No. _____

In the
Supreme Court of the United States

CHARLES DANIELS, DIRECTOR, *et al.*,
Petitioners,

v.

RONALD ROSS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Fed. R. Civ. P. 10(c) permits a habeas petitioner to rely on a state court order appended to, but never mentioned in, his original federal habeas petition to supply the core operative facts necessary to satisfy the relation-back standard set forth in *Mayle v. Felix*, 544 U.S. 644 (2005).

PARTIES TO THE PROCEEDING

Petitioner Charles Daniels, Director of the Nevada Department of Corrections, is substituted for Warden Brian Williams from the proceedings below. Petitioner Aaron D. Ford, Attorney General of the State of Nevada, is a party to the proceeding not listed in the caption. He joins this petition in full. Respondent Ronald Ross is an inmate in the custody of the Nevada Department of Corrections, though he is currently housed in the privately run Saguaro Correctional Center in Eloy, Arizona.

RELATED PROCEEDINGS

State of Nevada v. Ronald Ross., No. 07-F-09465-x
Justice Court, Las Vegas Township, Clark County, Nevada – bound over to the district court – August 11, 2007

State of Nevada v. Ronald Ross., No. C236169
Eighth Judicial District Court of the State of Nevada in and for the County of Clark – Judgment of Conviction – April 16, 2009

Ronald Ross v. State of Nevada, No. 52921
Nevada Supreme Court – Order of Affirmance – November 8, 2010

Ronald Ross v. D.W. Neven, et al., C236169
Eighth Judicial District Court of the State of Nevada in and for the County of Clark – Notice of Entry of Findings of Fact, Conclusions of Law, and Order – June 17, 2013

Ronald Ross v State of Nevada, No. 63624
Nevada Supreme Court – Order of Affirmance – July 22, 2014

Ronald Ross v. Warden Williams, *et al.*, No. 2:14-cv-015267-JCM-PAL – Judgment dismissing petition as untimely – August 29, 2016

Ronald Ross v. Warden Williams, et al.
United Sates Court of Appeals for the Ninth Circuit – Opinion Reversing and Remanding – February 24, 2020

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PETITION FOR WRIT OF CERTIORARI

Just last month, this Court again recognized that the Federal Rules of Civil Procedure (hereinafter "the Civil Rules")[1] apply in federal habeas corpus proceedings, so long as those rules do not conflict with the statutes and rules that are specific to conducting federal habeas cases. *Banister v. Davis*, 140 S. Ct. 1968 (2020). As the dissent in this case methodically lays out, the *en banc* majority's analysis fails to adhere to that principle. Instead, in trying to save Ross's petition from dismissal under the statute of limitations, the court below forced habeas procedure to fit into general standards for applying the Civil Rules.

The *en banc* majority applied the analysis required by this Court's relevant precedents backwards by not properly considering how habeas procedure and practice must inform the application of the Civil Rules in habeas proceedings. And in the process, they jammed the proverbial square peg into a round hole. This Court should not allow this *en banc* published opinion to stand because, contrary to holdings of this Court, it creates numerous conflicts with various provisions of the Rules Governing Section 2254 Cases in the United States District Courts (hereinafter "the Habeas Rules")[2], with the legislative intent of the

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[1] For the sake of expedience and clarity, throughout this petition particular rules of the Federal Rules of Civil Procedure will be referred to as "Civil Rule __." For example Fed. R. Civ. P. 10(c) will be referred to as Civil Rule 10(c).

[2] Similar to references to the Civil Rules, any particular Habeas Rules will be referred to as "Habeas Rule __." For example, Rule

Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), and general principles of habeas review. *See* Sup. Ct. R. 10(c).

This Court should grant the petition.

OPINIONS BELOW

The original opinions in this matter, which have since been withdrawn, were reported at *Ross v. Williams*, 896 F.3d 958 (9th Cir. 2018). *See also* App. 52-94. The order withdrawing the original opinions and granting *en banc* rehearing is reported at *Ross v. Williams*, 920 F.3d 1222 (9th Cir. 2019). The opinions from rehearing *en banc* are reported at *Ross v. Williams*, 950 F.3d 1160 (9th Cir. 2020). *See also* App. 1-51. The district court's order and judgment are unreported. *See* App. 95-109.

