

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-11180

GABRIEL BRIAN NOCK,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:24-cv-60144-DPG

Before ROSENBAUM, GRANT, and ABUDU, Circuit Judges.

PER CURIAM:

Gabriel Nock appeals the district court’s denial of his petition for a writ of habeas corpus. We granted a certificate of appealability (“COA”) limited to the following issue: whether the district court abused its discretion, under *Paez v. Secretary, Florida*

Department of Corrections, 947 F.3d 649 (11th Cir. 2020), in dismissing Nock’s 28 U.S.C. § 2254 petition as untimely without first permitting him to respond.

After careful review and with the benefit of oral argument, we conclude that the district court erred when it sua sponte dismissed Nock’s petition without first giving him notice and an opportunity to be heard. *See Day v. McDonough*, 547 U.S. 198, 210 (2006); *Paez*, 947 F.3d at 653. But because the record forecloses any possibility that Nock could establish timeliness, that error was harmless, and we affirm.

I. BACKGROUND

A. Conviction and Direct Appeal

After a man was found dead in his home, with his credit card missing, Broward County Sheriff’s officers discovered videos revealing Nock using the dead man’s credit card at stores in Broward County. Video evidence also showed the car Nock was driving, and Nock even gave his phone number to a cashier when he was using the victim’s credit card.

Law enforcement procured, among other things, an order allowing it to obtain real-time cellular site information, which allowed it to track Nock’s phone. Six days after the victim died, law enforcement learned that Nock’s phone had been turned on, and it was in South Beach. The Broward officers followed the signal and found Nock, by referring to a still frame from the videos they had reviewed. Then they found a Miami Beach police officer, who detained Nock. After the Broward officers confirmed that Nock was

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the person in the video still, the Florida district court of appeal determined, Nock volunteered to return to Broward County with the Broward officers.

There, the Broward officers read Nock his *Miranda* rights, interrogated Nock, and then arrested him for the murder of the man found six days earlier. Among other statements, Nock told the Broward detective that the victim, who had agreed to pay Nock for sex, had asked Nock to put the victim in a headlock until the victim tapped out, but the victim never tapped out. Nock got nervous, he said, and poured bleach around the victim's residence to cover his presence. Then he took whatever items he could and left in the victim's car.

The State of Florida charged Nock with first-degree murder and tampering with physical evidence, and Nock proceeded to trial. But as relevant here, before trial, Nock moved to suppress his post-arrest statements to the Broward County Sheriff's deputies as the fruit of an illegal arrest by Broward officers acting in Miami-Dade County, outside their jurisdiction. The trial court denied his motion. Then, the prosecution relied on Nock's statements as evidence at trial.

A Florida jury convicted Nock on both counts. And the Florida trial court sentenced Nock to life imprisonment with a concurrent term of 120 months.

Nock timely appealed his conviction and sentence. The Florida Fourth District Court of Appeal ("Fourth DCA") affirmed, and the Supreme Court of Florida approved the Fourth DCA's

decision. *See Nock*, 211 So. 3d at 322; *Nock v. State*, 256 So. 3d 828 (Fla. 2018). Nock’s conviction became final on January 30, 2019, ninety days after the Supreme Court of Florida’s decision.

B. Collateral Postconviction Proceedings

Nock filed his first pro se motion for postconviction relief in state court on July 22, 2019. After the state court denied the motion, Nock appealed. The Fourth DCA affirmed and later denied rehearing on May 17, 2022.

While the appeal from his first motion for postconviction relief was pending, on November 23, 2021, Nock filed a second motion for postconviction relief based on alleged newly discovered evidence.

A few months later, Nock obtained a Miami Beach Police Department report through a public-records request. The report allegedly confirmed that Miami Beach officers took Nock into custody before he made the statements the State used against him at trial, and it allegedly refuted the State’s contention that Nock voluntarily agreed to accompany Broward County Sheriff’s officers for questioning. Based on the report, Nock amended his second motion for postconviction relief to include a new claim. The state postconviction court denied this motion as “time-barred” and “successive” on February 23, 2023. Nock timely appealed, and the Fourth DCA summarily affirmed on November 9, 2023.

A couple of months later, on January 19, 2024, Nock filed a pro se federal petition for writ of habeas corpus under 28 U.S.C § 2254 (“Petition”) in the Southern District of Florida. To file his

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Petition, Nock used the stock form available on the Southern District of Florida's website.

The first page of the form gives petitioners a list of instructions. Among others, these instructions advise that the petition does “not need to cite law” and that if the petitioner does “not fill out the form properly, [the petitioner] will be asked to submit additional or correct information.” The form contains a thorough questionnaire asking about the procedural history and claims for relief in the criminal case. Finally, the form requests information on the “Timeliness of Petition.” It states, “If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition,” with the language of 28 U.S.C. § 2244(d) included in a footnote.

In filling out this form, Nock raised six grounds for relief. Ground Five rested in part on the newly discovered evidence we've described above. The supporting narrative explained that Nock received the Miami Beach police report for the first time on May 17, 2022, and later “filed an amended Successive or Second Motion for Postconviction Relief on the ground that the . . . report constituted newly discovered evidence.” In Nock's view, the report would have changed the outcome of his trial.

In the “Timeliness of Petition” section, Nock maintained that his Petition was timely. He asserted that under the statutory tolling provision in 28 U.S.C. § 2244(d)(2), the one-year period of

limitation was tolled while his direct appeals and both state post-conviction motions were pending.

