APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 2:14-cv-01527-JCM-PAL

[Filed February 24, 2020]

RONALD ROSS,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
WILLIAMS, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA,	)
	)
Respondents-Appellees.	)

OPINION

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted En Banc June 19, 2019
San Francisco, California

Before: Sidney R. Thomas, Chief Judge, and William A. Fletcher, Ronald M. Gould, Richard A. Paez, Marsha S. Berzon, Consuelo M. Callahan, Milan D. Smith, Jr., Sandra S. Ikuta, Jacqueline H. Nguyen, Paul J. Watford and Michelle T. Friedland, Circuit Judges.

Opinion by Judge Friedland;
Dissent by Judge Ikuta

SUMMARY*

Habeas Corpus

The en banc court reversed the district court's judgment dismissing as untimely Ronald Ross's amended habeas corpus petition challenging his Nevada state conviction for theft-related offenses, and remanded.

Proceeding *pro se*, Ross timely filed a habeas petition in the district court. Using a court-provided form, he asserted eight claims of ineffective assistance of counsel. He also attached an order from the Nevada Supreme Court affirming the denial of his state petition for postconviction relief. After AEDPA's one-year statute of limitations had expired, Ross filed with counsel's assistance an amended petition that included multiple claims, some of which resembled those identified in Ross's original *pro se* federal petition and discussed in the attached state court order. Dismissing

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the amended petition as untimely, the district court rejected Ross's argument that its claims related back to the original, timely petition.

Explaining that Federal Rules of Civil Procedure 15(c)(1)(B) and 10(c) apply in habeas proceedings, the en banc court held that if a petitioner attempts to set out habeas claims by identifying specific grounds for relief in an original petition and attaching a court decision that provides greater detail about the facts supporting those claims, that petition can support an amended petition's relation back. The en banc court held that the exhibit containing the Nevada Supreme Court order was a part of the original petition for all purposes under Rule 10(c), and that the original petition therefore set out or attempted to set out conduct, transactions, or occurrences to which claims in the amended petition could relate back under Rule 15(c)(1)(B).

The en banc court wrote that the central question is whether the amended and original petitions share a common core of operative facts, as those facts are laid out in the amended petition and "attempted to be set out" in the original petition; and that if an exhibit to the original petition includes facts unrelated to the grounds for relief asserted in that petition, those facts were not "attempted to be set out" in that petition and cannot form a basis for relation back. Applying this framework, the en banc court wrote that Ross's amended petition and his original petition with the attached exhibit share a common core of operative facts—for example, defense counsel's purported failure

to object to the state witness's distraction theft testimony–such that the amended petition relates back.

The en banc court rejected arguments (1) that the Nevada Supreme Court order is not a "written instrument" within the meaning of Rule 10(c) so it should not be considered part of Ross's petition and cannot provide facts to which the amended petition could relate back, and (2) that a petition can only incorporate an attachment by clearly and repeatedly referencing it. The en banc court wrote that a petition need not be pleaded with sufficient particularity to support relation back. Observing that Habeas Rule 2(c)'s particularity requirement applies to pleading, the en banc court explained that the requirements of relation back are explicitly more generous. The en banc court saw no basis to conclude that, in general, allowing a petitioner to incorporate facts from attachments into his petition for relation back purposes will saddle district courts with a greater volume of documents to review than the Habeas Rules expressly contemplate.

The en banc court remanded for the district court to consider which of the claims in the amended petition (beyond the claim regarding the failure to object to expert testimony) are supported by facts in the original petition.

Judge Ikuta, joined by Judges Callahan and M. Smith, dissented. She wrote that the majority's interpretation of Rule 10(c) in the habeas context—to mean that the facts contained in "a written instrument that is an exhibit to a" habeas petition are "part of the pleading for all purposes" but only to the extent the

facts are arguably related to the petition's grounds for relief—is unworkably broad and complex, inconsistent with the Habeas Rules, AEDPA's statute of limitations, and the Supreme Court's guidance on applying Rule 10(c) in this context.

COUNSEL

Jonathan M. Kirshbaum (argued), Assistant Federal Public Defender; Rene L. Valladares, Federal Public Defender; Office of the Federal Public Defender, Las Vegas, Nevada; for Petitioner-Appellant.

Jeffrey M. Conner (argued), Assistant Solicitor General; Matthew S. Johnson, Deputy Attorney General; Adam Paul Laxalt, Attorney General; Office of the Attorney General, Carson City, Nevada; for Respondents-Appellees.

David M. Porter, Chair, NADCL Amicus Committee, Sacramento, California; Gabriel J. Chin, University of California, Davis School of Law, Davis, California; for Amici Curiae National Association of Criminal Defense Lawyers and Aoki Center for Critical Race and Nation Studies.

OPINION

FRIEDLAND, Circuit Judge:

Ronald Ross, proceeding *pro se*, timely filed a habeas petition in the United States District Court for the District of Nevada. Using a court-provided form for

habeas petitions, he asserted eight claims of ineffective assistance of counsel based on specific alleged deficiencies in his trial counsel's performance. Ross's statements on the form petition contained a short description of each claim. Ross also attached a six-page order from the Nevada Supreme Court affirming the denial of his state petition for postconviction relief. That order summarized the factual basis for most of the claims Ross had raised in his state petition, many of which were the same as those raised in his federal petition.

The district court appointed Ross counsel. Some months later, after the one-year statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d)(1), had expired, Ross filed an amended petition with counsel's assistance. The amended petition included multiple claims, some of which resembled those that were identified in Ross's original *pro se* federal petition and discussed in the attached state court order. The district court dismissed Ross's amended petition as untimely, rejecting Ross's argument that its claims related back to his original, timely petition.

A divided three-judge panel affirmed the district court's dismissal. *Ross v. Williams*, 896 F.3d 958, 972–73 (9th Cir. 2018). We granted rehearing en banc, *Ross v. Williams*, 920 F.3d 1222, 1223 (9th Cir. 2019), and now reverse.

I

Following his conviction for several theft-related offenses in Nevada state court, Ronald Ross was

sentenced under Nevada's habitual offender statute to life in prison with a possibility of parole after twenty years. Ross appealed, and the Nevada Supreme Court affirmed his conviction and sentence on November 8, 2010. Ross did not file a petition for a writ of certiorari with the United States Supreme Court.

On November 30, 2011, Ross petitioned for postconviction relief in Nevada state district court, asserting among other things various claims of ineffective assistance of trial counsel. That court denied relief.

The Nevada Supreme Court affirmed on July 22, 2014, explaining its decision in a six-page written order. That order enumerated Ross's claims that his trial counsel was ineffective for:

> (A) "failing to engage in pretrial discovery," which would have enabled counsel to obtain a surveillance video;
>
> (B) "violating [Ross's] right to a speedy trial";
>
> (C) allowing "acommunication breakdown [that] prevented [Ross] from being able to assist counsel in the preparation of his defense";
>
> (D) "failing to object to expert testimony pertaining to pickpockets and distraction thefts";
>
> (E) "failing to retain a defense expert to rebut the expert testimony" about pickpockets and distraction thefts;

> (F) "failing to properly challenge the use of a preliminary-hearing transcript in lieu of live testimony" or to "mak[e] an offer of proof as to what additional questions counsel would have posed to a live trial witness";
>
> (G) "failing to renew at trial [Ross's] preliminary-hearing objection" concerning testimony about a surveillance video on the grounds that the testimony "violat[ed] the best evidence rule"; and
>
> (H) "failing to raise certain objections during the State's closing arguments and at sentencing and . . . failing to move post-verdict to dismiss the case for lack of evidence."[1]

In the course of rejecting those claims, the order discussed the facts underlying most of them.

On September 14, 2014, Ross filed a *pro se* federal habeas petition in the District of Nevada using the district's standard petition form. In relevant part, Ross listed his Sixth Amendment right to counsel as the constitutional basis for his claims. Where the form inquired about the facts on which he based those claims, Ross provided a list of alleged deficiencies in his trial counsel's performance. The list stated that trial

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[1] For ease of reference, we have adopted different labeling systems to identify the claims in each of the documents at issue. We denote claims addressed in the Nevada Supreme Court postconviction order as Claims A–H, claims included in the original federal petition as Claims 1–8, and claims included in the amended federal petition as Claims I–XI.

counsel (1) "failed to secure a speedy trial"; (2) "failed to review evidence prior to trial and adequately prepare"; (3) "failed to file pretrial motions"; (4) "failed to address the prejudice of evidence lost prior to trial"; (5) "failed to prepare for . . . jury selection" because counsel "attempted to force a deal"; (6) "failed to prepare for . . . trial," again because counsel "attempted to force a deal"; (7) "failed to retain defense experts for . . . trial"; and (8) "failed to object to the State's use of [an] expert witness."

Although Ross did not include any further facts on the petition form, he appended an affidavit stating, among other things, that the Nevada Supreme Court had affirmed the denial of his state postconviction relief petition. The affidavit included a notation to "see attached order." Ross then attached that order as exhibit "A." On the same day, he also filed a handwritten "request" in which he asked the court to provisionally file the petition, give him leave to amend, and appoint counsel. The request stated that "Petitioner incorporates by reference and fact, the attached Affidavit in support of this motion, and writ, with attached exhibits."

The district court reviewed the petition and appointed counsel to assist Ross. It set a deadline for the filing of any amended petition and stated that no response by the State would be required absent further court order. Following extensions of this filing deadline and with the assistance of newly appointed counsel, Ross filed an amended habeas petition on June 8, 2015, asserting eleven claims. Eight were claims for ineffective assistance of counsel, alleging that Ross's

trial counsel: (I) failed to protect Ross's right to a speedy trial; (II) failed to communicate with Ross prior to trial; (III) failed to seek an appropriate sanction based on a discovery violation; (IV) failed to object based on the best evidence rule; (V) failed to object to expert testimony; (VI) failed to call a defense expert; (VII) failed to object to the admission of preliminary hearing testimony based on the State's inability to establish the witness's unavailability; and (VIII) failed to raise mitigating arguments at sentencing against the imposition of a habitual offender sentence. The remainder alleged: (IX) violation of the Confrontation Clause; (X) violation of the right to a speedy trial; and (XI) deprivation of due process based on legally insufficient evidence.

The district court reviewed the amended petition and directed the State to file a response. The State moved to dismiss, arguing in relevant part that the amended petition was untimely. The State highlighted that the amended petition was filed after AEDPA's one-year statute of limitations had run, and the State contended that the amended petition's claims did not relate back to Ross's concededly timely original federal petition because the original petition lacked factual allegations. Ross opposed dismissal, arguing that his amended petition related back because the Nevada Supreme Court order he had attached to his original federal petition included the necessary facts. The district court granted the State's motion and entered an order of dismissal. The court reasoned that Ross had included no facts in his original form petition and had not referred to the attached state court order sufficiently for the facts therein to be considered

incorporated by reference, so there was nothing to which the amended petition could relate back.

Ross timely appealed.

II

As relevant to this case, AEDPA requires that an individual seeking habeas relief from a state criminal judgment file a petition in federal court within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). This statute of limitations is tolled during the pendency of state postconviction proceedings. 28 U.S.C. § 2244(d)(2). As the parties agree, Ross's September 14, 2014 original petition fell within the limitations period, while his June 8, 2015 amended petition did not.[2] The claims raised in the amended petition are therefore untimely unless they relate back to Ross's original petition.

Under Rule 15(c)(1)(B) of the Federal Rules of Civil Procedure, an otherwise untimely amended pleading "relates back to the date of the original pleading when . . . the amendment asserts a claim or defense

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[2] Ross's limitations period began to run on February 7, 2011, the deadline for him to seek United States Supreme Court review of the Nevada Supreme Court's decision affirming his judgment of conviction. The limitations period then ran for 296 days. It was tolled from November 30, 2011 to August 18, 2014 during the pendency of Ross's state postconviction proceedings. When those proceedings concluded, the limitations period began to run again. Because 296 of the 365 days to file had already passed, the AEDPA deadline was the first business day that was at least 69 days later: October 27, 2014.

that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Federal Rule of Civil Procedure 10(c) provides that "[a] statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion" and that "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

Relying on these rules, Ross argues that the exhibit containing the Nevada Supreme Court order was "a part of [his original petition] for all purposes," and that the original petition therefore "set out" or "attempted to . . . set out" conduct, transactions, or occurrences to which claims in his amended petition could relate back. Fed. R. Civ. P. 10(c); Fed. R. Civ. P. 15(c)(1)(B). We agree.

A

Federal Rules of Civil Procedure 15(c)(1)(B) and 10(c) apply in habeas proceedings. Under provisions of both the Federal Rules of Civil Procedure and the Rules Governing Section 2254 Cases in the United States District Courts (the "Habeas Rules"), the Federal Rules of Civil Procedure apply to habeas proceedings to the extent they are consistent with the Habeas Rules, federal statutory provisions, and habeas practice. *See* Fed. R. Civ. P. 81(a)(4); Habeas R. 12. An additional statutory provision specifically incorporates Federal Rule of Civil Procedure 15 into habeas procedure. *See* 28 U.S.C. § 2242 ("[An] [a]pplication for a writ of habeas corpus . . . . may be amended or supplemented as provided in the rules of procedure applicable to civil actions."). We refer to Federal Rule of Civil Procedure

81(a)(4), Habeas Rule 12, and Section 2242 collectively herein as the "Habeas Incorporation Provisions."

Relying on the Habeas Incorporation Provisions, the Supreme Court has applied both Rule 15(c) and Rule 10(c) to habeas proceedings. In *Mayle v. Felix*, 545 U.S. 644 (2005), the Supreme Court considered whether an amended habeas petition related back to an original petition under Rule 15(c).[3] *Id.* at 649, 656–64. In applying Rule 15(c) in habeas cases, some courts of appeals had treated an entire trial, conviction, or sentence as a "transaction" or "occurrence" to which an amended petition could relate back. *See id.* at 653–54, 656–57. The Court explained that this approach misinterpreted Rule 15(c): An amended petition "does not relate back . . . when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id.* at 650. Instead, the Court held, both petitions must "state claims that are tied to a common core of operative facts." *Id.* at 664.

In *Dye v. Hofbauer*, 546 U.S. 1 (2005) (per curiam), the Supreme Court held that, under Rule 10(c), a habeas petitioner could rely on a brief appended to his petition to plead his petition with sufficient particularity. *Id.* at 4. The habeas petition at issue asserted a claim of prosecutorial misconduct. *See id.* at

[3] *Mayle* relied on then-applicable provisions of the Habeas Rules and Federal Rules of Civil Procedure. *See* Habeas R. 11 (2004); Fed. R. Civ. P. 81(a)(2) (2004); Fed. R. Civ. P. 15(c)(2) (2004). Although these provisions have since been renumbered and in some instances revised, they remain identical or functionally equivalent to the provisions on which *Mayle* relied. *See* Fed. R. Civ. P. 81(a)(4); Habeas R. 12; Fed. R. Civ. P. 15(c)(1)(B).