JURISDICTION

After the Ninth Circuit granted Ross's petition for rehearing *en banc*, it issued its opinion and judgment on February 24, 2020. App. 1. This Petition is timely filed under Supreme Court Rule 13 and this Court's order dated March 19, 2020, which extended the deadline for filing any petition for writ of certiorari due after the date of the order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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2 of the Rules Governing Section 2254 Cases in the United States District Courts will be referred to throughout this petition as Habeas Rule 2.

STATUTORY PROVISIONS

Section 2244 of Title 28 provides, in part, that:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> > (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;
> > . . .
>
> (2) The 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 shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

A Nevada jury found Ross guilty of "two counts of burglary and one count each of larceny from the person, possession of credit card without the cardholder's consent, fraudulent use of a credit card, theft, and conspiracy to commit larceny." App. 97. Based on his prior criminal history, the state district court sentenced Ross under Nevada's habitual offender statute and imposed a sentence of life with the possibility of parole beginning after service of twenty years. App. 7. Ross appealed, and the Nevada Supreme Court affirmed. App. 7.

Ross filed a state post-conviction petition, which identified five claims for relief. Ross attached to the petition a twenty-two page, handwritten memorandum that provided particularized factual background on each of Ross's claims for relief, which Ross repeatedly referenced in his state petition. App. 30, 56.

The state district court appointed counsel to assist Ross, who filed a supplemental petition presenting six specific claims for relief and a claim of cumulative error regarding all the allegations of ineffective assistance of counsel. App. 56. The state district court denied the petition. App. 56.

Ross appealed. App. 56. In an order that rejected eight specific theories of ineffective assistance of counsel, as well as Ross's cumulative error theory, the Nevada Supreme Court affirmed the denial of post-conviction relief. App. 56.

Ross then filed a timely federal habeas petition, using the form provided in the District of Nevada for filing a *pro se* petition. App. 30. The form petition directed Ross to attach all written state court decisions to the petition and included detailed instructions on how to allege a particular claim for relief. App. 30.

Using the template for alleging specific claims for relief, Ross alleged "violations of his Fifth Amendment right to due process, his Sixth Amendment right to effective counsel, and his Fourteenth Amendment rights to due process and equal protection." App. 31. And in the space where the template invited Ross to assert a summary of the facts supporting his claim for relief, Ross repeated substantially the same thing by

presenting eight conclusory statements as to why trial counsel was ineffective without alleging any supporting facts. App. 31-32.

In addition to filing the form petition, Ross filed a handwritten affidavit, explaining the timing for filing of his federal petition. In the affidavit, he relied upon on the Nevada Supreme Court's order of affirmance and the remittitur from the state habeas appeal to show that he was not on the distribution list for either document. App. 32. And he further averred that he did not obtain a copy of the order of affirmance until about a month and half after the Nevada Supreme Court issued the order of affirmance. App. 59.

After reviewing Ross's petition, the district court appointed counsel. App. 59. Although it was untimely, Ross filed an amended petition that alleged eleven grounds for relief. App. 59-60.

The State moved to dismiss Ross's amended petition, including asserting that the amended petition is untimely. App. 60. Ross responded that he could overcome the statute of limitations, citing *Dye v. Hofbauer*, 546 U.S. 1 (2005), to argue that he incorporated the facts from the attached order of affirmance into his original petition. App. 100.

The federal district court granted the motion to dismiss. In particular, the court determined that Ross's original petition did not include any facts at all and rejected Ross's argument based on *Dye* because Ross did nothing that would have "alerted the court to a desire that petitioner was trying to make the Nevada Supreme Court's rulings part of his claims." App. 101.

But the district court granted a certificate of appealability on the issue, and Ross appealed. App. 102.

Initially, in a split-decision, a panel of the Ninth Circuit affirmed the judgment of the district court. The dissent insisted that the requirement for a liberal reading of *pro se* pleadings should require the court to treat "Ross's original petition as setting out the facts discussed in the attached state-court decision." App. 83. But the majority concluded that the original petition was devoid of factual allegations supporting Ross's claims for relief and that he failed to actually incorporate the state-court decision into his petition, which he could have achieved by making clear references to the document he intended to incorporate, as this Court allowed in *Dye*. App at 81-82.