C. The District Court’s Dismissal

The district court sua sponte dismissed with prejudice Nock’s Petition as untimely on January 30, 2024, eleven days after he filed it. In doing so, the court took judicial notice of the state-court docket. Based on that, the district court concluded that Nock was not entitled to statutory tolling because the state court rejected his second state postconviction motion as untimely and successive and thus as not “properly filed” for purposes of § 2244(d)(2). Separately, the district court concluded that Nock was not entitled to equitable tolling because he made “no allegations to support” such a claim, and he didn’t satisfy the actual-innocence exception to the statute of limitations.

The district court characterized 28 U.S.C. § 2244(d)(1)(A) (which calculates the statute-of-limitations period based solely on the date judgment became final) as the “only relevant provision” for determining whether Nock’s Petition was timely. It did so because it concluded that Nock had not alleged any claims that would fall under §§ 2244(d)(1)(B)–(D), which provide reasons why the statute of limitations does not expire one year after judgment becomes final. In reaching this conclusion, the court did not expressly address the factual allegations underlying Ground Five.

The order acknowledged the district court’s responsibility to provide notice and an opportunity to respond before sua sponte dismissing a habeas petition as untimely. But the court determined

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that the Petition itself satisfied these requirements. In support, the district court relied on *Paez*. There, we held that a habeas petitioner received sufficient notice and opportunity to be heard when the petitioner had the opportunity to respond to a magistrate judge's report and recommendation before the district court dismissed the petition as untimely. *Paez*, 947 F.3d at 651–53.

Nock timely moved under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment. He argued that his Petition was timely because newly discovered evidence reset the one-year limitations period.

The district court denied the motion. It held that Nock's second motion for postconviction relief did not toll the limitations period because that motion was itself untimely.

Nock sought a certificate of appealability in the Eleventh Circuit. A member of this Court granted Nock's application on one question: whether the district court abused its discretion, under *Paez*, in dismissing Nock's 28 U.S.C. § 2254 petition as untimely without first permitting Nock to respond.

After briefing was complete, we appointed counsel for Nock and ordered supplemental briefing.¹

¹ Tinsley Stokes Wright of Jones Day accepted the appointment. Wright and her colleagues Kelly Rodriguez and Jason Burnette very capably represented Nock, and we thank them for accepting the appointment.

II. STANDARD OF REVIEW

We review de novo a district court's decision to dismiss a petition for a writ of habeas corpus. *San Martin v. McNeil*, 633 F.3d 1257, 1265 (11th Cir. 2011). We review for abuse of discretion a district court's decision to consider sua sponte the timeliness of a § 2254 petition. *Paez*, 947 F.3d at 651. We review de novo the legal determination that the petition is untimely. *San Martin*, 633 F.3d at 1265.

III. ANALYSIS

We conclude that the district court erred when it sua sponte dismissed Nock's Petition with prejudice without first providing notice and an opportunity to respond. Still, on this record, we affirm.

To be sure, normally, a postdismissal motion for reconsideration could not cure the court's failure to provide the required notice and opportunity to be heard. That's so because the standard to successfully obtain reconsideration is harder to satisfy than the standard for surviving a motion to dismiss.

But Nock's motion for reconsideration irrefutably shows that he cannot satisfy AEDPA's statute of limitations under any standard. So remanding this case to the district court cannot affect the outcome here. And we don't "pointless[ly]" remand. See *United States v. Pon*, 963 F.3d 1207, 1238 (11th Cir. 2020).

A. The district court erred when it failed to give the petitioner notice and an opportunity to be heard before sua sponte dismissing his Petition.

Rule 4 of the Habeas Rules requires a district court to “promptly” examine a § 2254 petition and, “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.” Thus, district courts may summarily dismiss a habeas petition that is legally insufficient on its face. *See McFarland v. Scott*, 512 U.S. 849, 856 (1994).

That said, the Supreme Court has cautioned, “Of course, *before acting on its own initiative*, a court must accord the parties fair notice and an opportunity to present their positions.”² *Day v. McDonough*, 547 U.S. 198, 210 (2006) (emphasis added). *Day* explains one appropriate procedure for satisfying this requirement.

There, the state agreed in its answer that the habeas petition was “timely” because, it said, only 352 days of untolled time had passed before the petitioner filed it. *Id.* at 201–02. But the magistrate judge who reviewed the case determined that the state had made a computation error and, in fact, 388 days—23 beyond the

² This notice-and-opportunity-to-be-heard requirement is not express in Rule 4’s text but conforms with bedrock conceptions of due process. “The ‘essential requirements of due process’ are notice and . . . [an] opportunity to respond.” *Laskar v. Peterson*, 771 F.3d 1291, 1297 (11th Cir. 2014) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)); *see also Richards v. Jefferson County*, 517 U.S. 793, 797 n.4 (1996) (“The opportunity to be heard is an essential requisite of due process of law in judicial proceedings.”).

statutory period—had passed. *Id.* So the magistrate judge issued an order directing the petitioner to show cause why the court should not dismiss the petition as untimely. *Id.* Unsatisfied by the petitioner’s response, the magistrate judge recommended dismissal. *Id.* Then the district judge adopted the recommendation and dismissed the petition as untimely. *Id.*

The Supreme Court upheld the dismissal. *Id.* at 211. As the Court explained, “district courts are permitted, but not obliged, to consider *sua sponte* the timeliness of a state prisoner’s habeas petition.” *Id.* at 209. But “before acting on its own initiative,” the Court continued, “[o]f course, . . . the court must accord the parties fair notice and an opportunity to present their positions.” *Id.* Then, the Court considered the procedure the magistrate judge followed in the case and determined that Day received “due notice and a fair opportunity to show why the limitation period should not yield dismissal of the petition.” *Id.*

The Second Circuit has explained why notice and an opportunity to be heard are especially important when it comes to the possible untimeliness of a petition under AEDPA’s statute of limitations. To explain its thinking (and ours), we start by reviewing AEDPA’s statute of limitations.