2–3. In support, the petitioner attached a brief to his habeas petition, which articulated that claim in more detail. *See id.* at 3–4. The petition made repeated references to the brief. *Id.* at 4. The Supreme Court treated the brief as part of the petition under Rule 10(c), and accordingly deemed the petition to properly present the prosecutorial misconduct claim regardless of whether, without the attachment, the petition might have been construed as presenting the claim "in too vague and general a form." *Id.*

B

The foregoing authorities make plain that relation back is available under the circumstances presented here. If a petitioner attempts to set out habeas claims by identifying specific grounds for relief in an original petition and attaching a court decision that provides greater detail about the facts supporting those claims, that petition can support an amended petition's relation back.[4] An amended petition relates back if it asserts one or more claims that arise out of "the conduct, transaction, or occurrence" that the original petition "set out" or "attempted to . . . set out"—in other words, if the two petitions rely on a common core of operative facts. Fed. R. Civ. P. 15(c)(1)(B); *Mayle*, 545 U.S. at 657, 664. "[F]or all purposes," including relation back, the original petition consists of the petition itself and any "written instrument[s]" that are exhibits to the

[4] Because that rule resolves this case, we do not consider whether the original petition, without reliance on the attached Nevada Supreme Court order, included enough factual content to support the relation back of some of the claims later asserted in the amended petition. *See infra* n.9.

petition. Fed. R. Civ. P. 10(c); *see also Dye*, 546 U.S. at 4. Like a brief, a court decision is a written instrument. *See Dye*, 546 U.S. at 4.

1

We follow two steps to determine whether an amended petition relates back to an original petition that relied on an appended written instrument to help set forth the facts on which it based its claims. First, we determine what claims the amended petition alleges and what core facts underlie those claims. Second, for each claim in the amended petition, we look to the body of the original petition and its exhibits to see whether the original petition "set out" or "attempted to . . . set out" a corresponding factual episode, *see* Fed. R. Civ. P. 15(c)(1)(B)—or whether the claim is instead "supported by facts that differ in both time and type from those the original pleading set forth," *Mayle*, 545 U.S. at 650, 664. At a minimum, the original petition "attempted to . . . set out" all facts that supported a ground for relief asserted in the original petition. Those facts therefore could provide the necessary correspondence for relation back. *Cf. id.* at 659–60 (explaining that an amendment that "invoked a legal theory not suggested by the original complaint" could relate back to the original complaint because it arose out of the same "episode-in-suit" (citing *Tiller v. Atl. Coast Line R. Co.*, 323 U.S. 574, 580–81 (1945))[5]).

[5] "Episode-in-suit" refers to the incident that gave rise to a lawsuit. In *Tiller*, the episode-in-suit was "a worker's death attributed . . . to the railroad's failure to provide its employee with a reasonably safe place to work." *Mayle*, 545 U.S. at 660.

In comparing the petitions' sets of facts, we do not require that the facts in the original and amended petitions be stated in the same level of detail. Relation back may be appropriate if the later pleading "merely correct[s] technical deficiencies or expand[s] or modif[ies] the facts alleged in the earlier pleading," "restate[s] the original claim with greater particularity," or "amplif[ies] the details of the transaction alleged in the preceding pleading." 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1497 (3d ed. 2019). Sufficient correspondence exists if the two claims arise out of the same episode-in-suit. *See, e.g.*, *Mayle*, 545 U.S. at 664 n.7 (approving relation back when "the original petition challenged the trial court's admission of recanted statements, while the amended petition challenged the court's refusal to allow the defendant to show that the statements had been recanted" (citing *Woodward v. Williams*, 263 F.3d 1135, 1142 (10th Cir. 2001)); *Nguyen v. Curry*, 736 F.3d 1287, 1296–97 (9th Cir. 2013) (determining that a claim that appellate counsel was ineffective for failing to raise double jeopardy related back to a timely raised substantive double jeopardy claim), *abrogated on other grounds by Davila v. Davis*, 137 S. Ct. 2058 (2017).

The central question under this framework is whether the amended and original petitions share a common core of operative facts, as those facts are laid out in the amended petition and "attempted to be set out" in the original petition. If an exhibit to the original petition includes facts unrelated to the grounds for relief asserted in that petition, those facts were not

"attempted to be set out" in that petition and cannot form a basis for relation back.

Applying this framework here, Ross's original form petition and attached exhibit contain core facts to which claims in his amended petition relate back. An obvious example is Claim V of Ross's amended federal petition, which asserts that Ross's trial counsel was ineffective for failing to object when the State failed to "provide any notice that [it] intended to present expert testimony" from the State's witness about what "distract theft[s]" were. In his original form petition, Ross listed as Claim 8 the similar contention that "counsel . . . failed to object to the State's use of [an] expert witness." The attached Nevada Supreme Court postconviction order provided factual details related to this claim. In its discussion of Claim D, that order evaluated Ross's argument that his "counsel was ineffective for failing to object to expert testimony pertaining to pickpockets and distraction thefts where the [State's] witness was not noticed as an expert." Comparing the claims' operative facts clearly reveals a common core—defense counsel's purported failure to object to the state witness's distraction theft testimony—that was present in the original petition and to which the amended petition relates back.[6]

[6] As explained below, *see infra* Part III, we remand for the district court to consider which of the remaining claims in the amended petition are supported by facts in the original petition. We emphasize that the correspondence need not be as precise as the correspondence in the expert testimony claim for there to be relation back. *See Nguyen*, 736 F.3d at 1296–97.

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None of the State's or the dissent's counterarguments is persuasive. The State argues that the Nevada Supreme Court's order is not a "written instrument" within the meaning of Rule 10(c), so it should not be considered part of Ross's petition and cannot provide facts to which the amended petition could relate back. But Rule 10(c) does not define "written instrument," and, especially in the habeas context, there is no reason to believe—as the State contends—that the term was intended to be limited to private written agreements such as contracts, leases, or wills. *See* Habeas R. 4 advisory committee's note to 1976 adoption (consideration of habeas petition "may properly encompass any exhibits attached to the petition, including, but not limited to, transcripts, sentencing records, *and copies of state court opinions*" (emphasis added)). Indeed, *Dye* instructs that a legal brief counts as a written instrument within the meaning of Rule 10(c). *See* 546 U.S. at 4.[7] We need not

[7] *Dye* did not specify whether it relied on the portion of Rule 10(c) providing that a "written instrument that is an exhibit to a pleading is a part of the pleading for all purposes," the portion of Rule 10(c) providing that "statement[s] in a pleading" may be "adopted by reference elsewhere in the same pleading or in any other pleading or motion," or both. Fed. R. Civ. P. 10(c). For two reasons, we understand the Court to have relied at least on the "written instrument" provision. First, the Court described the brief as *appended* to the petition, which is best understood as a reference to the portion of Rule 10(c) about exhibits. Second, it is unlikely that the Supreme Court considered the brief in itself to be "a pleading" within the meaning of the other portion of Rule 10(c). *See* Fed. R. Civ. P. 7(a) (defining types of pleadings that may be filed in federal court, and not listing briefs); *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 345 (9th Cir. 1996) (distinguishing between a pleading and a brief).

articulate a comprehensive definition of "written instrument," because, whatever the boundaries of the definition, if it includes a brief it must include formal judicial decisions.

The State contends, however, that even if the Nevada Supreme Court's order is a written instrument within the meaning of Rule 10(c), *Dye* imposes a requirement that a petition can only incorporate an attachment by "clear[ly] and repeated[ly]" referencing it—which the State argues Ross did not do. *See Dye*, 546 U.S. at 4. But neither the Habeas Incorporation Provisions nor any other governing law erects this hurdle to petitioners' pursuit of habeas relief. *Dye* treated an appended supporting brief as part of a habeas petition pursuant to Rule 10(c), without making a distinction between habeas petitions and other civil actions for purposes of the incorporation of attachments. *See id.* (citing one of the Habeas Incorporation Provisions, then-Rule 81(a)(2), to support application of Rule 10(c)). The Court mentioned that the petition made "clear and repeated references" to the brief, *id.* at 4, but that does not mean that it was *necessary* for the petition to do so in order for that attachment to be a part of the petition. To the extent the Court relied on the "clear and repeated references" to the brief at all, it would have been because the issue in *Dye* was about whether the petition was pleaded with sufficient particularity, not about relation back.[8]

[8] Like the State, the dissent insists that *Dye* formulated a habeas-specific rule that an exhibit is incorporated only when the petition makes "clear . . . reference[]" to it. Dissent at 47 (alteration in original). Yet the dissent offers no explanation of why our contrary reading of *Dye* is incorrect.

In fact, a petition need not be pleaded with sufficient particularity to support relation back. Arguing otherwise, the State contends that Habeas Rule 2(c), which requires that habeas petitions "specify all the grounds for relief available" to a petitioner and "state the facts supporting each ground," cabins relation back by precluding the consideration of any matter outside the four corners of the petition. Similarly, the dissent suggests that the purported conflict between Rule 10(c) and Habeas Rule 2 indicates that we should preclude courts from examining exhibits for relation back purposes unless the exhibits have been clearly and repeatedly incorporated by reference. Dissent at 38–40, 47 & n.6. We cannot agree with either approach for the simple reason that Rule 2(c) sets forth only a pleading requirement. The requirements for relation back are different—and explicitly more generous. Rule 15(c)(1)(B) allows relation back to an occurrence that was only "*attempted* to be set out" in the original pleading, which necessarily contemplates that the original pleading may be inadequately pleaded yet still support relation back. Fed. R. Civ. P. 15(c)(1)(B) (emphasis added); *see also, e.g.*, *Dean v. United States*, 278 F.3d 1218, 1222 (11th Cir. 2002) (per curiam) (concluding that claims in an amended habeas petition could relate back to claims in an original petition that expressly omitted supporting facts if the claims arose out of the same specific conduct or occurrence);[9]

[9] The Eleventh Circuit in *Dean* adopted an even more permissive approach to relation back than Ross advocates for—or than we need consider—here. In *Dean*, the original petition included a claim objecting to perjured testimony at trial for which the

McClellon v. Lone Star Gas Co., 66 F.3d 98, 102 (5th Cir. 1995) (allowing relation back to original complaint that "obviously did not conform with the pleading requirements of [R]ule 8"). Indeed, a key purpose of Rule 15 is to permit pleading deficiencies to be fixed through amendment. *See* Wright & Miller § 1497.[10]

Mayle does not instruct otherwise. The Court did explain in *Mayle* that, because Habeas Rule 2(c)'s particularity-in-pleading requirement is "more demanding" than Federal Rule of Civil Procedure 8(a)(2)'s notice pleading standard,[11] habeas petitioners

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petitioner provided no factual support at all, indicating that he intended to file "all facts in support thereof" at a later time. *Id.* at 1221–22. The Eleventh Circuit held that this claim, among others, provided a basis for the amended petition to relate back. *See id.* at 1222. The court explained: "When the nature of the amended claim supports specifically the original claim, the facts there alleged implicate the original claim, even if the original claim contained insufficient facts to support it. One purpose of an amended claim is to fill in facts missing from the original claim." *Id.*

[10] The dissent sidesteps the fact that whether a petition was pleaded with sufficient particularity and whether a subsequent petition relates back to facts set out or attempted to be set out in the original petition are different questions governed by different standards, instead insisting that an original petition's failure to comply with the requirements for filing an adequate habeas petition prevents it from supporting relation back. Dissent at 40. But the inquiries are not so easily merged, because Rule 15 expressly contemplates that inadequately pleaded pleadings may support relation back, thereby requiring an analysis of what the pleading set out *or attempted to* set out, including in the habeas context.

[11] In light of the Supreme Court's later decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), it is not clear that there remains much practical

could not rely on a definition of "conduct, transaction, or occurrence" that was more "capacious" than the definition applied to civil cases. 545 U.S. at 655, 657. But, contrary to the dissent's suggestion, *see* Dissent at 35–36, *Mayle* did not adopt a habeas-specific meaning of Rule 15 that is *less* capacious than the standard civil definition. Rather, relying on Rule 15's application in "run-of-the-mine civil proceedings," *Mayle* simply explained that relation back depends upon there being claims in the amended petition that share a common core of operative facts with claims in the original habeas petition. 545 U.S. at 657–59.[12] The general

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difference between Habeas Rule 2(c)'s and Federal Rule of Civil Procedure 8(a)(2)'s pleading standards. *Compare Iqbal*, 556 U.S. at 677–78 (explaining that to survive a motion to dismiss a civil pleading must "state a claim to relief that is plausible on its face" and cannot rely on "labels and conclusions," "'naked assertion[s]' devoid of 'further factual enhancement,'" or "a sheer possibility that a defendant has acted unlawfully" (alteration in original) (quoting *Twombly*, 550 U.S. at 555, 557, 570)), *with Mayle*, 545 U.S. at 655 ("In the past, petitions have frequently contained mere conclusions of law, unsupported by any facts. [But] it is the relationship of the facts to the claim asserted that is important." (alteration in original) (quoting Habeas R. 2(c) advisory committee's note to 1976 adoption)), *and id.* ("[T]he petition is expected to state facts that point to a real possibility of constitutional error." (quoting Habeas R. 4 advisory committee's note to 1976 adoption)).

[12] The dissent suggests that applying normal relation back principles in federal habeas cases is "inconsistent with AEDPA." Dissent at 44, 47 n.6. This suggestion cannot be reconciled with the reasoning in *Mayle*, which applied normal relation back principles to determine relation back in a habeas case. If the Supreme Court had believed that allowing relation back defied AEDPA's statute of limitations, it presumably would have just said so instead of engaging in all of the analysis it did in *Mayle*.

principle that relation back requires a single course or pattern of conduct—not factually and temporally unrelated conduct arising out of the same underlying proceeding—showed why an entire criminal proceeding was too broad to "delineate an 'occurrence'" for relation back purposes. *Id.* at 661 (quoting Fed. R. Civ. P. 15(c)). Here, Ross identified particular errors that he believes entitle him to habeas relief; nowhere in his original or amended petition did he attempt to rely on his entire trial as the transaction or occurrence at issue.[13]

The State next contends that permitting relation back based on attached exhibits would contravene the goals motivating the Habeas Rules' adoption in Rule 2(d) of a standard form for habeas petitions. The Advisory Committee explained that the form was adopted to achieve greater administrative convenience. Prior to adoption of the form, petitions frequently contained "mere conclusions of law, unsupported by any facts," or were "lengthy and often illegible . . . [and] arranged in no logical order." *See* Habeas R. 2(c) advisory committee's note to 1976 adoption.[14] Judges who received such submissions "had to spend hours deciphering them." *Id.*

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[13] Indeed, *Mayle* instructs courts to look for "congeries" of facts, 545 U.S. at 661—which the Oxford English Dictionary defines as a "collection of things merely massed or heaped together; a mass, heap," *Oxford English Dictionary* (2d ed. 1989)—thereby illustrating our prior point that relation back looks to the existence of supporting facts and not to how well those facts are pleaded.