The majority began its analysis by surveying this Court's decision in *Mayle* before moving to a deeper analysis of the Habeas Rules and their interaction with Civil Rule 10(c). App. 60-68. Then the majority methodically disposed of each of Ross's and the dissent's arguments as to why Ross's amended petition relates back to the original petition. App. 68-81. As a result, the divided panel affirmed the judgment of the district court. App. 81-82.

However, the Ninth Circuit called for *en banc* review of the panel ruling, and in an 8-3 decision, the *en banc* panel reversed. App. 28. The *en banc* majority began its analysis by focusing on general application of Civil Rules 10(c) and 15(c), and the majority reasoned that as long as Ross identified a claim in his petition, Civil Rule 10(c) would allow Ross to rely on related

facts from the Nevada Supreme Court's order of affirmance to provide the factual bases for relation back. App. 11- 17. Although the court rejected arguments from the State and the dissenting judges that the court's new rule conflicts with the Habeas Rules and the statute of limitations, App. 18-27, the court expressly declined to identify a clear standard for determining when a claim is adequately raised within the petition to trigger its new rule, App. 17 n.6. Additionally, it refused to provide any guidance in defining what a written instrument is under Civil Rule 10(c). App. 18-19.

Judge Ikuta, joined by two other judges, dissented while asserting that adopting Ross's selective reading of Civil Rule 10(c) conflicts with the Habeas Rules, the AEDPA statute of limitations, and guidance this Court gave in applying Civil Rule 10(c) to habeas cases in *Dye*. App. 29. The dissent noted that the majority's new rule: (1) creates unnecessary tension between Civil Rule 10(c) and various requirements of Habeas Rule 2; (2) undermines the statute of limitations by allowing savvy habeas petitions to assert broad claims for relief while attaching documents to later use "as a wellspring of facts to support new claims for relief in a subsequent petition"; and (3) fails to follow this Court's narrowed application of Civil Rule 10(c) in *Dye* to maintain consistency with Habeas Rule 2(c). App. 39-49.

REASONS FOR GRANTING THE PETITION

In *Mayle v. Felix*, 545 U.S. 644 (2005), this Court set out the standard for when an untimely federal habeas petition relates back to a prior timely filed petition. The central governing principle of *Mayle*, and the numerous other cases where this Court has applied the Civil Rules to habeas corpus cases, is that the Civil Rules may not be applied in a way that undermines the statutes and rules that are specific to habeas corpus proceedings. 545 U.S. at 654. In *Mayle*, this Court ultimately determined that consideration of the Habeas Rules and the policy underlying the statute of limitations compelled a strict, narrow application of the standard for relation back to avoid creating an exception that would swallow AEDPA's one-year statute of limitation. *Id.* at 656-64.

Here, the *en banc* majority determined that Ross's petition could be saved from dismissal based on principles of relation back because the materials Ross filed with his petition included a state court decision discussing some of the facts that relate to some of Ross's conclusory statements from the original petition. And the lower court considered the state court decision to be part of the petition under Civil Rule 10(c), despite the fact that Ross made no reference to the order in his petition.

As Judge Ikuta's dissenting opinion establishes, the majority of the *en banc* panel of the Ninth Circuit put the cart before the horse by improperly focusing on the scope of the Civil Rules generally and forcing that application on habeas cases, rather than properly assessing how habeas procedure and policy should

inform application of the Civil Rules to habeas cases. App. 48. The lower court's failure to adhere to the general principles governing application of the Civil Rules in habeas cases creates impermissible conflicts between the Civil Rules and both the Habeas Rules and the AEDPA statute of limitation.

Any single conflict between the Civil Rules and the Habeas Rules or the statutes governing habeas review ought to require reversal of the Ninth Circuit's opinion. But the new rule on relation back that the *en banc* majority established below creates three conflicts with controlling rules and statutes that are particularly troublesome because those conflicts will actually do more to harm than help *pro se* litigants. While the Ninth Circuit strained logic to save Ross's petition from dismissal, they initiated an attack on aspects of the Habeas Rules that were expressly adopted in 1976 with the intent of lightening the burdens that habeas review places on district court judges by making it easier to identify the cases presenting claims that warrant closer scrutiny. *See* Advisory Committee Notes to Habeas Rule 2 (discussing the advantages of adopting the use of a standard form petition, including saving time and making petitions easier to read, which works to the benefit of the courts and petitioners).