AEDPA imposes a one-year statute of limitations that begins to run “from the latest of” the following four circumstances:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

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(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

And Section 2244(d)(2) tolls the statute-of-limitations period for any time “during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” *Id.* § 2244(d)(2). The Supreme Court has held, in turn, that “a state post-conviction petition rejected by the state court as being untimely under state law is not ‘properly filed’ within the meaning of AEDPA’s § 2244(d)(2).” *Sweet v. Sec’y, Dep’t of Corr.*, 467 F.3d 1311, 1316 (11th Cir. 2006) (citing *Pace v. DiGuglielmo*, 544 U.S. 408 (2005)).

So determining the expiration of the one-year statutory period under Subsections 2244(d)(1)(A) and (d)(2) combined requires a strict numerical computation based on docket entries, eliminating consideration of any periods when the petitioner had a

“properly filed application” challenging the “pertinent judgment or claim.”

But as the Second Circuit has explained, that’s not the case with each of the three alternative limitations periods that Section 2244(d)(1) lists. To determine when the statutory period expires under each of Subsections 2244(d)(1)(B) through (D), when they apply, we must consider “special circumstances” that are “usually outside of the record and often will not be fully addressed in the petition of an unlearned and unskilled *pro se* petitioner.” *Acosta v. Artuz*, 221 F.3d 117, 125 (2d Cir. 2000).³

For instance, to determine the statutory period under Subsection 2244(d)(1)(D), which is relevant here, we must know (1) when the petitioner discovered the factual predicate of the claim or claims he presents and (2) the earliest date by which he could have discovered that information through the exercise of due diligence. *See* 28 U.S.C. § 2244(d)(1)(D). Ordinarily, this information does not appear in the record.

So a petitioner must receive notice and an opportunity to be heard *before* a district court sua sponte dismisses a habeas petition for untimeliness. *See Day*, 547 U.S. at 210. Indeed, “providing the adversely affected party with notice and the opportunity to be heard plays an important role in establishing the fairness and

³ The Supreme Court cited with approval *Acosta* in *Day* for the proposition that “before acting on their own initiative, a court must accord parties fair notice and an opportunity to present their positions.” *See Day*, 547 U.S. at 211.

reliability of the order.” *Acosta*, 221 F.3d at 124 (citation and alteration omitted). And “[i]t avoids the risk that the court may overlook valid answers to its perception of defects in the plaintiff’s case.” *Id.* (citation omitted).

But here, the district court sua sponte dismissed Nock’s Petition as untimely without first giving him notice and an opportunity to explain why his petition might not be untimely. That was error, and it violated Nock’s due-process rights. When the district court determined that Nock’s Petition appeared to be untimely, it should have instead issued an order directing Nock to show cause why the Petition should not be dismissed as untimely. Then, Nock would have learned of the problem that the court saw and had a chance to explain why his Petition should not be dismissed for untimeliness.

Generally, the failure to provide notice and an opportunity to be heard before a sua sponte procedural dismissal requires vacatur of the dismissal order and remand to the district court to provide the petitioner with an opportunity to be heard. But here, the State argues that we should not follow that course because Nock received notice and “two meaningful opportunities” to be heard in the district court: (1) his initial Petition and (2) his Rule 59(e) motion for reconsideration. We address those arguments next.

B. The Petition form did not provide the required notice and opportunity to be heard.

The State contends that the stock form for filing a habeas petition gave Nock the necessary notice and opportunity to be

heard that due process requires. In support of its position, the State points to language in the form that requires a petitioner whose conviction became final more than a year before the filing of the petition to “explain why” Section 2244(d)’s one-year statute of limitations “does not bar [the] petition.” For three reasons, we disagree that this language gives sufficient notice and an opportunity to be heard.

First, what the stock form ostensibly gives with one hand, it takes with the other. Besides the language the State invokes, the stock form instructs prisoners that they “do not need to cite law” and that they “will be asked to submit additional or correct information” if deficiencies exist. These instructions do not reasonably alert a pro se petitioner that the form might represent his only opportunity to address timeliness.⁴ To the contrary, they suggest that the petitioner will have a later chance to address any problems or shortcomings.