[14] Following the 1976 enactment of the Habeas Rules, subsequent amendments moved the provision providing for a form petition from Habeas Rule 2(c) to Habeas Rule 2(d). Accordingly, this note corresponds to the provision now listed in Habeas Rule 2(d).

We disagree with the State that ruling in Ross's favor here will saddle district courts with the task of sifting through unmanageably large attachments. As an initial matter, Ross was obligated to attach the Nevada Supreme Court decision to his habeas petition,[15] and the Advisory Committee notes to the 1976 adoption of Habeas Rule 4 explicitly contemplate that district courts will review "any exhibits attached to the petition, including, but not limited to, transcripts, sentencing records, and copies of state court opinions" as part of their ordinary habeas screening obligations. Accordingly, we see no basis to conclude that, in general, allowing a petitioner to incorporate facts from attachments into his petition for relation back purposes will saddle district courts with a greater volume of documents to review than the Habeas Rules expressly contemplate.[16]

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[15] Because the form petition required Ross to attach the decision, it is far from clear that, as the dissent contends, Ross failed to "substantially follow" the requirements of the form petition. *See* Habeas R. 2(d); Dissent at 40–42. The form petition purported to allow Ross to attach only two pages stating supporting facts, but it also included a separate requirement that he attach a state court order he knew to contain further supporting facts. Faced with this apparent inconsistency, he might reasonably have interpreted the form's instructions not to constrain him from relying on the facts in required attachments.

[16] The dissent at first appears to suggest that treating exhibits as part of a habeas petition would undermine various aspects of habeas rules and procedure, *see* Dissent at 40–42, but it later admits that any documents to which a petition makes "clear . . . reference[]" would be incorporated therein, *see id.* at 47 (alteration in original). The dissent offers no account of why its concerns about the volume of attachments or compliance with the habeas rules would be ameliorated by the inclusion of words such as "see attached" or "incorporated by reference."

Moreover, in determining whether an amended petition relates back, district courts face no obligation to wade unguided through entire exhibits attached to an original petition to determine whether those exhibits contain core facts. Relation back is decided once there is an amended petition—and an amended petition must itself satisfy the particularity standards of Rule 2(c) in order to avoid dismissal on particularity grounds, separate and apart from timeliness concerns. The only operative pleading before the court will therefore presumably be one that is particular and not too difficult to navigate. Moreover, relation back is rarely decided on the pleadings alone; instead, courts typically have the benefit of briefing on a motion to amend or motion to dismiss. As in this case, such briefing will typically identify the specific portions of an earlier pleading that contain the relevant factual material to which the new pleading is attempting to relate back, avoiding the need for the judge to sift independently through the original petition's exhibits. If the submissions discussing the amended petition fail to do so, district courts have familiar remedies, such as dismissing the new claim as time-barred for failure to show that it relates back, declining to grant leave to amend for similar reasons, or requesting supplemental briefing to better explain the relationship between the amended petition and the original one—for example, by identifying the particular facts from an attachment that support each claim for relief.[17]

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[17] Contrary to the dissent's view, *see* Dissent at 33–34, our holdings that an attachment to a petition is a part of the petition for all purposes and that only those facts that correspond to a claim asserted in the petition are "set out or attempted to be set out" in

To the extent the State has a separate concern about whether contending with voluminous filings is consistent with Rule 2's particularity-in-pleading standard, the Habeas Rules provide a more direct solution. It is true that some of the requirements of Habeas Rule 2 were motivated by the Advisory Committee's concern that petitioners too frequently filed "lengthy and often illegible petitions" or "mere conclusions of law, unsupported by any facts." *See* Habeas R. 2(c) advisory committee's note to 1976 adoption. But when a petitioner files a petition that is insufficient under the particularity-in-pleading standard, the Advisory Committee Notes instruct that the district court must accept and file the defective petition, and in appropriate circumstances "require the petitioner to submit a corrected petition that conforms to Rule 2(c)." *See* Habeas R. 2(c) advisory committee's note to 2004 amendment. Although an earlier incarnation of Rule 2 had permitted a court to return an insufficient petition to the petitioner without filing it, following the enactment of AEDPA's one-year statute of limitations the Advisory Committee cautioned that rejecting without filing "a petition because it is not in proper form may pose a significant penalty for a petitioner, who may not be able to file another petition within the . . . limitations period." *Id.* Rather than retroactively applying—with prejudice—the requirements of Rule 2(c) to an original pleading

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that petition are entirely consistent. Background facts set out in an attachment that are unrelated to the original petition's claims may be a part of a petition without necessarily setting out or attempting to set out a transaction or occurrence to which a later amended petition may relate back.

once there is an amended pleading, district courts must accept original petitions in the form they are filed and then enforce Rule 2(c) by requiring petitioners to make any necessary adjustments through the amendment process.[18]

These commonsense procedures also dispose of any concern that petitioners could lay the groundwork for an endless host of claims unburdened by the statute of limitations merely by submitting a blank petition and attaching a complete trial record or other voluminous filings. Such a petitioner would have failed to set out any claims in her original petition in the first place, and therefore could not incorporate corresponding facts under the rule we explain here. And the district court would have ample ability to require re-filing to ensure that such a petitioner complied with the particularity-in-pleading requirement.[19]

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[18] For example, if, upon "promptly examin[ing]" Ross's original petition, the district court had concern about a deficiency in that petition, the district court could have informed Ross about the deficiency. *See* Habeas R. 4. Had the court done so, Ross could have simply copied the factual background from the state court order into an amended petition. Indeed, there is every reason to believe Ross would have done precisely this given that he had already tried to incorporate that order by reference in support of his claims. If this rote copying had occurred before the statute of limitations had run, there would be no question that Ross's amended petition would not be time barred.

[19] Although the reasons given above suffice to require reversal here, we also note that courts are obligated to "liberally construe[]" documents filed *pro se*, like Ross's original petition. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Doing so, it is clear that Ross "attempted to . . . set out" the factual background for the claims in his petition by attaching the Nevada Supreme Court's order to it.

III

For the foregoing reasons, claims in Ross's amended petition that share core operative facts in common with those in his original petition relate back to the original petition and should not have been dismissed. But because we do not typically consider in the first instance issues not discussed by the district court, *see Am. President Lines, Ltd. v. Int'l Longshore & Warehouse Union, Alaska Longshore Div., Unit 60*, 721 F.3d 1147, 1157 (9th Cir. 2013), we will not ourselves undertake the full comparison necessary to determine which claims in the amended petition relate back. Rather, we remand for the district court to consider which of the claims in the amended petition (beyond the claim regarding the failure to object to expert testimony, discussed above) are supported by facts incorporated into the original petition.

REVERSED AND REMANDED.

Fed. R. Civ. P. 15(c)(1)(B). The obligation to construe *pro se* filings liberally means courts must frequently look to the contents of a *pro se* filing rather than its form. For example, in *Zichko v. Idaho*, 247 F.3d 1015 (9th Cir. 2001), we concluded that a habeas petitioner had preserved for appeal a particular claim even though facts relating to that claim did not appear in the part of the *pro se* petition in which he labeled and summarized the claim. *Id.* at 1020-21. And in *Woods v. Carey*, 525 F.3d 886 (9th Cir. 2008), we explained that, when a *pro se* petitioner whose habeas petition is pending submits a new petition, the new petition should be construed as a motion to amend the pending petition rather than as a second or successive petition. *Id.* at 888-90; *see also Belgarde v. Montana*, 123 F.3d 1210, 1213 (9th Cir. 1997) (noting that we construe *pro se* petitioners' use of habeas forms "with deference").

IKUTA, Circuit Judge, joined by CALLAHAN and M. SMITH, Circuit Judges, dissenting:

The Federal Rules of Civil Procedure (the Civil Rules) do not automatically apply to habeas proceedings. Instead, the Supreme Court has made clear that courts must first determine whether a Civil Rule is inconsistent with the Habeas Rules or AEDPA, and if so, whether a less expansive reading of the Civil Rule eliminates the conflict. *See Mayle v. Felix*, 545 U.S. 644, 656–64 (2005); *Gonzalez v. Crosby*, 545 U.S. 524, 528–33 (2005). Here, the majority interprets Rule 10(c) in the habeas context to mean that the *facts* contained in "a written instrument that is an exhibit to a" habeas petition are "part of the pleading for all purposes" but only to the extent the facts are arguably related to the petition's grounds for relief. On its face, this interpretation is unworkably broad and complex, saddling district courts with the task of sorting through voluminous attachments to determine which facts correspond to a petition's grounds for relief. In effect, the majority returns us to the gloomy days before the Habeas Rules when judges spent hours deciphering "two thousand pages of irrational, prolix and redundant pleadings." Rule 2, Rules Governing Section 2254 Cases, advisory committee's notes (quoting *Passic v. Michigan*, 98 F. Supp. 1015, 1016 (E.D. Mich. 1951)). Because the majority's interpretation is inconsistent with the Habeas Rules, AEDPA's statute of limitations, and the Supreme Court's guidance on applying Rule 10(c) in this context, *see Dye v. Hofbauer*, 546 U.S. 1, 4 (2005) (per curiam), I dissent.

I

In 2009, Ronald Ross was convicted by a jury of several theft-related offenses. He was sentenced under Nevada's habitual-offender statute, receiving a lifetime term of imprisonment with eligibility for parole after 20 years. Ross appealed his conviction and sentence. The Nevada Supreme Court affirmed.

Ross then filed a pro se petition for post-conviction relief (PCR) in Nevada state court. He attached to the petition a 22-page handwritten memorandum that set forth the factual bases for his claims in greater detail. When the form petition asked for "supporting facts," Ross repeatedly referenced his "supporting memorandum." The state PCR court denied relief, and the Nevada Supreme Court affirmed.

Having exhausted his state-court remedies, Ross filed a timely pro se habeas petition in federal court. Ross used the court-provided form "Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 By a Person in State Custody." The form instructs a petitioner to "[a]ttach to this petition a copy of all state court written decisions regarding this conviction." In boldface, the form warns the petitioner:

> **State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that**

> **relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.**

The form then leads the petitioner step-by-step to provide the necessary information for each claimed ground for relief. For each alleged ground of relief, the form states, "I allege that my state court conviction and/or sentence are unconstitutional, in violation of my _____ Amendment right to _____, based on these facts:_____ ." The form then guides the petitioner to explain how this claim was exhausted in state court.

The final page of the form requires a certification as to the truth of the allegations. This page states in boldface, "**DECLARATION UNDER PENALTY OF PERJURY**," and continues:

> I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.**

The petitioner must then sign and date the form.

In his petition, Ross alleged violations of his Fifth Amendment right to due process, his Sixth Amendment right to counsel, and his Fourteenth Amendment right to due process and equal protection. But each time the petition required a statement that the alleged

constitutional violation was "based on these facts," Ross provided only the following conclusory allegations:

> Counsel was ineffective for failing to:
>
> 1. Secure a speedy trial
> 2. Failed to review evidence and adequately prepare
> 3. Failed to file pretrial motions
> 4. Failed to argue the prejudice of evidence lost prior to trial
> 5. Failed to prepare for jury selection
> 6. Failed to prepare for trial
> 7. Failed to retain defense experts
> 8. Failed to object to the state's use of expert witness.

Ross did not take the opportunity to "attach up to two extra pages stating additional grounds and/or supporting facts." And unlike in state court, where Ross repeatedly referenced a "supporting memorandum," Ross did not indicate that any attached document contained "supporting facts," or even mention any attached document.

Ross did, however, attach several documents to his petition. First, he attached a three-page handwritten affidavit in which he explained that he encountered delays in obtaining a copy of a Nevada Supreme Court ruling on his post-convictions relief claims. Second, he attached a copy of the six-page Nevada Supreme Court

ruling, along with a remittitur and the first page of a letter from his attorney regarding the ruling. But Ross's petition made no mention of the Nevada Supreme Court ruling.

AEDPA's one-year statute of limitations, *see* 28 U.S.C. § 2244(d)(1), expired on October 27, 2014, a little over a month after Ross filed his original petition. On June 8, 2015, nearly eight months after the limitations period expired, Ross's newly appointed counsel filed a 27-page petition styled as a "First Amended Petition for Writ of Habeas Corpus." The new petition raised eleven claims for relief and provided several pages of facts and argument for each of the claims. The state moved to dismiss on the ground that the amended petition was time barred, and the district court granted the motion. This appeal followed.

II

There is no dispute that Ross filed his amended petition after AEDPA's one-year statute of limitations ran. Maj. at 11. To avoid this time bar, Ross argues that the amended petition "relates back" to the date of the original petition under Rule 15(c)(1) of the Federal Rules of Civil Procedure (the Civil Rules).[1]

There is a fatal flaw with Ross's argument: To relate back, the amended petition must assert "a claim or defense that arose out of the conduct, transaction, or

[1] Rule 15(c)(1) provides: "An amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1).

occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1). But as the majority tacitly concedes, *see* Maj. at 9, 12, Ross's original petition contains no well-pleaded factual allegations—indeed, it contains no factual allegations at all. Because the original petition fails to set out any "conduct, transaction, or occurrence," relation back under Rule 15(c)(1) is simply unavailable.

This should be the end of Ross's story. But the majority springs an unexpected twist. According to the majority, the Nevada Supreme Court ruling that is attached to Ross's habeas petition must be deemed to be part of the petition under Rule 10(c) of the Civil Rules. Maj. at 14.[2] But not the entire ruling; rather, the majority explains, only the facts in the ruling that are related to the original petition's "grounds for relief" are incorporated into the petition. Maj. at 16. If any of the facts in the ruling are "unrelated" to the original petition's grounds for relief, they are effectively stricken from the attachment. Maj. at 16. The majority explains that, after determining which facts are incorporated into the original petition, the district court must then determine whether the claims in the amended petition are "supported by facts in the original petition." Maj. at 17 n.6. The majority "emphasize[s]," however, that the correspondence between the facts incorporated by attachment into the

[2] Rule 10(c) states: "Adoption by Reference; Exhibits. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c).

original petition and the new claims need not be that "precise." Maj. at 17 n.6.