And while it is typically the practice of this Court to allow an issue to percolate in the lower courts before it will take the issue up on review, the time is ripe to take this issue up now. As Judge Ikuta's dissenting opinion lays out, the Ninth Circuit's overly broad and unworkable rule will unduly burden lower courts with issues that the Habeas Rules are designed to eliminate.

The Rules Committee already identified and sought to prevent those issues when it adopted Habeas Rule 2 more than four decades ago. Allowing the Ninth Circuit's published *en banc* decision to remain in place improperly undermines the authority of the Rules Committee.

I. The Majority's New Rule Conflicts with *Mayle*'s Recognition that Overly Broad Application of Relation Back Undermines the Habeas Rules and the Statute of Limitation.

Tasked with addressing how to apply the standard for relation back in habeas case, in *Mayle,* this Court recognized the tension that an overly broad application of relation back would create with the rules and statutes governing federal habeas review. 545 U.S. at 656-57. In *Mayle*, the habeas petitioner proposed that relation back should apply to any claim related to the "petitioner's trial, conviction, or sentence." *Id.* at 656. But agreeing with circuit courts that had been "mindful of Congress' decision to expedite collateral attacks," this Court adopted a much narrower standard. *Id*. at 657-64. In developing that standard, this Court expressly linked the formulation of the relation back standard to the requirement that petitioner's specifically plead the facts for each ground for relief. *Id*. at 661. The "congeries" of operative facts a petitioner would need to plead in support of a claim alleged within the petition would make up the "conduct, transaction, or occurrence" that an amended claim must share in common with a claim from the original petition in order to relate back. *Id.* As a result, to show that his claims relate back, this Court

requires a petitioner to show that the operative facts of an amended claim relate in both time and type to the operative facts of a claim pleaded in a prior timely filed petition. *Id*. at 650, 657.

This Court adopted that narrow standard and rejected the "same trial, conviction, or sentence" standard, recognizing that AEDPA's statute of limitations would have "slim significance" if a claim would relate back "simply because they relate to the same trial, conviction, or sentence as a timely filed claim." *Mayle*, 545 U.S. at 662. While creating practical conflicts with the Habeas Rules, the lack of guidance provided by the *en banc* majority in how its new rule applies triggers concerns similar to those expressed by this Court in *Mayle*.

First, the majority opinion fails to explain how an attachment to a pleading that is part of the pleading for "*all purposes*" can provide the "congeries of facts" necessary to satisfy the relation-back standard of *Mayle*, but those same "congeries of facts" are somehow not part of the petition for otherwise determining whether the petition satisfies Habeas Rule 2(c). This cannot be true when *Mayle* expressly tied the relation-back standard to the need for specific pleading in habeas cases as a limiting principle that would prevent application of relation back in a way that would swallow the entire statute of limitation. *Id*. 656-57, 662-63.

But even without considering the inextricable relationship this Court established between Habeas Rule 2(c)'s pleading requirements and the relation-back standard in *Mayle*, it defies logic to suggest that the

"all purposes" language from Civil Rule 10(c) can be interpreted to make an exhibit part of the petition to satisfy the relation-back standard but not to be considered in whether the allegations of the petition meet the pleading standard. "[A]ll purposes" does not mean *some purposes*, it means *all purposes*.

Thus, if an exhibit is part of the petition for relation back under Civil Rule 10(c), it must also be part of the petition for purposes of considering whether the petitioner satisfied the pleading requirements. But without at least requiring a petitioner to make clear references in his petition identifying whatever it is he wishes to incorporate into the petition—as occurred in *Dye*—the *en banc* majority's application of Civil Rule 10(c) conflicts with Habeas Rule 2(c)'s requirement that the petition plead "the facts *supporting* each ground." (emphasis added). Otherwise, courts and respondents will be left to sift through anything a petitioner attaches to a petition and guess what facts, if any, in the attachments might support a claim for relief. But the Rules Committee expressly sought to avoid that result by (1) requiring the petitioner to plead that facts he believes supports his claims for relief, and (2) adopting the use of a form petition for *pro se* petitioners. Advisory Committee Notes to Habeas Rule 2.