Second, as we’ve noted, unlike Subsection 2244(d)(1)(A), Subsections 2244(d)(1)(B) through (D), by their nature, require us to consider “special circumstances” that are “usually outside of the record.” *Acosta v. Artuz*, 221 F.3d at 125. As the Sixth Circuit has

⁴ See *Race v. Salmonsens*, 131 F.4th 792, 796 (9th Cir. 2025) (“Due process is not a concept so flimsy that a petitioner’s own actions can sweep it away. We thus decline to adopt a novel rule that a district court’s obligation to provide notice before dismissing a habeas petition of its own accord is satisfied by the contents of a petitioner’s filing. While Rule 4 permits a court to raise timeliness issues sua sponte, it simply does not go so far as to do away with the requirement that a petitioner be provided notice and an opportunity to respond.”).

observed, “[a] notice requirement gives petitioners the opportunity to bring essential information not evident from the face of the motion to the court’s attention. . . .” *Shelton v. United States*, 800 F.3d 292, 295 (6th Cir. 2015). And often “an unlearned and unskilled *pro se* petitioner,” *Acosta*, 221 F.3d at 125, will not have the knowledge or ability to fully address these “special circumstances” and “essential information” in the first instance. Especially when we consider these problems alongside the stock form’s reassurance that a petitioner “will be asked to submit additional or correct information” if they fail to fill out the form properly, we can’t reasonably conclude that the stock form, in and of itself, provides adequate notice and an opportunity to be heard before dismissal for untimeliness.

And third, notice serves another function that the stock form cannot: it allows the state to determine whether it wishes to waive its statute-of-limitations affirmative defense. *See Ethridge v. Bell*, 49 F.4th 674, 687 (2d Cir. 2022). But the federal judiciary, not the state, created the stock form. And only the petitioner, not the state, completes the stock form. So sua sponte dismissal based solely on the petition, without notice, makes it harder for the state to waive its statute-of-limitations affirmative defense if it wishes to do so.

Our colleague disagrees. She asserts that the stock form, in and of itself, provides sufficient notice.

In support, she relies on *Paez*, 947 F.3d 649. In *Paez*, a magistrate judge determined that a petition was untimely under Subsection 2244(d)(1)(A), after consulting the petition and state-court dockets. *Id.* at 651. Based on that calculation, the magistrate judge

issued a report and recommendation recommending that the district court *sua sponte* dismiss the petition. *Id.* Although the petitioner objected, the district court adopted the recommendation over his objections and dismissed the petition as untimely. *Id.* At no point in his objections or otherwise did the petitioner challenge the dates the magistrate judge relied on or suggest that the alternative statutory-period triggers in Subsections (d)(1)(B) through (D) might apply. *See id.* at 653, 655. We held that the report and recommendation gave the petitioner sufficient notice, and the opportunity to object provided him with a chance to be heard. *See id.* at 653.

Our colleague cites *Paez* for its statement at one point that the petitioner there was “provided ample notice and opportunity to explain why his petition was timely in his form petition and again when he was given the opportunity to respond to the magistrate judge’s Report and Recommendation that his petition be summarily dismissed as untimely.” 947 F.3d at 655. She asserts that this shows that notice from the stock form alone sufficed.

We respectfully disagree. In the context of the opinion, it’s clear that we relied on the magistrate judge’s report and recommendation as our basis for finding that the *Paez* petitioner received sufficient notice. To be sure, we said that the district court “did not err by *sua sponte* dismissing Mr. Paez’s § 2254 petition *after giving him notice of its decision* and an opportunity to be heard *in opposition*.” *Id.* But a petitioner cannot respond “in opposition” to a decision it has no notice of. Yes, in summing up why Paez received

adequate notice, we mentioned the stock form, in addition to the report and recommendation. *Id.* at 654. In context, though, it's clear that we did not hold that the stock form, by itself, offered sufficient notice.

To the contrary, we summarized the sole authority we relied on to support the statement our colleague invokes as “holding that plaintiff ‘was afforded both notice and a reasonable opportunity to oppose’ procedural default when he was given an opportunity to object to magistrate judge’s Report and Recommendation that ‘placed [him] on notice that procedural default was a potentially dispositive issue.’” *Id.* That case simply provides no authority for our colleague’s position that the stock form, in and of itself, provided sufficient notice. So it’s clear that we mentioned the stock form as an icing on the cake—not as something capable of existing as the cake itself.⁵

In sum, the stock form does not offer sufficient notice before a district court’s sua sponte dismissal of a habeas petition.

C. Generally, a motion for reconsideration after a sua sponte dismissal does not provide an adequate opportunity to be heard.

Next, the State argues that the district court’s sua sponte dismissal order, combined with the Rule 59(e) motion for

⁵ Our concurring colleague misunderstands our discussion of the citation on which *Paez* relies. See Concurrence at 2 n.1. We discuss the cited authority only to show the meaning of the sentence in *Paez* that cites it.

reconsideration, gave Nock adequate notice and an opportunity to be heard. In support of its position, the State invokes *Paez*, 947 F.3d 649.

We agree with the State that, like the report and recommendation in *Paez*, the district court’s sua sponte dismissal here provided sufficient notice of the untimeliness problem that the court perceived. But that’s where our agreement ends.

A motion for reconsideration is not comparable to objections to a magistrate judge’s report and recommendation. When a party objects to a magistrate judge’s report and recommendation on a dispositive motion (like a sua sponte dismissal for untimeliness), the district court must review de novo “those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1). So on a recommendation for dismissal for untimeliness, the district court engages in the same consideration of a petitioner’s objections as it would if the district court ordered the petitioner in the first instance to show cause why their petition should not be dismissed for untimeliness.

The same standard does not apply when a district court considers a motion for reconsideration. We’ve explained that a litigant may not use a motion for reconsideration to make “arguments that were previously available, but not pressed.” *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (citation and internal quotation marks omitted). This is a narrow standard—and it is far more restrictive than the standard on a motion to dismiss. Under this standard, a petitioner could not argue that their petition was

timely if that argument were available to the petitioner when they filed their petition.