It is far from clear what is required under the majority's new rule.

As a threshold matter, the majority is inconsistent. Relying first on the language of Rule 10(c), the majority states that "the original petition consists of the petition itself and any 'written instrument[s]' that are exhibits to the petition" for "all purposes." Maj. at 14. But the majority then skips over the operative language in Rule 10(c)—that the written instrument is "part of the pleading for all purposes"—and instead holds that the original petition includes only *certain* facts set forth in the exhibit— apparently, those facts that can be used for the relation back of a subsequent amended petition. *See* Maj. at 16. This novel approach of using Rule 15(c) to determine the content of a habeas petition from the vantage point of a later, untimely petition has no support in the Civil or Habeas Rules.

Even if this backwards-looking approach made sense, the majority fails to provide district courts with any guidance on how to determine when the facts in an attached exhibit are related to the "grounds for relief asserted in [a] petition." Maj. at 16. The legal claims listed in the form habeas petition are often broad and vague. Here, for instance, Ross's original petition asserts violations of his Fifth Amendment right to Due Process, his Sixth Amendment right to counsel, and his Fourteenth Amendment right to Due Process and Equal Protection, based on conclusory allegations such as "[c]ounsel was ineffective for failing to . . . prepare for trial." How will a district court determine whether

the facts in voluminous attachments, which may include opinions, briefs, and entire trial transcripts, relate to the claim that counsel failed to "prepare for a trial"? The majority does not say. The task may be manageable in this case, where the attachment is a mere six-page judicial opinion. But as the majority implicitly recognizes, a district court must undertake this analysis with respect to any and all attachments to the habeas petition, which could amount to thousands of pages, and the district court must deem any fact in any attachment that even arguably relates to a broad claim to be part of the original petition, at least for purposes of relation back. *See* Maj. at 17 & n.6.

There is a critical problem with such an expansive interpretation and application of Rule 10(c): it is directly contrary to Supreme Court rulings preventing this sort of application of the Civil Rules in the habeas context.

III

The Supreme Court has made clear that "habeas corpus is . . . not automatically subject to all rules governing ordinary civil actions." *Schlanger v. Seamans*, 401 U.S. 487, 490 n.4 (1971) (citing *Harris v. Nelson*, 394 U.S. 286 (1969)). Habeas proceedings are "unique," and so "[h]abeas corpus practice in the federal courts has conformed with civil practice only in a general sense." *Harris*, 394 U.S. at 294. From its inception, habeas corpus was "tempered by a due regard for the finality of the judgment of the committing court." *Schneckloth v. Bustamonte*, 412 U.S. 218, 256 (1973) (Powell, J., concurring).

The Court has likewise made clear that a Civil Rule "applies in habeas corpus proceedings under 28 U.S.C. § 2254 only 'to the extent that [it is] not inconsistent with' applicable federal statutory provisions and rules." *Gonzalez*, 545 U.S. at 529 (footnote omitted) (citation omitted). Specifically, Rule 81(a)(4) of the Civil Rules provides that the Civil Rules apply to habeas proceedings only "to the extent that the practice in those proceedings: (A) is not specified in a federal statute [or the Habeas Rules]; and (B) has previously conformed to the practice in civil actions." Fed. R. Civ. P. 81(a)(4). Similarly, Habeas Rule 12 "'permits application of the [Civil Rules] only when it would be appropriate to do so,' and would not be 'inconsistent or inequitable in the overall framework of habeas corpus.'" *Mayle*, 545 U.S. at 654 (quoting Rule 11, Rules Governing Section 2254 Cases, advisory committee's notes (2004)). Moreover, even beyond a "substantive conflict with AEDPA standards," a Civil Rule cannot be applied if it "could be used to circumvent" habeas-specific procedures. *Gonzalez*, 545 U.S. at 531–32.

In light of the Supreme Court's recognition that courts must "limit the friction" between a Civil Rule and habeas requirements, *id.* at 534, the Court has provided a framework for applying Civil Rules in the habeas context.

First, any interpretation and application of a Civil Rule in the habeas context must be consistent with the corresponding Habeas Rule and the unique nature of habeas proceedings. A court may not adopt an expansive interpretation of a Civil Rule if doing so will interfere with habeas-specific requirements. *See Mayle*,

545 U.S. at 664*; see also Harris*, 394 U.S. at 297 (rejecting a "literal application" of Rule 33, which provides for discovery through interrogatories, to habeas proceedings, because it "would do violence to the efficient and effective administration of" habeas). Thus in *Mayle*, the Court rejected the Ninth Circuit's expansive interpretation of Rule 15(c) as allowing an amended habeas petition to relate back to an original petition merely because both petitions related to the "same trial, conviction, or sentence." 545 U.S. at 662. According to the Court, the Ninth Circuit's interpretation interfered with Habeas Rule 2(c), which required that habeas petitioners plead with particularity. *Id.* at 661. Before applying a Civil Rule in the habeas context, therefore, courts must determine whether doing so is consistent with the corresponding Habeas Rule, and if not, the extent to which the two can be harmonized by applying the Civil Rule "less broadly." *Id.* at 657.

Second, any application of a Civil Rule must be consistent with AEDPA, and AEDPA's goal of "advanc[ing] the finality of criminal convictions." *Id.* at 662. In light of this goal, the Supreme Court held that Rule 60, which provides for relief from final judgments or orders, applies only narrowly in the habeas context so as to avoid circumventing AEDPA's general prohibition on second or successive petitions. *See Gonzalez*, 545 U.S. at 531–33; *see also Pitchess v. Davis*, 421 U.S. 482, 489–90 (1975) (declining to apply Rule 60 when doing so would be inconsistent with statutory exhaustion requirement). Similarly, courts must be "mindful of Congress' decision to expedite collateral attacks by placing stringent time restrictions

on [them]." *Mayle*, 545 U.S. at 657 (citation omitted). Given AEDPA's concerns with "finality" and "federalism," it imposes "a tight time line, a one-year limitation period" on habeas petitions. *Id.* at 662–63. Courts may not apply a Civil Rule to a habeas proceeding in a way that "swallow[s] AEDPA's statute of limitation." *Id.* (quoting *Felix v. Mayle*, 379 F.3d 612, 619 (9th Cir. 2004) (Tallman, J., concurring in part and dissenting in part), *rev'd*, *Mayle v. Felix*, 545 U.S. 644 (2005)). Thus, if applying a Civil Rule in the habeas context would give AEDPA's statute of limitations "slim significance," *id.* at 662, courts should apply the rule "less broadly" to account for AEDPA's policy concerns regarding finality, *id.* at 657.

IV

The majority makes a fundamental error in adopting an interpretation of the Rule 10(c) and applying it in the habeas context without even considering the Supreme Court's guidance for ensuring consistency with the Habeas Rules, the unique nature of habeas, and AEDPA. Maj. at 15–17. As a result, the majority's interpretation conflicts with all three.

A

First, the majority's interpretation of Rule 10(c) is inconsistent with the corresponding Habeas Rule and with the proper administration of habeas proceedings. *See Mayle*, 545 U.S. at 661, *Gonzalez*, 545 U.S. at 531–33. The corresponding rule here is Habeas Rule 2, which governs the form of habeas petitions. *See* Rule 2, Rules Governing Section 2254 Cases, advisory committee's notes. Habeas Rule 2 provides that "[t]he

petition must: (1) specify all grounds for relief available to the petitioner; (2) state all facts supporting each ground; (3) state the relief requested; (4) be printed, typewritten, or legibly handwritten; and (5) be signed under penalty of perjury . . . .” Rule 2(c), Rules Governing Section 2254 Cases. The petition must also “substantially follow either the form appended to [the Habeas Rules] or a form prescribed by a local district-court rule.” Rule 2(d), Rules Governing Section 2254 Cases. The majority’s expansive interpretation of Rule 10(c) is contrary to Habeas Rule 2 in three material ways.

First, the majority’s interpretation of Rule 10(c) violates the requirement imposed by Habeas Rule 2(c) that the petition specify the grounds for relief and the facts supporting each ground. The Habeas Rules’ specificity requirement is one of the unique features of habeas proceedings. *See Mayle*, 545 U.S. at 649. It is distinct from the pleading requirements in the civil context, *see* Fed. R. Civ. P. 8(a)(2), which requires that a complaint merely provide “fair notice of what the plaintiff’s claim is and the grounds upon which it rests,” *see Mayle*, 545 U.S. at 655 (citation omitted). As explained by the Supreme Court, Habeas Rule 2(c) “is more demanding.” *Id.* “It provides that the petition must ‘specify all the grounds for relief available to the petitioner’ and ‘state the facts supporting each ground.’” *Id.* (quoting Rule 2(c), Rules Governing Section 2254 Cases).

This specificity requirement is necessary to assist courts in fulfilling the Habeas Rules’ screening function. Under Habeas Rule 4, courts must “promptly

examine" each petition, and dismiss a petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4, Rules Governing Section 2254 Cases. This reflects a congressional command, *see* 28 U.S.C. §2243, which makes it "the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer," Rule 4, Rules Governing Section 2254 Cases, advisory committee's notes (citing *Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970)).

By departing from Habeas Rule 2(c)'s specificity requirement, the majority's interpretation of Rule 10(c) frustrates this screening function. Under the majority's take on Rule 10(c), a petitioner need not state claims and facts with specificity because the facts recited in any attached document, whether it is a judicial opinion, a brief, or an entire trial transcript, are deemed to be part of the petition so long as the facts are arguably related to the petition's claims for relief. Maj. at 16–17. Because any exhibit can serve as a source of facts, a court cannot perform its screening function without searching through the attachments and speculating as to which facts support which claims. Moreover, the court's screening obligations are vitiated by a petitioner's ability to bring an "amended" petition at any time by relying on facts referenced in attached documents, so long as they are arguably related to the claims in the original petition. Therefore, the majority's interpretation of Rule 10(c) interferes with "the efficient and effective administration" of habeas. *Harris*, 394 U.S. at 297.

The majority's argument that it can ignore the conflict between its reading of Rule 10(c) and Habeas Rule 2(c) on the ground that "[Habeas] Rule 2(c) sets forth only a pleading requirement" is unavailing. Maj. at 19. As the majority acknowledges, the threshold question in this case is whether the facts in an attachment can be considered part of a habeas petition for purposes of relation back. Maj. at 15. Habeas Rule 2 "describes the requirements of the actual petition, including matters relating to its form, *contents*, *scope*, and sufficiency." Rule 2, Rules Governing Section 2254 Cases, advisory committee's notes (emphasis added). It is precisely because Habeas Rule 2 sets forth a "pleading requirement," Maj. at 19, that it controls to the extent a Civil Rule, such as Rule 10(c), could expand the "contents" or "scope" of a habeas petition beyond that contemplated by Habeas Rule 2, *see* Rule 12, Rules Governing Section 2254 Cases (Civil Rules apply only "to the extent they are not inconsistent" with Habeas Rules). The majority attempts to gloss over the conflict between its application of Rule 10(c) and Habeas Rule 2 by focusing instead on the "generous" language of Rule 15(c)(1)(B), Maj. at 19, but this is merely a straw man. Rule 15(c)(1)(B) does not address the contents of the original habeas petition, and so it has no bearing on the question whether the majority's application of Rule 10(c) to modify the contents of the habeas petition is inconsistent with the requirements of Habeas Rule 2.

Second, the majority's interpretation of Rule 10(c) conflicts with Habeas Rule 2(d)'s requirement that petitioners use a standardized form. The standardized form requirement is a unique feature of habeas,

distinguishing habeas petitions from civil complaints. *Compare* Rule 2(d), Rules Governing Section 2254 Cases *with* Fed. R. Civ. P. 8(a). There are habeas-specific reasons for this rule. Because habeas petitioners are frequently pro se prisoners, *see* 1 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice & Procedure § 12.2, at 852 (7th ed. 2018), the requirement to use a standardized form was calculated to improve the quality of the habeas petition and to assist judges in identifying meritorious claims, *see* Rule 2, Rules Governing Section 2254 Cases, advisory committee's notes ("Administrative convenience, of benefit to both the court and the petitioner, results from the use of a prescribed form.").[3] Before this requirement, petitions "frequently contained mere conclusions of law, unsupported by any facts." *Id.* "In addition, lengthy and often illegible petitions, arranged in no logical order, were submitted to judges who . . . had to spend hours deciphering them." *Id.* The standardized form in this case instructs petitioners that they "may attach up to two extra pages stating additional grounds and/or supporting facts." Limiting petitions to "two extra pages" of additional facts makes sense in light of the concerns that motivated the

[3] The majority "note[s] that courts [must] 'liberally construe[]' documents filed pro se." Maj. at 26 n.19. But the form habeas petitions like the one Ross used were designed to assist prisoners filing pro se. *See* Rule 2, Rules Governing Section 2254 Cases, advisory committee's notes. These petitions provide clear, step-by-step instructions in plain English and give prisoners ample guidance for setting out their claims and the facts supporting them. Given these substantial efforts to accommodate pro se filers, there appears to be no basis for further relaxing procedural requirements.

Habeas Rules. *See* Rule 2, Rules Governing Section 2254 Cases, advisory committee's notes.

The majority's interpretation of Rule 10(c) eliminates the value of this requirement, because it requires courts to deem attached materials part of the petition. Maj. at 14. The majority does not acknowledge that Ross failed to comply with the form petition. *See* Maj. at 9, 23 n.15. Indeed, the majority casts aside the form petition's instructions and the requirement that a petitioner "substantially follow" the form, Rule 2(d), Rules Governing Section 2254 Cases, by interpreting Rule 10(c) to allow petitioners to attach reams of documents, all of which may contain facts that correspond to the petition's claims for relief, Maj. at 16–17.[4] In doing so, the majority strikes a blow to "the efficient and effective administration" of habeas, *Harris*, 394 U.S. at 297, and returns judges to the task of ferreting through thousands of pages of "irrational, prolix and redundant pleadings," Rule 2, Rules

[4] The majority does not go so far as to argue that Ross "substantially follow[ed]" the requirements of the form petition. Maj. at 23 n.15. Instead, the majority argues that Ross might have been confused by the instruction (on page 1) to "[a]ttach to th[e] petition a copy of all state court written decisions regarding this conviction" and the separate instruction (on page 3) that "[y]ou may attach up to two extra pages stating additional grounds and/or supporting facts." There is nothing "apparent[ly] inconsisten[t]" with these instructions, Maj. at 23 n.15, because no reasonable petitioner would think that attaching "all state court written decisions" is the same as "*stating* additional grounds and/or supporting facts," particularly given that these instructions appear in separate sections on separate pages of the form petition. In short, the majority's post-hoc rationalization as to why Ross did not follow the instructions is unsupported by the record and belied by common sense.