Second, turning to language from Civil Rule 15(c) that a petitioner only needs to "attempt" to set out conduct, transactions, or occurrences to provide for relation back, the majority purported to limit its new rule to situations where the attached exhibit includes facts related to a claim identified in the petition. App.

16-17. But the majority evasively declined to define exactly what a petitioner needs to do to adequately raise a claim in the original petition that will then allow an attachment to be considered for relation-back purposes. App. 17 n.6.

The majority's failure to set a clear, workable standard for when a claim is "attempted to be set out" under Civil Rule 15(c), renders this limit toothless. Instead, as the dissent noted, the *en banc* majority's new rule creates the sort of boundless relation-back standard this Court sought to avoid in *Mayle.* App. 47-48. Without a clear standard for when a claim is sufficiently laid out within the petition, the savvy habeas petitioner is incentivized to allege broad, undefined claims and attach a plethora of documents to his petition in hopes that he can use facts from those documents to present numerous new claims in a later amended petition without concern for the statute of limitation. A rule that would allow relation back under such circumstances is hardly different than the proposed rule this Court rejected in *Mayle*—that claims arising from the same trial, conviction, or sentence would relate back. Instead, it creates a conflict with the Habeas Rules and undermines *Mayle*'s reliance on the pleading standards to narrow application of relation back in the habeas context.

Third, by not providing a clear standard for what constitutes a written instrument, the Ninth Circuit has left the courts and *pro se* petitioners with no guidance as to what documents will be considered part of the petition under Civil Rule 10(c). App. 18-19. The lack of clear guidance in defining "written instrument"

creates yet another incentive for petitioners to attach a plethora of documents to their *pro se* petitions, hoping that at least some of what they attach will be considered part of the petition, while completely undermining the time-saving goals of the specific pleading requirement and the use of the form petition.

As Judge Ikuta methodically laid out in her dissent, the *en banc* majority's new rule creates significant conflicts with the Habeas Rules that will have real consequences for district courts. App. 39-49. As a result, the lower court's *en banc* published opinion conflicts with this Court's decisions, *Mayle* in particular, that require federal courts to look to habeas policy and procedure when applying the Civil Rules in habeas cases. This Court should grant the petition.

II. This Court Should Not Wait to Correct the Conflict Created by the *En Banc* Majority's New Rule.

While it is typical for this Court to let issues percolate in the lower courts before taking them up on review, this Court should not wait to address an issue like this that implicates something the Rules Committee expressly addressed more than four decades ago. The Advisory Committee Notes to Habeas Rule 2 establish that the Rules Committee adopted a specific pleading requirement and mandated the use of form petitions for *pro se* inmates in 1976 for a reason. Past experience of the courts had shown that, without proper guidance, habeas petitioners were prone to filing petitions that "contained mere conclusions of law, unsupported by any facts," or "lengthy and often illegible petitions, arranged in no logical order," which

left district court judges spending "hours deciphering them." Advisory Committee Notes to Habeas Rule 2. But the use of a standard form in a majority of the districts around the country indicated that the use of the form saved time and made *pro se* petitions easier for the courts to read. And as the committee noted, the use "of a standard form benefits the petitioner as well." *Id*.

The *en banc* majority's new rule in this case winds back the clock and incentivizes practices the Habeas Rules are designed to prevent. For that reason alone, this Court should grant this petition.

But the *en banc* majority's failure to establish a workable standard for when its new rule will actually apply creates further problems that require this Court's intervention now. Without a clearly defined standard that places real limits on when a petitioner can later rely on appended exhibits to satisfy the relation-back standard, the lower court's opinion squarely conflicts with this Court's concerns in *Mayle* that a boundless standard for relation back will swallow the AEDPA statute of limitation. *Mayle*, 535 U.S. at 657, 661 (citation omitted).

The *en banc* majority's new rule has real consequences for all parties involved. Most significantly, this new standard for applying relation back in the habeas context will work to the detriment, not the benefit, of most habeas petitioners. Overburdened district courts, forced to sift through a multitude of documents attached to *pro se* habeas petitions, will have difficulty separating the wheat from the chaff, which harms the system as whole. This

Court's intervention is warranted to correct the Ninth Circuit's departure from well-established precedent on applying the Civil Rules in habeas cases.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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