But we’ve said that generally, “[a] complaint need not anticipate and negate affirmative defenses and should not ordinarily be dismissed based on an affirmative defense unless the defense is apparent on the face of the complaint.” *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1304 (11th Cir. 2020). And the statute of limitations is an affirmative defense. *Boyd v. Warden, Holman Corr. Fac.*, 856 F.3d 853, 872 (11th Cir. 2017).

Plus, as we’ve explained, often “an unlearned and unskilled *pro se* petitioner,” *Acosta*, 221 F.3d at 125, will not have the knowledge or ability to fully address in their initial petition the “special circumstances” and “essential information” that the alternative limitations-period triggers in Subsections 2244(d)(1)(B) through (D) require. So not only is the standard on a motion for reconsideration harder for a petitioner to satisfy than the standard on a motion to dismiss, but it also requires a petitioner to have alleged in their petition facts that our precedent does not require a petitioner to include.

For these reasons, we agree with our sister circuits that “a motion for reconsideration is not an adequate substitute opportunity for a habeas petitioner to respond when a district court *sua sponte* dismisses the petition. . . .” *Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001); *see also Ethridge*, 49 F.4th at 688–89; *Hill v. Braxton*, 277 F.3d 701, 707–08 (4th Cir. 2002).

Our colleague relies on *Turner v. Secretary, Dep’t of Corrections*, 991 F.3d 1208 (11th Cir. 2021), to suggest that we have already held that “a post-dismissal opportunity to reopen offer[s] sufficient notice and opportunity to respond.” We respectfully disagree.

In *Turner*, the petitioner failed to file his petition on the standard form. *Id.* at 1210. As a result, the district court ordered him to file an amendment using the proper paperwork. *Id.* First, though, the court observed that Turner’s petition failed “to disclose relevant dates showing when his direct appeal concluded, when he commenced a state post-conviction proceeding, and when that proceeding concluded.” *Id.* The court continued, noting that Turner’s failure made the timeliness of his petition “not ascertainable.” *Id.*

So when Turner filed the required supplement, he candidly conceded that “[i]t is clear that Movant is far beyond the one-year time limit.” *Id.* The district court then dismissed the case without requiring a response from the state. *Id.* In its order, the court noted that “Turner admits that his petition ‘is far beyond the one-year time limit.’” *Id.* Then the court went one better, confirming the relevant dates of Turner’s conviction and filings, based on the online dockets of the state court. *See id.* The court said Turner could move to reopen the action if he thought the determination of untimeliness was incorrect. *Id.* Instead, Turner sought a certificate of appealability. *Id.*

Our colleague tries to equate the district court’s personalized directions to Turner, after he had already filed one deficient

petition, with the general instructions on the stock form. But they aren't the same. For starters, the stock form is publicly available to everyone—including Turner before he filed his petition the first time. If our colleague were correct that the stock form alone provided sufficient notice, it would make no difference that Turner originally filed his petition without using the form; the form still would have provided sufficient notice. But that's not what the district court or we held. Rather, the district court not only directed Turner to file his petition on the stock form, but then, it also specifically advised him to address the timeliness of his petition—this despite the stock form's instructions. That situation is meaningfully different from relying on the stock form's instructions, by themselves, for notice. So *Turner* is not instructive in this respect.

Our colleague also relies on *Turner* for another reason. She notes that Turner argued on appeal that he did not receive “the benefit of objecting to a magistrate judge’s report,” like he thought *Paez* required. *See id.* at 1212. We explained that *Paez* created no such requirement. *Id.* Rather, we said, *Paez* “reinforce[d] . . . ‘an opportunity to be heard as to the propriety of taking judicial notice.’” *Id.* (quoting *Paez*, 947 F.3d at 652 (quotation omitted)). And we suggested that Turner could have moved to reopen if he took issue with the district court’s judicial-notice determinations. But the propriety of taking judicial notice is not the same thing as dismissing a petition for failure to state a claim.

Rule 201, Fed. R. Evid., sets forth not only the standards for taking judicial notice, but also specifies that a court may take

judicial notice “before notifying a party.” Fed. R. Evid. 201(f). If that happens, “the party, on request, is still entitled to be heard.” *Id.* The rule does not specify the form that opportunity to be heard must take. *See id.* But a court’s sua sponte taking of judicial notice, by definition, raises an issue that was not “previously available.” *Wilchombe*, 555 F.3d at 957 (citation and internal quotation marks omitted). So restrictions on the use of a motion for reconsideration wouldn’t affect the scope of review if a litigant objected in a motion for reconsideration to the taking of judicial notice.

Of course, as we’ve already explained, that’s just not the case when it comes to using a motion for reconsideration as a vehicle for addressing a district court’s sua sponte dismissal of a petition for untimeliness.

Our colleague argues that the lack of restrictions on the use of a motion for reconsideration in the context of contesting a court’s sua sponte taking of judicial notice is irrelevant “because petitioners are required to address timeliness in their petitions [so] that argument will always be preserved for a Rule 59 motion where the petitioner can show that the court got it wrong.” Concurrence at 6 n.4. This is a non-answer because it assumes the petitioner received adequate notice from the stock form alone. As we have explained, though, that is a flawed premise.