Governing Section 2254 Cases, advisory committee's notes (quoting *Passic*, 98 F. Supp. at 1016). This will result in the very thing the Habeas Rules—and form petitions specifically—were designed to prevent: an increased burden on the judicial system and an increase in length, and corresponding decrease in quality, of habeas petitions. *See id.*

Finally, the majority's interpretation of Rule 10(c) renders the Habeas Rules' penalty-of-perjury requirement meaningless. A petitioner cannot reasonably be considered to have verified the accuracy of factual statements included in hundreds or thousands of pages of documents from a range of sources. *See* Rule 2(c)(5), Rules Governing Section 2254 Cases.[5] By effectively relieving pro se petitioners of the responsibility to verify the accuracy of the facts alleged in a habeas petition, the majority undermines one of the important means of improving the quality of habeas pleadings and better enabling the courts to identify meritorious claims. *See* Rule 2, Rules Governing Section 2254 Cases, advisory committee's notes ("There is a penalty for perjury, and this would seem the most appropriate way to try to discourage it."). Again, this penalty-of-perjury requirement is a unique feature of habeas proceedings, and is based on habeas-specific reasons. *Cf.* Fed. R. Civ. P. 11(a) ("Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit.").

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[5] This requirement reflects a congressional command. *See* 28 U.S.C. § 2242 ("Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.").

The majority does not attempt to address the inconsistency of its interpretation and application of Rule 10(c) with Habeas Rule 2. Instead, the majority directs a court considering a late petition to allow (or solicit) "briefing to better explain the relationship between the amended petition and the original one," and to allow the petitioner the opportunity to identify "the particular facts from an attachment that support each claim for relief." Maj. at 24– 25. This approach tacitly concedes there may be no obvious relationship between the original petition and the new one. Indeed, in this very case, where the exhibit is a brief, six-page ruling, the majority nevertheless declines to "undertake the full comparison necessary to determine which claims in the amended petition relate back." Maj. at 27.

In sum, the majority's interpretation of Rule 10(c) conflicts with Habeas Rule 2 and does so in a way that frustrates the "the efficient and effective administration" of habeas. *Harris*, 394 U.S. at 297. It should be rejected on this ground alone.

B

Second, the majority's interpretation of Rule 10(c) is inconsistent with AEDPA. As *Mayle* explained, we may not apply a Civil Rule in a manner that would "swallow AEDPA's statute of limitation," 545 U.S. at 662 (citation omitted), but rather must respect Congress's decision to put "stringent time restrictions" on collateral attacks, *id.* at 657.

The majority's interpretation and application of Rule 10(c) conflicts with these instructions. If each attachment to a habeas petition can serve as a wellspring of facts to support new claims for relief in a subsequent petition, petitioners will lay the groundwork for a host of claims that will relate back merely by pleading broad, malleable claims for relief and then following the form's instructions to "[a]ttach to this petition a copy of all state court written decisions regarding this conviction." Because a petitioner apparently needs only a colorable argument that facts in an attachment relate to a broad claim in the original petition, any reasonable petitioner will assert broad claims for relief and attach reams of documents to preserve a full panoply of claims that can be revived after AEDPA's limitations period runs. Thus, under the majority's reasoning, a petitioner's amended habeas petition will rarely be barred by AEDPA's statute of limitations. *See* Maj. at 15–17.

The majority does not address the inconsistency between its interpretation of Rule 10(c) and AEDPA. As the majority implicitly acknowledges, an attorney can sidestep AEDPA's statute of limitations merely by explaining how facts buried in hundreds of pages of exhibits relate to the claims for relief in the original petition and then argue that the entirely new claims in the amended petition relate to those facts. Maj. at 15–17. The majority fails to explain how this result can be squared with *Mayle*'s warning that "it would be anomalous" to apply an inappropriately broad reading of a Civil Rule in the habeas context so as to avoid AEDPA's stringent time restrictions. 545 U.S. at 663. Thus, the majority's reading of Rule 10(c) "swallow[s]

AEDPA's statute of limitation," *Mayle*, 545 U.S. at 662 (citation omitted), in direct contradiction to the Supreme Court's specific direction in *Mayle*. In applying Rule 10(c) in a way that gives AEDPA's statute of limitations "slim significance," *id.* at 662, the majority disregards "AEDPA's 'finality' and 'federalism' concerns," *id.* at 663.

C

Rather than tailor its interpretation of Rule 10(c) to be consistent with the Habeas Rules and AEDPA, as required by the Supreme Court, the majority attempts to justify its rejection of this guidance on the ground that the Supreme Court cited and applied Rule 10(c) in *Dye*, 546 U.S. at 4. Maj. at 14. But *Dye* does not support the majority. To the contrary, it demonstrates how Rule 10(c) should be interpreted narrowly to avoid conflicts in the habeas context. *See Dye*, 546 U.S. at 4.

In *Dye v. Hofbauer*, the Sixth Circuit dismissed a state prisoner's habeas petition on the ground that the petitioner failed to exhaust his claim of prosecutorial misconduct in state court. 111 F. App'x 363, 364 (6th Cir. 2004), *rev'd*, 546 U.S. 1 (2005). The Sixth Circuit reasoned that the petitioner's federal habeas petition made only a vague reference to a due process violation; therefore, even if the petitioner had presented an identical claim in his state petition, he had not "fairly presented" a federal constitutional claim to the state court. *Id.* The Supreme Court reversed. Citing Rule 10(c) and Rule 81(a)(2) (which then provided that the Civil Rules apply to habeas proceedings only "to the extent" consistent with the Habeas Rules and historical practice), the Court held that the petitioner had

adequately exhausted his claims because the "petition made clear and repeated references to an appended [state-court] brief, which presented [the petitioner's] federal claim with more than sufficient particularity." *Dye*, 546 U.S. at 4. In other words, rather than rely on Rule 10(c)'s broad language that a document attached to a pleading "is a part of the pleading for all purposes," the Court held that only when a habeas petition "ma[kes] clear . . . reference[]" to an attachment, may a court consider the attachment under Rule 10(c) to clarify the allegations in the petition. *Id.*

Contrary to the majority's reading, Maj. at 14, by focusing on the petitioner's "clear and repeated references" to the attachment, *Dye* implicitly rejected the majority's interpretation of Rule 10(c). *Dye*'s narrow application of Rule 10(c) is consistent with the Habeas Rules, the unique nature of habeas proceedings, and AEDPA. The incorporation by reference of an attachment, which itself was sufficiently particular, is consistent with the specificity requirements of Habeas Rule 2(c). *See* Rule 2(c), Rules Governing Section 2254 Cases. A targeted incorporation of specific facts allows the petitioner to comply with the Habeas Rules' penalty-of-perjury requirement, *see* Rule 2(c)(5), Rules Governing Section 2254 Cases, because the petitioner can rationally identify the specific facts verified to be true. And *Dye*'s narrow interpretation of Rule 10(c) is consistent with AEDPA's statute of limitations, because the incorporation of targeted facts in a specified exhibit does not give a petitioner an unbounded opportunity to later raise a wide range of other claims after AEDPA's one-year limitations period has run. *Cf. Mayle*, 545 U.S. at 662.

V

Applying Rule 10(c) as it was applied in *Dye*, and in a manner consistent with the Supreme Court's framework, the analysis of Ross's challenge is straightforward. Ross's original petition does not make "clear . . . reference[]" to the Nevada Supreme Court ruling attached to his petition. Ross knew how to incorporate an appended document by reference; he did exactly that in his state petition. Because he did not reference the Nevada Supreme Court ruling in his federal habeas petition, it was not incorporated into his petition under Rule 10(c) and *Dye*, 546 U.S. at 4. This means that his original petition failed to set out any "conduct, transaction, or occurrence." Fed. R. Civ. P. 15(c)(1)(B). In the absence of any "congeries of facts," *Mayle*, 545 U.S. at 661, in the original petition, the amended petition could not relate back to a core of operative facts in the original petition. As a result, Ross's amended petition does not relate back to the original petition under Rule 15(c), and the claims in the amended petition are time-barred.[6]

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[6] Because the proper analysis of Rule 10(c) resolves this case, there is no need to analyze whether Rule 15(c) applies to the amended petition. Nevertheless, any interpretation and application of that rule in the habeas context must also meet the Supreme Court's requirement that an application of the Civil Rules be consistent with the Habeas Rules, habeas procedures, and AEDPA. The majority's broad interpretation of Rule 15(c) as giving courts expansive authority to find "[s]ufficient correspondence" between a claim in the amended petition and a "corresponding factual episode" in the original petition, Maj. at 15–16, and the majority's "emphasi[s] that the correspondence need not be as precise" as the example in its opinion, Maj. at 17 n.6, is mistaken, *cf. Mayle*, 545 U.S. at 661 (rejecting Ninth Circuit's "boundless" approach to Rule

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By applying Rule 10(c) to a habeas petition without giving due consideration to the habeas context, the majority violates the Supreme Court's direction for applying the Civil Rules in this context and creates an approach inconsistent with the Habeas Rules and with Congress's intention to impose strict time limits on habeas petitions. Further, the majority turns its back on the Supreme Court's guidance for applying Rule 10(c) in the habeas context, which makes clear that an exhibit is incorporated into a habeas petition only when the petition makes "clear . . . reference[] to" the exhibit. *Dye*, 546 U.S. at 4. The majority's approach is squarely at odds with AEDPA and the Habeas Rules, and it places a substantial burden on the judicial system. Therefore, I dissent.

15(c) because "[a] miscellany of claims for relief could be raised later rather than sooner and relate back"). Similarly, the majority's reliance on *Dean v. United States*, 278 F.3d 1218, 1222 (11th Cir. 2002) (per curiam), to suggest that an amended petition might relate back to an original petition even if the original petition "provide[s] no factual support at all" is misplaced. Maj. at 19–20 & n.9. This is because *Mayle* (which postdates *Dean*) rejected such a boundless application of Rule 15(c)(1)(B) by holding that "separate *congeries of facts* supporting the grounds for relief . . . delineate an 'occurrence.'" 545 U.S. at 661 (emphasis added). That is, there is no "conduct, transaction, or occurrence" if there are no "congeries of facts."

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 2:14-cv-01527-JCM-PAL

[Filed July, 19, 2018]

RONALD ROSS,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
WILLIAMS, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA,	)
	)
Respondents-Appellees.	)

OPINION

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, Senior District Judge, Presiding

Argued and Submitted December 5, 2017
San Francisco, California

Before: Milan D. Smith, Jr. and Sandra S. Ikuta, Circuit Judges, and John D. Bates,[*] District Judge.

Opinion by Judge Ikuta;
Dissent by Judge Bates

SUMMARY[**]

Habeas Corpus

The panel affirmed the district court's judgment dismissing as untimely California state prisoner Ronald Ross's amended habeas corpus petition brought pursuant to 28 U.S.C. § 2254.

Ross argued that the claims in his new petition, prepared with the assistance of counsel, arose out of facts set out in a state court order attached to his pro se original petition, and that the district court therefore erred in failing to apply the relation back doctrine in Fed. R. Civ. P. 15(c).

The panel held that because Ross did not comply with Rule 2(c) of the Rules Governing Section 2254 Cases either directly or by incorporating (or attempting to incorporate) the facts in the Nevada Supreme Court affirmance into his original petition, that petition does not provide an aggregation of facts that can support the

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[*] The Honorable John D. Bates, United States Senior District Judge for the District of Columbia, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

claims in his amended petition. The panel concluded that the district court therefore did not err in concluding that Ross's amended petition cannot relate back to the claims in his original petition.

Dissenting, District Judge Bates wrote that this court should liberally construe Ross's pro se original petition as setting out facts discussed in the attached state court decision, and should then remand for the district court to determine in the first instance whether the claims in the amended petition arose out of the conduct, transaction, or occurrence set out in his original petition.

COUNSEL

Jonathan M. Kirshbaum (argued), Assistant Federal Public Defender; Rene L. Valladares, Federal Public Defender; Office of the Federal Public Defender, Las Vegas, Nevada; for Petitioner-Appellant.

Lawrence VanDyke (argued), Solicitor General; Matthew S. Johnson, Deputy Attorney General; Adam Paul Laxalt, Attorney General; Office of the Attorney General, Carson City, Nevada; for Respondents-Appellees.

OPINION

IKUTA, Circuit Judge:

Ronald Ross filed an amended habeas petition eight months after the statute of limitations under Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) had run. The district court dismissed it as

untimely and rejected Ross's argument that it related back to his original, timely petition. Ross argues that the claims in his new petition arose out of facts set out in a state court order attached to his original petition, and therefore the district court erred in failing to apply the relation back doctrine in Rule 15(c) of the Federal Rules of Civil Procedure (Civil Rule 15(c)). Because the facts set out in the state court order were not clearly incorporated into Ross's original petition, and Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rule 2) precludes the court from construing the petition as incorporating such facts, we affirm.

I

In 2009, Ronald Ross was convicted by a Nevada jury of several theft-related offenses. Ross, who had at least five prior felony convictions, including one for larceny, was sentenced under Nevada's habitual offender statute to a lifetime term of imprisonment with parole eligibility after 20 years. *See* Nev. Rev. Stat. §§ 207.010–.016. Ross timely appealed his conviction and sentence, and on November 8, 2010, the Nevada Supreme Court affirmed. Because Ross did not petition for certiorari, the Nevada Supreme Court's judgment became final on February 7, 2011, and AEDPA's one-year limitation period for Ross to file a federal habeas petition began to run. *See* 28 U.S.C. § 2244(d)(1)(A).

On November 30, 2011, Ross timely filed a pro se petition for post-conviction relief (PCR) in Nevada state court, temporarily tolling the one-year period for his federal habeas petition. *See* 28 U.S.C. § 2244(d)(2).

Ross asserted five claims for relief, including violations of his right to a speedy trial, and various theories of ineffective assistance of counsel. Ross also attached a 22-page handwritten memorandum, setting forth in great detail the factual bases for his claims. Ross repeatedly referred to this memorandum when the form petition asked for "supporting facts" for his claims. After Ross was appointed counsel, he filed a supplemental PCR petition, asserting six specific claims, as well as a claim that the cumulative effect of the alleged errors amounted to ineffective assistance of counsel.

