doing nothing in the case in the intervening four-year period. As I explain more below, it was very busy. But what it was doing doesn’t somehow make O’Kelley’s filing of his motion to amend his petition to add specificity to subclaims I(q), IV(a), and IV(q) after the court dismissed those claims on April 2, 2019, untimely on this record. Let me explain.

23-12947

ROSENBAUM, J., Dissenting

3

While the State's motion to dismiss certain claims (again, it did not seek to dismiss subclaims I(q), IV(a), and IV(q)) was pending, on November 16, 2015, the district court entered a scheduling order directing possible discovery and three stages of briefing.

The first stage of briefing would occur after either discovery closed or the court denied discovery. At that time, O'Kelley was to file a brief in support of a motion for a federal evidentiary hearing.

The second stage would take place once the court either denied an evidentiary hearing or else held one. At that time, O'Kelley was to "file a brief on the issues of procedural default, cause and prejudice, and fundamental miscarriage of justice." The district court explained that O'Kelley would "file the initial brief regarding the issues of procedural default because *he will have the final opportunity to respond to any unforeseen arguments* subsequently raised by the [State] in his reply."

After the parties had fully briefed those issues, the court said it would enter "an order concerning procedural default and what issues it will review on the merits." And at the third stage, O'Kelley was to "file a final brief on any remaining claims."

O'Kelley complied with these directions.

Following discovery, on March 8, 2017, O'Kelley moved for an evidentiary hearing, as the district court had instructed in its scheduling order. The motion was ripe for resolution as of April 24, 2017, when O'Kelley filed his reply brief. About ten months later, on March 7, 2018, the district court denied O'Kelley's motion.

That triggered the second stage of briefing. On April 23, 2018, O’Kelley timely filed his brief on “procedural default, exhaustion, and miscarriage of justice,” again, as the district court had instructed.

At no point in these two stages of briefing (or again, in the State’s motion seeking to dismiss certain of O’Kelley’s claims) did the State identify any problems with subclaims I(q) or IV(q). And it asserted with respect to subclaim IV(a) only that O’Kelley had procedurally defaulted it—not that he had pled it with insufficient specificity. That’s so even though the State argued that specificity-in-pleading problems plagued several of O’Kelley’s other claims.

Still, as I’ve noted, the following year, on April 2, 2019, the district court sua sponte dismissed, among other claims, subclaims I(q), IV(a), and IV(q) as insufficiently pled. It did so even though the court had explained in its scheduling order that it gave O’Kelley the chance to file “the initial brief regarding the issues of procedural default because he will have the final opportunity to respond to *any unforeseen arguments* subsequently raised by the [State] in his reply.”

So on July 26, 2019, O’Kelley moved for reconsideration of the court’s order and to amend his claims to add more specificity. With respect to subclaim I(q), O’Kelley proposed about two new pages of factual allegations. For subclaim IV(a), he alleged about a page-and-a-half of new factual allegations. And for subclaim IV(q), he asserted more than a page of new factual allegations.

23-12947

ROSENBAUM, J., Dissenting

5

Nearly a year later, on May 28, 2020, the district court denied O’Kelley the chance to amend his petition on these subclaims. It said O’Kelley had “unduly delayed in requesting leave to supplement his claims with the requisite factual support.” In support, the district court reasoned that it had “permitted [O’Kelley] to litigate his claims for several years” and had adopted his “proposed schedule [under which] the Court and both parties would have a clear understanding regarding which issues are to be the subjects of merits briefing.”

I respectfully disagree that O’Kelley engaged in “undu[e] delay[.]” He had no reason to believe the three subclaims lacked sufficient specificity. The State hadn’t so argued, even though it took that position with respect to several other claims. The district court allowed the parties to conduct discovery on and otherwise litigate those subclaims for four years before dismissing them out of the blue. And it dismissed them after telling O’Kelley three-and-a-half years earlier that O’Kelley would get “the final opportunity to respond to *any unforeseen arguments* subsequently raised by the [State].”

What’s the point of that if the court was going to sua sponte dismiss for a previously unraised reason? And if the reason was unraised, how could O’Kelley have “unduly delayed” in timely seeking to amend his petition to address the deficiency after the court pointed it out? Plus, why facilitate litigation for four years if the deficiency in the specificity justified a sua sponte dismissal from the outset?

The Concurrence has no problem with the district court's approach. It argues that, at the time O'Kelley filed his petition initially, he was aware of the facts supporting the additional specificity of his claims. That misses the point.

Specificity can be a bit of a grey standard. The facts of this case show that amply. As I've noted, even the State apparently didn't think subclaims I(q), IV(a), and IV(q) had a specificity problem. After all, the State certainly wasn't shy about raising specificity concerns about other claims, but it made none about these three subclaims. Because the specificity requirement can be subject to an eye-of-the-beholder problem, a sua sponte dismissal on that basis—particularly when the State hasn't even raised it—seems inappropriate to me. And that's especially so if we don't want to encourage prisoners to file unnecessarily long petitions crammed with everything they know about a claim, no matter how minor a detail, to avoid possible sua sponte dismissal. That type of regular practice will add to the district court's burdens, not lighten them.

In short, the district court's conclusion that O'Kelley "unduly delayed" and the Concurrence's endorsement of that conclusion just don't seem to me to accurately describe what occurred. Because I don't think this record supports the conclusion that O'Kelley "unduly delayed" in seeking to amend his petition to remedy the deficiencies the district court sua sponte found after his petition had been pending for four years, I would conclude that the district court abused its discretion in denying his motion to amend on that basis.