D. Despite the error, we affirm because the untimeliness of Nock’s claim is now “clear” from the record.

Although Nock’s motion for reconsideration did not cure the district court’s failure to provide pre-dismissal notice and an

opportunity to be heard, it placed Nock's timeliness theory and supporting factual assertions before the court. And we have explained that when a district court does provide notice and an opportunity to be heard, "a district court may *sua sponte* dismiss a § 2254 petition if the petition's untimeliness is clear from the face of the petition itself." *Paez*, 947 F.3d at 654 (citation and internal quotation marks omitted). Based on a de novo review of Nock's motion for reconsideration, we must conclude that the Petition's untimeliness is now "clear" from the record. We explain why below.

AEDPA's statute of limitations applies on a claim-by-claim basis when different statutory triggers apply. *Zack v. Tucker*, 704 F.3d 917, 926 (11th Cir. 2013) (en banc). Here, Ground Five is the only claim for which Nock invokes the newly-discovered-evidence trigger in Subsection 2244(d)(1)(D). Subsection 2244(d)(1)(A) governs his remaining grounds.

Nock does not challenge the district court's calculation that his remaining grounds are untimely under Subsection 2244(d)(1)(A), and the dates in the record confirm that conclusion. The district court originally *sua sponte* dismissed Nock's Petition after calculating the statutory period based solely on the trigger that Subsection 2244(d)(1)(A) lists. That is, after accounting for any time "during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim [wa]s pending," 28 U.S.C. § 2244(d)(2), the district court determined that more than a year's worth of time had

passed since “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review,” *id.* § 2244(d)(1)(A). Although Ground Five rested on newly discovered evidence, the district court did not consider whether Subsection 2244(d)(1)(B) through (D)’s triggers might apply.

So in his motion for reconsideration, Nock asserted that Subsection 2244(d)(1)(D), not (A), provided the correct limitations-period trigger. In support, Nock argued that the Miami Beach Police Department report he received on June 17, 2022, revealed facts that, in Nock’s view, established a Fourth Amendment violation.⁶ And, he contended, he exercised due diligence in obtaining that report.

We assume for purposes of our analysis that, in fact, the report proves a Fourth Amendment violation and that Nock could not have obtained it before June 17, 2022, with due diligence.⁷ That means AEDPA’s one-year statutory period began to run on June 17, 2022, under Subsection 2244(d)(1)(D)’s trigger. But Nock did not file his Section 2254 Petition until January 19, 2024—more than nineteen months after the statutory period began to run.

⁶ We do not opine on the merits of Ground Five, as (1) the case is not before us on that issue, and in any case, (2) as we explain, Nock’s Petition is patently untimely.

⁷ Nock’s Petition states that he received the report on May 17, 2022, but his Rule 59(e) motion identifies June 17, 2022. We use the later date, which is more favorable to Nock. The discrepancy does not affect the result.

Nock’s motion for reconsideration recognized this problem and attempted to address it. To do so, Nock invoked Subsection 2244(d)(2), which, as we’ve noted, tolls the statute-of-limitations period for any time “during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” Nock argued that his second postconviction motion, which he filed on November 23, 2021, and which the Fourth District Court of Appeal affirmed denial of on November 9, 2023, tolled the statutory period under Subsection 2244(d)(2).

We disagree. Subsection (d)(2) tolls the statutory period for only the time that a “properly filed” collateral-review motion is pending. *Id.* § 2244(d)(2). And in *Sweet v. Secretary, Department of Corrections*, we held that “if the . . . petition . . . filed in state court was not timely under state law, then it would not be ‘properly filed’ under AEDPA.” 467 F.3d at 1316. We explained that the Supreme Court has reasoned that “when a postconviction petition is untimely under state law, that is the end of the matter for purposes of § 2244(d)(2), because time limits, no matter their form, are filing conditions.” *Id.* (quoting *Pace*, 544 U.S. at 417) (internal quotation marks and *Sweet*’s emphasis omitted).

Here, the Florida courts denied Nock’s second postconviction motion. Among other independent reasons, they did so because they ruled the motion was both untimely and successive.

Nock argues that, despite these rulings, his second postconviction motion was “properly filed” under Florida law because the

state court “did not summarily deny the motion as untimely or successive, but instead ordered the state to respond.” But our precedent rejects this position. “[W]hen a state court unambiguously rules that a post-conviction petition is untimely under state law, we must respect that ruling and conclude that the petition was not ‘properly filed’ for the purposes of § 2244(d)(2), regardless of whether the state court also reached the merits of one of the claims.” *Id.* at 1318. That is the end of the matter. We are bound by *Sweet* under our prior-precedent rule.⁸

Without statutory tolling, Ground Five was patently untimely. *See Paez*, 947 F.3d at 655. And Nock has asserted no other basis for establishing timeliness—either in his motion for reconsideration or before us. Nor does anything else in the record suggest another basis for showing timeliness. Plus, because the State has defended the district court’s dismissal of Nock’s Petition as untimely, we know the State has not waived that affirmative defense.