The state trial court denied Ross's amended PCR petition, and the Nevada Supreme Court affirmed on July 30, 2014. The Nevada Supreme Court's affirmance identified and rejected eight specific arguments for ineffective assistance of counsel, in addition to the cumulative error claim.[1] The Nevada Supreme Court's

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[1] The Nevada Supreme Court addressed Ross's claims that his counsel was ineffective for:

(1) "failing to engage in pretrial discovery";

(2) "violating [Ross's] right to a speedy trial";

(3) allowing "a communication breakdown [that] prevented [Ross] from being able to assist counsel in the preparation of his defense";

(4) "failing to object to expert testimony";

(5) "failing to retain a defense expert";

(6) "failing to properly challenge the use of a preliminary-hearing transcript";

(7) "failing to renew at trial his preliminary-hearing objection for violating the best evidence rule"; and

remittitur issued on August 18, 2014, and AEDPA's one-year limitation period began to run again the next day. *See* 28 U.S.C. § 2244(d)(2); *Jefferson v. Budge*, 419 F.3d 1013, 1015 n.2 (9th Cir. 2005).

On September 14, 2014, Ross filed a timely pro se habeas petition in the U.S. District Court for the District of Nevada. Ross used the form "Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 By a Person in State Custody" promulgated by that district court in its local rules. *See* Habeas R. 2(d).[2] The habeas petition form stated: "Attach to this petition a copy of all state court written decisions regarding this conviction." The habeas petition form also provided detailed instructions, which guided habeas petitioners on how to fill in the blanks in each section of the form in order to explain each of their separate grounds for relief. The form begins with the instruction that the petitioner should "[s]tate concisely every ground" for habeas relief and "[s]ummarize briefly the facts supporting each ground." It also provided that Ross could "attach up to two extra pages stating additional grounds and/or supporting facts." The form further cautioned that Ross "must raise in this petition all grounds for relief that relate to this conviction. Any

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(8) "failing to raise certain objections during the State's closing arguments and at sentencing and for failing to move post-verdict to dismiss the case for lack of evidence."

[2] As discussed in detail, *infra* Part III.A, the Rules Governing Section 2254 Cases in the United States District Courts (or "Habeas Rules") apply to Ross's petition. Habeas Rule 2(d) provides that "[t]he petition must substantially follow either the form appended to these rules [(the national form)] or a form prescribed by a local district-court rule."

grounds not raised in this petition will likely be barred from being litigated in a subsequent action."

At the top of the template for each ground for relief, the form contained the following sentence "I allege that my state court conviction and/or sentence are unconstitutional, in violation of my ___ Amendment right to _____, based on these facts: _____ . . . ." Ross alleged three grounds for relief in the space provided by the form, alleging 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. In the space provided for supporting facts, however, Ross wrote substantially the same thing under each ground:

> Counsel was ineffective for failing to:
>
> 1) Secure a speedy trial
> 2) Failed to review evidence and adequately prepare
> 3) Failed to file pretrial motions
> 4) Failed to argue the prejudice of evidence lost prior to trial
> 5) Failed to prepare for jury selection
> 6) Failed to prepare for trial
> 7) Failed to retain defense experts
> 8) Failed to object to the state's use of expert witness.

Ross also attached a handwritten affidavit explaining the reasons for his delay in obtaining a copy of the Nevada Supreme Court's ruling. Ross's affidavit explained that he was not listed on either the distribution list for the Nevada Supreme Court's order of affirmance on July 22, 2014,[3] nor on the distribution list for the court's remittitur on August 18, 2014. The affidavit further alleged that Ross did not receive a copy of the order of affirmance until September 11, 2014, as demonstrated by his signature and time stamp on the front of the envelope. To document both his absence from the distribution lists and the date he received the order of affirmance, he attached: (1) a copy of the Nevada Supreme Court's order of affirmance; (2) a copy of the Nevada Supreme Court's remittitur; (3) an envelope from his counsel; and (4) a letter from his counsel dated September 2, 2014, transmitting a copy of the Nevada Supreme Court's order. The district court appointed counsel for Ross, and on June 8, 2015, Ross filed an amended petition, raising 11 grounds for relief.[4] This petition was filed nearly eight months after

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[3] Ross's affidavit stated: "[O]n the date of 22 July 2014, the Nevada Supreme Court issued an Order of Affirmance denying the appeal of my state post-conviction writ of habeas corpus (see attached order). That it is noticed that petitioner Ronald Ross is *not* listed on the distribution for the order of affirmance."

[4] These were that: (1) Ross's Sixth Amendment confrontation right was violated when "the prosecution was allowed to admit the preliminary hearing testimony of a witness even though the prosecution did not make a sufficient showing that the witness was unavailable"; (2) Ross's Sixth Amendment right to a speedy trial was violated "when the case was continued at the state's request for 541 days"; (3) the evidence against Ross was insufficient to support his conviction; and (4) Ross's Sixth Amendment right to

AEDPA's one-year limitation period had expired. After the district court ordered a response, the state moved to dismiss Ross's amended petition as barred by the statute of limitations. The district court granted Nevada's motion to dismiss. It rejected Ross's argument that the facts contained in the Nevada Supreme Court's order of affirmance were incorporated in the original petition, and therefore rejected his contention that the claims in his new petition related back to the date of the original pleading. Nevertheless, the court granted a certificate of appealability on that issue.

We have jurisdiction under 28 U.S.C. § 2253, and we review de novo a district court's dismissal of an application for a writ of habeas corpus. *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir. 2001).

II

Ross does not dispute that his new petition would be barred by the AEDPA statute of limitations unless it relates back to the original petition pursuant to Civil

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counsel was violated when trial counsel failed (a) to "protect Ross's right to a speedy trial"; (b) to "communicate with [Ross] prior to trial"; (c) to "seek [an] appropriate sanction" for the state's failure to preserve the allegedly exculpatory surveillance video; (d) to "object based on [the] best evidence rule" to a police detective's testimony about the content of that video; (e) to object to the detective's testimony about "distract thefts," which Ross argued was expert testimony; (f) to call a defense expert to rebut the detective's testimony; (g) to object to the admission of the preliminary hearing testimony that allegedly violated Ross's confrontation rights; and (h) to "raise mitigating arguments at sentencing."

Rule 15(c). We therefore begin by considering the requirements of this rule in the habeas context.

Civil Rule 15(c) allows an amendment to a pleading after the statute of limitations has run to relate back to the original pleading if it arises out of the same "conduct, transaction, or occurrence." Fed. R. Civ. P. 15(c). This rule is applicable to a habeas petition. *See Mayle v. Felix*, 545 U.S. 644, 655 (2005). "The 'original pleading' to which Rule 15 refers is *the complaint* in an ordinary civil case, and *the petition* in a habeas proceeding." *Id.* (emphasis added).

Mayle provides guidance on what constitutes the same "conduct, transaction, or occurrence" in the context of a habeas petition. *Id.* at 656–59. The petitioner in that case had raised to the state court a Fifth Amendment claim based on the admission of statements made during the petitioner's pretrial interrogation and a Sixth Amendment claim based on the admission of videotaped statements made by a prosecution witness. *Id.* at 650. In a timely *pro se* habeas petition, the petitioner raised the Sixth Amendment claim, but not the Fifth Amendment claim. *Id.* at 651. Five months after AEDPA's statute of limitations had run, the petitioner sought to amend his petition to include a Fifth Amendment claim, arguing that the claim could relate back under Civil Rule 15(c) because "both . . . claims challenged the constitutionality of the same criminal conviction." *Id.* at 652. The Ninth Circuit agreed, reasoning that "the relevant 'transaction' for purposes of Rule 15(c)(2) was [petitioner's] 'trial and conviction in state court.'" *Id.* at

653 (quoting *Felix v. Mayle*, 379 F.3d 612, 615 (9th Cir. 2004)).

The Supreme Court rejected this interpretation of "conduct, transaction, or occurrence." *Id.* at 659. Instead, *Mayle* held that "relation back depends on the existence of a common core of operative facts uniting the original and newly asserted claims." *Id.* (internal quotation marks and citation omitted). Even though petitioner's Sixth Amendment confrontation claim and Fifth Amendment privilege against self-incrimination claim made constitutional challenges to the admission of pretrial statements, these claims had to be "pleaded discretely" because they involved "separate congeries of facts supporting the grounds for relief," under Habeas Rule 2(c). *Id.* at 661. Each of these "separate congeries of facts," *Mayle* explained, "would delineate an 'occurrence.'" *Id.* In other words, for purposes of Civil Rule 15(c), an "occurrence" is an aggregation of facts supporting a discrete claim for relief, and a new claim must arise from the same aggregation of facts set forth in the earlier petition in order to relate back. An amendment cannot relate back to "facts that differ in both time and type from those the original [petition] set forth." *Id.* at 650.

Mayle also highlighted the flaws in the rejected Ninth Circuit approach, under which "[a] miscellany of claims for relief could be raised later rather than sooner and relate back." *Id.* at 661. According to the Supreme Court, such an approach, which would define "conduct, transaction, or occurrence" to "encompass any pretrial, trial, or post-trial error that could provide a basis for challenging the conviction," would not only be

too general, but would be contrary to Congress's intent in enacting the AEDPA statute of limitations. *Id.* at 661–62. "Congress enacted AEDPA to advance the finality of criminal convictions," in part by adopting a tight time line. *Id.* at 662. "If claims asserted after the one-year period could be revived simply because they relate to the same trial, conviction, or sentence as a timely filed claim, AEDPA's limitation period would have slim significance." *Id.* "Given AEDPA's 'finality' and 'federalism' concerns," *Mayle* held that this interpretation of Civil Rule 15's application to habeas proceedings was untenable. *Id.* at 663 (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)).

In light of *Mayle*'s strictures, Ross's amended petition may relate back to the original petition only if that petition set forth an aggregation of facts from which his new claims arise. The petition form contains no facts at all. Instead, Ross argues that the facts set forth in the Nevada state court affirmance are incorporated into the habeas petition, and the claims in his amended petition arose out of those facts. We now analyze this argument.

III

Our first step is to determine when, under the applicable federal rules, an attachment to a habeas petition is deemed to be incorporated into that petition. This issue requires us to interpret the Habeas Rules.

A

The Habeas Rules "govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254" by a state prisoner. Habeas R.

1(a). Like the Federal Rules of Evidence and the Civil Rules, the Habeas Rules are promulgated by the Supreme Court pursuant to the Rules Enabling Act, 28 U.S.C. § 2072,[5] *see* H.R. Rep. 94-1471, at 2 & n.2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2478, 2479, and therefore are "in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard [a] Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988). As with other federal rules, the Advisory Committee notes to the Habeas Rules "provide a reliable source of insight into the meaning of a rule." *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002); *see also Heinemann v. Satterberg*, 731 F.3d 914, 917 (9th Cir. 2013) ("We pay attention to the Advisory Committee Notes.").

The Habeas Rules incorporate some, but not all, of the Civil Rules. Habeas Rule 12 provides that the Civil Rules "to the extent that they are not inconsistent with any statutory provisions or these [Habeas Rules] may be applied to a proceeding under these rules." *See also* Fed. R. Civ. P. 81(a)(4) (providing that the Civil Rules apply to proceedings for habeas corpus "to the extent that the practice in those proceedings" is not specified

[5] The Supreme Court initially promulgated the Habeas Rules in 1976 pursuant to authority conferred by 18 U.S.C. §§ 3771–72 (1976) (criminal proceedings) and 28 U.S.C. § 2072 (1976) (civil proceedings). *See* H.R. Rep. 94-1471 at 2 n.2. The Rules Enabling Act was subsequently amended by repealing 18 U.S.C. §§ 3771–72 and consolidating the authority to promulgate rules for both civil and criminal proceedings in 28 U.S.C. § 2072. *See* Judicial Improvements and Access to Justice Act, Pub. L. 100-702, §§ 401–04, 102 Stat. 4642, 4648–4651 (1988).

in "the Rules Governing Section 2254 Cases," among other rules). In determining whether application of the Civil Rules would be inconsistent with statutes or the Habeas Rules, courts must take into account "the overall framework of habeas corpus." *Mayle*, 545 U.S. at 654 (quoting Habeas R. 12 advisory committee's note).[6] Habeas Rule 12 "permits application of the civil rules only when it would be appropriate to do so." Habeas R. 12 advisory committee's note.

Habeas Rule 2 sets forth the requirements for the form and content of a habeas petition. Habeas Rule 2(c) specifies the content of the petition. Under this rule, the petition must "specify all grounds for relief available to the petitioner," "state the facts supporting each ground," "state the relief requested," and "be signed under penalty of perjury," among other requirements.[7] Habeas Rule 2(d) provides that the petition must "substantially follow either the form

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[6] Habeas Rule 12 was formerly Habeas Rule 11, but was renumbered in 2009. *See* Habeas R. 12 advisory committee's note to 2009 amendment.

[7] Habeas Rule 2(c) provides in full:

> The petition must:
>
> (1) specify all the grounds for relief available to the petitioner;
>
> (2) state the facts supporting each ground;
>
> (3) state the relief requested;
>
> (4) be printed, typewritten, or legibly handwritten; and
>
> (5) be signed under penalty of perjury by the petitioner or by a person authorized to sign it for the petitioner under 28 U.S.C. § 2242.

appended" to the Habeas Rules or "a form prescribed by a local district court rule."[8]

The Advisory Committee explained the reasons for this requirement. Before the enactment of Habeas Rule 2, habeas petitions had "frequently contained mere conclusions of law, unsupported by any facts. Since it is the relationship of the facts to the claim asserted that is important, these petitions were obviously deficient." Habeas R. 2 advisory committee's note. Moreover, "lengthy and often illegible petitions, arranged in no logical order, were submitted to judges who have had to spend hours deciphering them." *Id.* According to the Advisory Committee, "[t]he requirement of a standard form benefits the petitioner as well," because the petitioner's "assertions are more readily apparent, and a meritorious claim is more likely to be properly raised and supported." *Id.* The Advisory Committee acknowledged that the factual adequacy of the petition would depend on the petitioner's capabilities and the available legal assistance, but concluded that "[o]n balance . . . the use of forms has contributed enough to warrant mandating their use." *Id.*

In *Mayle*, the Supreme Court reinforced these requirements, explaining that "a complaint need only provide fair notice of what the plaintiff's claim is and the grounds upon which it rests," under the Civil Rules, 545 U.S. at 655 (citation omitted), but "Habeas Corpus

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[8] Habeas Rule 2(d) provides in full: "The petition must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make forms available to petitioners without charge."