Given these circumstances, we decline to reverse and remand. Nock received notice of the timeliness problem in the form of the district court’s sua sponte dismissal order, and he fully explained his view of why his Petition was timely. His view is simply wrong as a matter of law. Remanding under these circumstances would be a Pyrrhic victory for Nock. No additional legal argument

⁸ The district court conducted this same analysis in its order denying the motion for reconsideration. It’s just that the district court did so after saying it was applying the narrow standard for reconsideration, so we do the analysis anew looking at the record and law de novo.

could alter the statutory calculation based on the dates and state-court rulings Nock himself identified. So a remand would create more work for the district court, without any chance of a different outcome for Nock. And we don't "pointless[ly]" remand. *See Pon*, 963 F.3d at 1238. (explaining that harmless-error review conserves judicial resources by avoiding "pointless retrials").

Still, we take this opportunity to remind district courts that they must provide habeas petitioners with notice and an opportunity to be heard *before* they dismiss a habeas petition for untimeliness. We know that district courts are extremely busy and appreciate that they seek to efficiently resolve the matters before them. But to avoid due-process violations, district courts can quickly dispense with petitions that may be untimely or otherwise unmeritorious once they have provided a petitioner with notice and an opportunity to be heard. District courts may do so as they see fit, of course. One effective method is a show-cause order. It can be a useful tool to put the petitioner on notice as to why his petition is at risk of dismissal, to provide an opportunity for the petitioner to be heard on that concern, and to quickly resolve untimely or otherwise-unmeritorious petitions.

IV. CONCLUSION

For the reasons we've explained, we affirm the district court's dismissal of Nock's Petition.

AFFIRMED.

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GRANT, Circuit Judge, Concurring in the Judgment:

I respectfully disagree with the majority’s conclusion that Nock did not receive the notice and opportunity to respond that due process requires. But because I agree that the record demonstrates that Nock’s petition was untimely, I concur in the judgment affirming the district court’s dismissal.

District courts can dismiss a § 2254 petition sua sponte “if the petition’s untimeliness is clear from the face of the petition itself.” *Paez v. Sec’y, Fla. Dep’t of Corr.*, 947 F.3d 649, 654 (11th Cir. 2020) (quotation omitted). In *Paez*, we affirmed the district court’s decision to do just that, noting that the petitioner was “provided ample notice and opportunity to explain why his petition was timely in his form petition *and again* when he was given the opportunity to respond to the magistrate judge’s Report and Recommendation.” *Id.* at 655 (emphasis added). We recognized, in other words, that a properly drafted form petition alone can offer a habeas petitioner constitutionally sufficient notice and opportunity to respond.

The majority counters that “in context” it is “clear” that *Paez* did not actually mean what it said. Majority Op. at 16. But the only “context” to which the majority refers is *Paez*’s statement that an opportunity to respond to a magistrate judge’s report and recommendation satisfies due process. *Id.* Still, as the majority acknowledges, *Paez* also stated that the petitioner was “provided ample notice and opportunity to explain why his petition was timely in his

form petition.” *Id.* (emphasis added) (quoting *Paez*, 947 F.3d at 655). The majority’s suggested “context” cannot erase that holding.¹

It was not long before we identified yet another route to constitutionally sufficient notice and opportunity to respond. See *Turner v. Sec’y, Dep’t of Corr.*, 991 F.3d 1208, 1212 (11th Cir. 2021). In *Turner*, we started by agreeing that *Paez* had reinforced the importance of “an opportunity to be heard as to the propriety of taking judicial notice.” *Id.* (quoting *Paez*, 947 F.3d at 652). But we also concluded that *Turner* received exactly that: an opportunity to reopen his case if he could show that the district court’s untimeliness determination was incorrect. *Id.* To be sure, *Turner*’s main argument was that *Paez* had introduced new requirements, most prominently the opportunity to respond to a magistrate judge’s report and recommendation. See *id.* Our rejection of that specific suggestion is not relevant here—but our conclusion that a post-dismissal opportunity to reopen offered sufficient notice and opportunity to respond is.

Turner puts the majority in an awkward position: if neither the stock form nor an opportunity to reopen are constitutionally

¹ The majority also argues that we should ignore *Paez*’s holding because “the sole authority [*Paez*] relied on to support the statement” does not go as far. *Id.* at 17. But even if that were true, we would still be bound by *Paez*’s holding under our prior panel precedent rule. After all, our precedents are binding no matter how weak the majority may find their supporting citations. See *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) (rejecting “any exception to the prior panel precedent rule based upon a perceived defect in the prior panel’s reasoning or analysis”).

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adequate, then nothing explains how Turner received due process. The majority suggests that the district court’s “directions” to “disclose relevant dates” made the difference. Majority Op. at 20 (quotation omitted). But Nock, too, received those “directions” from the court—it’s just that they were on the stock form, which Turner did not use for his initial petition. See Habeas Petition at 1–2, 25, *Nock v. Fla. Dep’t of Corr.*, No. 24-cv-60144 (S.D. Fla. Jan. 30, 2024), Dkt. No. 1; *Turner*, 991 F.3d at 1210.² The majority thinks that Turner received due process when he was “specifically advised” to “address the timeliness of his petition.” Majority Op. at 21. I agree.