Rule 2(c) is more demanding" because it requires the petition to "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground," *id.* (quoting Habeas R. 2(c)). "[N]otice pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error." *Id.* (internal quotation marks omitted) (quoting Habeas R. 4 advisory committee's note). *Mayle* likewise recognized that "the model form available to aid prisoners in filing their habeas petitions" alerts prisoners to this higher standard. *Id.*

Although Habeas Rule 2(c) has been applied strictly to require habeas petitioners to set forth the factual grounds in the form itself, the Supreme Court has recognized an exception when the habeas petition expressly incorporates attached material by reference. *See Dye v. Hofbauer*, 546 U.S. 1 (2005). In *Dye*, the Supreme Court considered the Sixth Circuit's denial of a habeas petitioner's prosecutorial misconduct claim. *Id.* at 2–3. The Sixth Circuit had denied relief in part on the ground that the petition "presented the prosecutorial misconduct claim in too vague and general a form." *Id.* at 4. The Supreme Court held that this reasoning was incorrect because "[t]he habeas corpus petition made clear and repeated references to an appended supporting brief, which presented [petitioner's] federal claim with more than sufficient particularity." *Id.* In reaching this conclusion, *Dye* cited Civil Rule 10(c), which provides: "A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a

pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c).

B

Ross urges us to interpret *Dye* and Civil Rule 10(c) broadly. According to Ross, because Civil Rule 10(c) states that "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes," a court must deem the facts set out in any document attached to a habeas petition to be included in his habeas petition as a matter of law, regardless whether the petitioner "made clear and repeated references" to the document as supporting the petitioner's legal claim.

We reject this argument, because it is inconsistent with *Mayle*'s direction that we may apply the Civil Rules only to the extent that they are consistent with the Habeas Rules, *see* Habeas R. 12, taking into account the overall habeas framework, *see Mayle*, 545 U.S. at 654.[9] Ross's proposed application of Civil Rule 10(c) would conflict with the language and purpose of Habeas Rule 2(c), which requires petitioners to specifically identify "the facts supporting each ground" for relief, in order to alleviate the court's burden of deciphering lengthy or poorly organized petitions. Habeas R. 2 advisory committee's note. If Civil Rule 10(c) applies as broadly as Ross claims, judges would once again be required to wade through "two thousand pages of irrational, prolix, and redundant pleadings," to

[9] The parties also dispute whether a court decision is a "written instrument" for purposes of Civil Rule 10(c), but we need not decide that question here.

the detriment of judges and petitioners alike. *Id.* (quoting *Passic v. Michigan*, 98 F. Supp. 1015, 1016 (E.D. Mich. 1951)).

Further, Ross's proposed application of Civil Rule 10(c) would be inconsistent with AEDPA. If each attachment to a habeas petition could serve as a wellspring of facts to support any new claim for relief in a subsequent petition, a petitioner would lay the groundwork for a host of claims that could later relate back merely by following the form's instruction to "[a]ttach to this petition a copy of all state court written decisions regarding this conviction." Moreover, any reasonable petitioner would be motivated to attach reams of documents to each petition in order to preserve a full panoply of possible claims that could be revived after the limitations period has run. Such an application of Civil Rule 10(c) "would permit 'the "relation back" doctrine to swallow AEDPA's statute of limitations.'" *Mayle*, 545 U.S. at 662 (quoting *Felix*, 379 F.3d at 619 (Tallman, J., concurring in part and dissenting in part)). But as the Supreme Court explained, "Congress enacted AEDPA to advance the finality of criminal convictions," and we may not apply the Civil Rules in a way that would give AEDPA's limitations period "slim significance." *Mayle*, 545 U.S. at 662.

The application of Civil Rule 10(c) approved in *Dye* raises none of these concerns. When a petitioner incorporates by making "clear and repeated references to an appended supporting brief," and the brief presents the petitioner's claims "with more than sufficient particularity," it does not impose a significant

additional burden on the courts to identify the petitioner's claims or assess their merit. *Dye*, 546 U.S. at 4. Nor does the targeted incorporation of specific facts in a timely petition give a petitioner an unbounded opportunity to later raise a wide range of other claims under the relation back doctrine. *Cf. Mayle*, 545 U.S. at 661. To the extent the application of Civil Rule 10(c) is limited to this context, where the petitioner expressly and specifically identifies the applicable facts incorporated into the habeas petition, it is consistent with Habeas Rule 2, and therefore not barred by Habeas Rule 12.

C

We also reject Ross's argument that applying Civil Rule 10(c) in his suggested manner is consistent with Habeas Rule 4, which governs a district court's preliminary review of the petition.[10] Under Habeas Rule 4, "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to

[10] Habeas Rule 4 provides in full:

> 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. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

relief," then the district court must dismiss the petition. Otherwise, the district court must order the state to respond. Habeas R. 4. Because this language directs the court to examine the facts in the state court order or any other documents attached to the petition, Ross argues, it enables a court to consider whether any facts support the petitioner's legal claims. We disagree.

Habeas Rule 4 was designed to give courts "an active role in summarily disposing of facially defective habeas petitions." *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). The rule imposes on courts the duty to screen out frivolous applications, Habeas R. 4 advisory committee's note, when "the allegations in the petition are 'vague [or] conclusory' or 'palpably incredible' or 'patently frivolous or false,'" *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (alteration in original) (internal citations omitted), or if there are easily identifiable procedural errors, such as a procedural default, *see Boyd*, 147 F.3d at 1128, failure to exhaust state remedies, *see* Habeas R. 4 advisory committee's note, or untimeliness, that are "obvious on the face of a habeas petition," *Wentzell v. Neven*, 674 F.3d 1124, 1126 (9th Cir. 2012); *Herbst v. Cook*, 260 F.3d 1039, 1042 (9th Cir. 2001) (same). The rule does not authorize a court to sort through attachments to determine whether facts can be identified to support the petitioner's legal claims. The latter activity is appropriately reserved for the petitioner; even in an ordinary civil proceeding, we are precluded from

manufacturing a party's case. *See Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1069 n.1 (9th Cir 2008).[11]

D

Finally, Ross argues that we should construe his pro se pleadings liberally. He also claims his case is particularly worthy of such liberal construction, because the attachment in his case is only six pages in length rather than the thousands of pages of material that concerned the Advisory Committee. Therefore, he argues, deeming the attached state court opinion to be incorporated in his original petition under Civil Rule

[11] Ross cites several out-of-circuit cases to support this argument, but they are not on point, as they address the question whether documents filed as an exhibit to the state's answer to a habeas petition are part of the answer, and therefore must be served on the petitioner. In *Rodriguez v. Florida Department of Corrections*, for instance, the court ordered the state to respond to the prisoner's habeas petition pursuant to Habeas Rule 5, and to include a comprehensive appendix of records from prior state proceedings. 748 F.3d 1073, 1074 (11th Cir. 2014). The state served the prisoner with its answer, but did not include a copy of the appendix even though its answer referred to documents in the appendix. *Id.* The Eleventh Circuit concluded that because Rule 10 of the Federal Rules of Civil Procedure made the appendix "part of the pleading," it had to be served on the prisoner along with the answer under Habeas Rule 4. *Id.* at 1076–77; *see also Sixta v. Thaler*, 615 F.3d 569, 572 (5th Cir. 2010) (same); *Thompson v. Greene*, 427 F.3d 263, 268–69 & n.7 (4th Cir. 2005) (holding that failing to serve the exhibits was inconsistent with the federal rules and the Due Process Clause). This conclusion is consistent with the Habeas Rules. By contrast, these out-of-circuit opinions do not address the question whether a court must deem the content of any attached exhibit to be incorporated by reference into a petition, nor whether such content would meet the requirement of Habeas Rule 2(c).

10(c) would not be overly burdensome, and would not be inconsistent with the Habeas Rules.

To the extent Ross's arguments are based on his pro se status, they are unavailing. The Habeas Rules and the standard form are designed for use by pro se prisoners, *see* Habeas R. 2 advisory committee's note, and nevertheless impose a "more demanding" pleading standard then had historically been required, *Mayle*, 545 U.S. at 655. Every pro se petitioner must meet the same requirement to "specify all the grounds for relief" and the "facts supporting each ground" in order to make the meritorious claims more readily ascertainable. As with any complaint, a habeas petition must allege sufficient facts to establish the existence of an actionable claim; the absence of such facts cannot be cured by a liberal reading. Even in the civil rights context, where our willingness to "afford the [pro se plaintiff] the benefit of any doubt" is at its zenith, *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc)), we will not supply elements that are not present in a pro se plaintiff's complaint. In *Byrd v. Maricopa County Sheriff's Department*, for instance, we held that a pro se prisoner's complaint failed to state an equal protection claim, even where a document that "was part of the record before the district court" would have provided a "viable" basis for that claim. 629 F.3d 1135, 1139–40 (9th Cir. 2011) (en banc); *see also Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (holding that a district court could not "augment" a pro se plaintiff's complaint to survive a

motion to dismiss by incorporating facts from a closely related case).[12]

By contrast, a "technical" mistake is one that does not implicate the substance of a petitioner's claim. For example, where a pro se prisoner "had complied with all substantive requirements for filing a federal habeas petition," a district court could not reject the prisoner's petition on the ground he used "white-out and a pen on his cover sheet to write the correct name of the court in which he filed." *Corjasso v. Ayers*, 278 F.3d 874, 878 (9th Cir. 2002). Our holding in *Corjasso* underscores the difference between our willingness to overlook technical mistakes and our unwillingness to supply "essential elements of the claim that were not initially pled," even in the pro se context. *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). The dissent's reliance on *Corjasso* to show we do not hold a "technical" mistake against pro se petitioners, Dissent at 33, is therefore misplaced.[13]

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[12] The dissent attempts to distinguish *Byrd*, *Pena*, and *Ivey* on the ground that they do not involve relation back under Civil Rule 15(c). Dissent at 36. This misses the point. These cases establish the rule that a court cannot augment a pro se petitioner's complaint by including facts borrowed from documents outside the complaint. As a necessary result, the "conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading," Fed. R. Civ. P. 15(c)(1)(B), does not include facts that cannot be found in the original pleading. An amended complaint cannot relate back to an original pleading that is missing the relevant facts.

[13] The dissent cites cases where we have recharacterized the nature of a petitioner's filing in a manner that favors the petitioner, Dissent at 31–32 (citing *Woods v. Carey*, 525 F.3d 886, 888, 890 (9th Cir. 2008) (recharacterizing a "second" habeas

E

The dissent focuses on the slightly different argument that facts contained in the state court order attached to Ross's original petition constitute "occurrence[s]" that were "attempted to be set out" in the petition itself, Fed. R. Civ. P. 15(c)(1)(B); Dissent at 32, 36, 41, and therefore provide a basis for relation back of the new petition.

We disagree with the dissent's reading of "attempted to be set out" in this context. As noted above, because a court cannot augment a pro se petitioner's complaint by including facts borrowed from documents outside the complaint (except when they are expressly incorporated by reference in the complaint), we may not deem such facts to be set out or "attempted to be set out" in that pleading. *See supra* p. 21. The dissent's contrary reading of Civil Rule 15 runs afoul of *Mayle*'s warning not to adopt an overly "capacious" construction of the rule, 545 U.S. at 657, and not to view its requirements "at too high a level of generality," *id.* at 661 (citation omitted), in a manner that would defeat the purposes of Habeas Rule 2(c) and AEDPA.[14]

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petition as a motion to amend rather than a successive petition); *United States v. Seesing*, 234 F.3d 456, 464 (9th Cir. 2000) (noting the practice of recharacterizing pro se filings as § 2255 habeas petitions under certain circumstances)). Those cases are inapplicable here. While a court may "ignore the legal label that a pro se litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category," *Castro v. United States*, 540 U.S. 375, 381 (2003) (collecting cases), a court may not manufacture the substance of a petitioner's claim.

[14] The dissent cites to a pre-*Mayle* case, *Anthony v. Cambra*, 236 F.3d 568, 576 (9th Cir. 2000), Dissent at 32, for the general

Rather, as *Mayle* explains, the scope of Civil Rule 15(c) must be read in light of Habeas Rule 2(c), which "instructs petitioners to 'specify all [available] grounds for relief' and to 'state the facts supporting each ground.'" *Id.* (alteration in original) (quoting Habeas R. 2(c)). Merely attaching a state court order to a habeas petition, as required by the petition form, does not qualify as an attempt to meet such requirements.[15] *Cf. Dye*, 546 U.S. at 4.

Moreover, the dissent's construction would raise the concerns cited in *Mayle* that the relation back doctrine will "swallow AEDPA's statute of limitations." *Mayle*,

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proposition that we freely allow relation back in the habeas context, but that case is inapposite. In that case, there was no dispute that the habeas petitioner had set forth his claims in sufficient detail in the original petition, and we applied Civil Rule 15(c) only to revive these claims after the court mistakenly dismissed the original petition due to a procedural error. *Anthony*, 236 F.3d at 575–77.

[15] The dissent argues that because the facts in the state court order attached to Ross's original petition "match the claims raised summarily in the petition," we should deem the attachment to constitute an attempt to set out the facts supporting Ross's claims for purposes of Civil Rule 15(c). Dissent at 34. But there is no such one-to-one matching between the two documents. At least half the claims in Ross's original petition do not line up with the state court opinion. The state court makes no mention of a claim based on counsel having "[f]ailed to prepare for jury selection." Nor does the state court opinion clearly provide the factual bases for Ross's claims that counsel "[f]ailed to review evidence and adequately prepare," "[f]ailed to argue the prejudice of evidence lost prior to trial," and "[f]ailed to prepare for trial." Given the inconsistency between Ross's petition and the state court order and the lack of any clarifying incorporation by reference, a district court could not glean that Ross was attempting to set forth the bases of his claims.