² The majority claims that the district court’s “personalized directions” are different than the stock form’s “general instructions.” Majority Op. at 20–21. But that is a surprising claim considering that these “personalized directions” appear nearly verbatim in the stock form. Compare *Turner*, 991 F.3d at 1210 (directing Turner to disclose “when his direct appeal concluded, when he commenced a state post-conviction proceeding, and when that proceeding concluded”), with Habeas Petition at 1–2, *Nock*, No. 24-cv-60144 (directing Nock to disclose the “[d]ate of result” for his “direct appeals” and the “[d]ate of filing” and “[d]ate of result” for his state post-conviction proceeding). And in fact, the multiple pages of instruction on the stock form are actually *more* thorough than the district court’s one-paragraph direction to Turner. Compare Habeas Petition, *Nock*, No. 24-cv-60144, with Order, *Turner v. Sec’y, Dep’t of Corr.*, No. 17-cv-00648 (M.D. Fla. June 8, 2018), Dkt. No. 8. Petitioners would choose the stock form’s detailed instructions over the district court’s cursory directions any day, but under the majority’s logic, that choice would deprive them of due process.

And that is precisely why that same court-provided direction in the stock form is constitutionally adequate.

In my view, under *Turner* and *Paez*, Nock had notice and an opportunity to respond—twice over. *First* is the stock form, which lays out the timeliness requirements that demanded dismissal of his petition. *See* Habeas Petition at 25, *Nock*, No. 24-cv-60144. Nock filled out everything properly and correctly; it’s just that the information he submitted showed that his claim was indisputably untimely. Put differently, the form gave him all the information he needed, and he responded properly to those requirements. According to *Paez*, that is enough.

The majority objects that this form could have misled Nock because it tells petitioners that “they ‘will be asked to submit additional or correct information’ if deficiencies exist.” Majority Op. at 14 (quoting the stock form). I certainly agree that a serious notice deficiency could occur if a stock form were misleading, or told a petitioner that he would have an opportunity to try again if the court found his initial petition did not entitle him to relief. But here that is not the case. The full text of the provision shows that the form does not mislead: “If you do not fill out the form properly, you will be asked to submit additional or correct information.” Appendix to Appellant’s Brief at 26. The instruction thus informs petitioners that if information is missing, incorrect, or improperly notated, they will be asked to offer the appropriate information. That

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is different than the promise of another chance if the substance of that information plainly fails to meet the legal standard.³

Second, Nock’s chance to move to reopen the case after his petition was dismissed was also sufficient to show notice and opportunity to respond. *Turner*, 991 F.3d at 1212. The majority disagrees, noting that parties cannot use Rule 59 motions to make “arguments that were previously available, but not pressed.” Majority Op. at 18 (quotation omitted). What follows, according to the majority, is that a petitioner in this context cannot raise a timeliness argument in a Rule 59 motion because under our precedent a petitioner need not address timeliness in the initial petition. *Id.* at 18–19.

That reasoning is flawed. After all, “[h]abeas corpus petitions must meet heightened pleading requirements,” and those requirements, including for timeliness, are specifically outlined in the stock form. *McFarland v. Scott*, 512 U.S. 849, 856 (1994); see Rules Governing Section 2254 Cases, Rule 2(c)–(d), 4; Habeas Petition at 25, *Nock*, No. 24-cv-60144. Indeed, that is why “even though the statute of limitations is an affirmative defense, the district court may review *sua sponte* the timeliness of the section 2254 petition.” *Jackson v. Sec’y for Dep’t of Corr.*, 292 F.3d 1347, 1349 (11th Cir. 2002). Because petitioners must address timeliness in their initial

³ The majority points out that the mere presence of a form on the internet cannot create notice to the world. See Majority Op. at 21. I agree. But slaying that straw man does not show that Nock did not have the benefit of the notice provided in the stock form. After all, he used it.

petitions, they necessarily preserve the issue of timeliness for a Rule 59 motion. *Contra* Majority Op. at 18–19, 21–22. So if courts dismiss timely petitions as untimely, petitioners may use Rule 59 motions to correct those “manifest errors of law or fact.” *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (quotation omitted).⁴

Nock’s petition proves the point. He entered the relevant facts on the form. Those facts were clear, and they were not in his favor—which means he is unable, even now, to show an error in the district court’s decision. Briefly stated, the Florida state court rejected Nock’s second postconviction motion as untimely. And “when a state court determines that a petition is untimely . . . the timeliness decision standing alone compels a federal court to conclude that the state motion was not ‘properly filed.’” *Sweet v. Sec’y, Dep’t of Corr.*, 467 F.3d 1311, 1318 (11th Cir. 2006) (quoting 28 U.S.C. § 2244(d)(2)). Because that second postconviction motion was untimely, it was not “properly filed,” which means it could not

⁴ The majority attempts to dispute this by discussing the reasons that an objection to judicial notice could always be raised under Rule 59. Majority Op. at 21–22. But that has nothing to do with my point that because petitioners are required to address timeliness in their petitions that argument will always be preserved for a Rule 59 motion where the petitioner can show that the court got it wrong. The majority claims that this is a “non-answer because it assumes the petitioner received adequate notice from the stock form alone.” *Id.* at 22. But even if the majority were right that the stock form alone does not provide adequate notice as a matter of due process, it surely would be enough to preserve the issue of timeliness for a Rule 59 motion. And here, Nock used the stock form, which allowed him to address timeliness in his Rule 59 motion.

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toll the limitations period under § 2244(d)(2). As the majority agrees, that means Nock’s federal petition was also untimely. Majority Op. at 26.

In short, both the stock form and the opportunity to move to reopen satisfied the constitutional standard for notice and opportunity to respond on timeliness. For these reasons, I disagree with the majority’s conclusion that the Constitution requires more. That said, I do not disagree that a show-cause order could be a useful tool in similar situations, especially where the facts are not as clear as they are here. *See id.* at 27.