545 U.S. at 662 (quoting *Felix*, 379 F.3d at 619 (Tallman, J., concurring in part and dissenting in part)). As explained above, attaching the state court opinion is precisely what the form petition already requires petitioners to do. Because it summarizes the relevant pretrial, trial, and post-trial conduct, a state court opinion would allow "[a] miscellany of claims for relief [to] be raised later rather than sooner and relate back," so long as they have some relation to the opinion's description of those events. *Id.* at 661. Regardless whether this is labeled as incorporation by reference under Civil Rule 10(c), as Ross suggests, or an attempt to set out facts under Civil Rule 15(c), per the dissent, this rule would effectively toll the statute of limitations for all such claims for all petitioners using the form petition. Because we may not construe Civil Rule 15(c) in an overly "capacious" manner that would defeat Habeas Rule 2 and AEDPA, *Mayle*, 545 U.S. at 657, we reject these arguments. For the same reasons, we reject Ross's and the dissent's argument that we should make an exception to the strictures of Civil Rule 15(c) in his case due to the fact that the state court opinion was only six pages long.[16]

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[16] Even if a limited exception for state court orders, as opposed to trial transcripts and other documents, were consistent with the Habeas Rules, any such "limiting" rule is not tethered to anything in the Habeas Rules or the habeas framework itself, and so it is doubtful that it would stay limiting for long. District judges will ultimately be required to undertake the substantial burden of making case-by-case determinations in response to petitioners' arguments that various attachments provide a sufficient basis for relation back, contrary to the reasons for mandating the use of standard forms. The dissent's suggestion that at least *short* state court opinions should be deemed to constitute an attempt to set out

F

Finally, the dissent argues that we should make an exception to Civil Rule 15(c) in Ross's case due to his pro se status at the time of his original petition. The dissent pays lip service to the concerns raised in *Mayle* regarding clarity and finality but brushes them aside, concluding that they are not "sufficient to justify withholding the benefit of liberal construction from a pro se petitioner." Dissent at 39. But this is contrary to *Mayle*'s clear instructions that we must take such concerns seriously when applying relation back in the habeas context. 545 U.S. at 662. In fact, *Mayle* expressly rejected the argument that a more liberal relation back scheme was necessary to protect the interests of pro se prisoners. *See id.* at 664 n.8; *id.* at 675–76 (Souter, J., dissenting).

The dissent attempts to distinguish *Mayle* on several grounds, but none of them is persuasive. First, the dissent concedes that *Mayle* declined to differentiate between pro se petitioners and those represented by counsel in applying Civil Rule 15(c) to the habeas context, but makes a flimsy attempt to distinguish *Mayle* on the ground that the pro se petitioner's counsel in *Mayle* was appointed before the statute of limitations had expired. Dissent at 40 n.4. This argument is meritless. While *Mayle* noted the timing of the counsel's appointment, that fact did not influence *Mayle*'s interpretation of the relation back doctrine. *See* 545 U.S. at 664 n.8 (explaining that the filing of a habeas petition does not fall within the

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the relevant "conduct, transaction, or occurrence" in the original petition, Dissent at 32 n.1, fails for the same reason.

category of cases that "require appointment of counsel for an indigent litigant at a critical stage to ensure his meaningful access to justice").

Second, the dissent argues that *Mayle* is distinguishable because "many of Ross's claims *were* raised in his original petition—he simply failed to substantiate them with sufficient facts." Dissent at 38–39. This ignores *Mayle*'s central holding. *Mayle* did not focus on whether the petitioner's original and amended petitions raised the same claims, but rather held that the new Fifth Amendment claim in the amended petition did not relate back to the original petition, because the original petition did not contain "separate congeries of facts supporting th[at] ground[] for relief." 545 U.S. at 661. Thus under *Mayle*, the relation-back question here is whether Ross's original petition incorporated the facts set out in the attached state court order, not whether Ross sought to raise new claims in his subsequent amended petition. And contrary to the dissent, *Mayle*'s insistence on avoiding an interpretation of Rule 15(c) that would allow a petitioner to raise a "miscellany of claims for relief" in subsequent petitions without regard to AEDPA's statute of limitations carries equal force here. *Id.* at 661–62. As the dissent concedes, Ross's amended petition seeks to raise multiple new claims not

presented in the original petition.[17] Certainly, Ross's case is not distinguishable from *Mayle* on this basis.

The dissent's other arguments for ignoring the concerns set forth in *Mayle* are similarly meritless. The dissent notes that Ross "indisputably filed his original petition within the applicable one-year limitations period." Dissent at 39. This is immaterial, however, as the same could be said in every relation back case where a plaintiff files an inadequate original petition and seeks to have a subsequent amended petition relate back. Finally, the dissent contends that because Civil Rule 15(a)(2) allows a court to deny a petitioner leave to file an amended petition, it provides an adequate safeguard against abuse. Dissent at 39. But *Mayle* squarely rejected this argument. 545 U.S. at 663 ("[W]e do not regard Rule 15(a) as a firm check against petition amendments that present new claims dependent upon discrete facts after AEDPA's limitation period has run.").

We therefore reject Ross and the dissent's arguments based on Ross's pro se status at the time of

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[17] Ross raised only ineffective assistance of counsel claims in his original petition. In his amended petition, Ross asserted direct violations of his Confrontation Clause and Speedy Trial rights, and brought a sufficiency-of-the-evidence challenge. Ross's amended petition also alleged that counsel was ineffective for failing to raise mitigating arguments at sentencing, a claim that is likewise absent from his original petition. Moreover, the amended petition sought to revive multiple ineffective assistance claims that were addressed in the state court order but not raised in the original petition, such as inadequate communication, failure to object based on the best evidence rule, and failure to object based on witness unavailability.

his original petition. This is not to say that pro se habeas petitioners may not benefit from our practice of liberal construction. Consistent with the pleading scheme, a court may liberally construe the legal claims and facts set forth in the petitioner's habeas form, pursuant to Habeas Rule 2(c), as making out a plausible claim for relief. But giving a generous reading to the claims a petitioner has actually made is a far cry from requiring a court to piece together the claims themselves. Whether under the guise of Civil Rule 10(c) or 15(c), even "a liberal interpretation . . . may not supply essential elements of the claim that were not initially pled." *Ivey*, 673 F.2d at 268; *see also Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) ("The broad reading of the plaintiff's complaint does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based.").

IV

Applying these legal principles here, we conclude that the Nevada state court affirmance is not incorporated by reference in Ross's original petition. There is no dispute that Ross did not comply with Habeas Rule 2(c) or the language in the standard form prescribed by the Nevada district court, which required him to "summarize briefly" the necessary facts in the space provided for each ground and to "attach up to two extra pages stating additional grounds and/or supporting facts." Unlike the petitioner in *Dye*, Ross did not incorporate the facts supporting his legal allegations by making "clear and repeated references" to the document as supporting his legal claims. 546

U.S. at 4. Indeed, Ross made no attempt to do so. His federal habeas petition makes no reference to the state court order or indicates that it sets forth the facts supporting his claimed grounds for relief.[18] Rather, his reference to the state court affirmance in his affidavit makes it clear he intended to use it for a different purpose, namely to support his affidavit's explanation of the timing of when he learned of the state court's ruling. This was no mistake; Ross knew how to incorporate by reference, because he had filled out a similar form for his state PCR petition, attached a 22-page handwritten memorandum that set forth the factual background for each claim and identified the facts that were relevant to each claim, and explicitly incorporated those facts with respect to each claim in his state PCR petition by writing "please see supporting memorandum. . ." in the space provided for supporting facts for each claim.

Because Ross did not comply with Habeas Rule 2(c) either directly or by incorporating (or attempting to incorporate) the facts in the Nevada Supreme Court affirmance into his original petition, that petition does not provide an aggregation of facts that can support the claims in his amended petition. Accordingly, the district court did not err in concluding that Ross's amended petition cannot relate back to the claims in his original petition because they contain no facts.

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[18] We reject Ross's argument that, by checking the space on the form petition indicating that he had raised Ground 1 to the Nevada Supreme Court, he also explicitly incorporated the Nevada Supreme Court's order deciding that ground. This falls far short of the "clear" reference that *Dye* requires. 546 U.S. at 4.

AFFIRMED.

BATES, Senior District Judge, dissenting:

Proceeding *pro se*, Ronald Ross filed a federal habeas petition a few months before his time to do so under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was set to expire. His form petition asserted ineffective assistance of trial counsel on several grounds, including failure to secure a speedy trial, to assert prejudice from evidence lost before trial, to retain defense experts, and to object to the state's experts. Ross's petition contained no specific factual allegations, but he attached to his petition a six-page state-court decision that discussed the factual bases of most of his claims in some detail. The majority holds that Ross's amended petition—which he prepared with the assistance of counsel but filed several months after AEDPA's deadline had passed—does not relate back to the date of his original petition because the original petition set out no facts. *See* Fed. R. Civ. P. 15(c)(1)(B) (providing that an amendment relates back if it asserts claims that arise out of the "conduct, transaction, or occurrence" set out in the original pleading).

Under the familiar rule that *pro se* pleadings are to be liberally construed, however, *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam), we should read Ross's original petition as setting out the facts discussed in the attached state-court decision. Then, we should remand for the district court to determine in the first instance whether the claims in Ross's amended petition arose out of the conduct, transaction, or occurrence set out in his original petition.

I

Federal Rule of Civil Procedure 15(c)(1)(B) permits an amendment to a pleading to relate back to the date of the original pleading where "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." The Supreme Court has recognized that Rule 15(c) applies in habeas proceedings, *see Mayle v. Felix*, 545 U.S. 644, 655 (2005), and there is no dispute that if the claims in Ross's amended habeas petition arose out of the "congeries of facts" set out in his original petition, *id.* at 661, the amendment would be timely. According to the majority, however, Ross's original petition set out "no facts at all," Majority Op. at 11, and so there was nothing for the claims in Ross's amended petition to relate back to.

But this reading of Ross's original petition is unduly narrow in light of his *pro se* status. The Supreme Court has repeatedly told us that *pro se* filings are to be liberally construed. *See Erickson*, 551 U.S. at 94 (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). This rule applies with equal force in the habeas context, where it requires courts not only to draw reasonable factual inferences in the petitioner's favor, *see Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010), but also to construe the *filing itself* in a manner that favors the petitioner, *see, e.g.*, *Woods v. Carey*, 525 F.3d 886, 890 (9th Cir. 2008) (construing a *pro se* filing styled as a "second" habeas petition as a motion to amend a pending petition, thereby avoiding AEDPA's exacting standards for second and successive petitions);

United States v. Seesing, 234 F.3d 456, 463–64 (9th Cir. 2000) (reversing the district court's decision to construe a *pro se* prisoner's letter as a habeas petition because doing so "seriously diminished the possibility of successfully filing a future, properly drafted and documented, motion").

Here, the facts underlying the claims in Ross's original petition were set out (for the most part) in a reasoned decision of the Nevada Supreme Court, which was attached as an exhibit to Ross's petition. In light of Ross's *pro se* status, his original petition should have been liberally construed as at least "*attempt[ing]* to . . . set out" those facts. Fed. R. Civ. P. 15(c)(1)(B) (emphasis added); *see Anthony v. Cambra*, 236 F.3d 568, 576 (9th Cir. 2000) (allowing relation back in the habeas context where "the central policy of Rule 15(c)—ensuring that the non-moving party has sufficient notice of the facts and claims giving rise to the proposed amendment—[was] satisfied"). To the extent that his amended petition asserted claims arising out of those facts, therefore, it should have been allowed to relate back.

True, the form petition that Ross filled out instructed him to "[s]ummarize briefly the facts supporting each ground" for relief, and Ross failed to heed this instruction. But as counsel for the state admitted at oral argument, had Ross's petition simply pointed to the facts discussed in the Nevada Supreme Court's order, those facts would have been incorporated into the petition by reference and hence could have

supported relation back.[1] *See* Fed. R. Civ. P. 10(c); *Dye v. Hofbauer*, 546 U.S. 1, 4 (2005). Perhaps we should not excuse a counseled petitioner for such a mistake, and perhaps even a *pro se* petitioner could not prevail if the attachment were a trial transcript or some other, denser document. But here, where the factual bases of Ross's claims were plain on the face of the attachment to his *pro se* petition, Ross's failure explicitly to incorporate those facts into his form petition was precisely the kind of "technical" mistake that we have repeatedly refused to hold against *pro se* petitioners. *Corjasso v. Ayers*, 278 F.3d 874, 878 (9th Cir. 2002).

The majority protests that this application of the rule of liberal construction for *pro se* pleadings lacks a limiting principle. Respectfully, I disagree. Where, as here, a statecourt decision denying postconviction relief is attached as an exhibit to a *pro se* habeas petition and the petition lists claims that correspond to the claims addressed in that decision, principles of liberal construction require that the facts discussed in the

[1] When asked what Ross would have had to do to incorporate these facts into his petition, counsel replied that "he could have said, 'see page 3 of that decision, here's the facts that I want to incorporate as my supporting facts.'" *See* U.S. Court of Appeals for the Ninth Circuit, *16- 16533 Ronald Ross v. Williams*, YouTube, 12:05–12:12 (Dec. 5, 2017), https://www.youtube.com/watch?v=bryJdYNcodY. In other words, the state contends that for incorporation to be effective, a petitioner must identify the specific facts that the petitioner believes support his claims. But the state-court decision attached to Ross's petition is only six pages long, four of which set out the factual basis for (and then reject) each of his eight claims. If a simple "see pages 2 through 5" would not have been enough to incorporate the facts stated on those pages, what more would Ross have had to write? The state's attempt to frame incorporation by reference as a demanding task is unpersuasive.

decision be construed as "set out" in the petition for purposes of relation back under Rule 15(c).

This narrow rule makes sense. State-court decisions denying postconviction review usually distill the factual background of a petitioner's claims into an easily digestible summary. *See* Rule 5 of the Rules Governing Section 2254 Cases in the U.S. District Courts (the "Habeas Rules") advisory committee's note to 2004 amendment (recognizing that such decisions "may assist [the federal habeas court] in resolving the issues raised . . . in the petition"). Moreover, because AEDPA's exhaustion requirement bars a petitioner from asserting claims in a federal habeas petition that were not raised in state proceedings, *see* 28 U.S.C. § 2254(b)–(c), the state-court decision will in most cases neatly summarize the facts underlying those claims—and *only* those claims—that the district court can consider on habeas review. And where the claims addressed in an attached state-court decision match the claims raised summarily in the petition, the *pro se* petitioner can fairly be said to have "attempted" to set out those facts in his petition. Fed. R. Civ. P. 15(c)(1)(B).

The limitations of this approach are firmly grounded in the framework of habeas litigation. Unlike the state-court decision denying postconviction review, documents like trial transcripts or other parts of the state-court record are less likely to summarize concisely the facts underlying the petitioner's claims. And other decisions from earlier in the petitioner's state-court proceedings are less likely to summarize the facts underlying precisely those claims that the

petitioner is entitled to assert on federal habeas review in light of AEDPA's exhaustion requirement.

The majority's concern that a narrow ruling in Ross's favor would not "stay limiting for long" is unwarranted. Majority Op. at 25 n.16. District courts know that liberal construction does not require them "to act as counsel or paralegal to *pro se* litigants." *Pliler v. Ford*, 542 U.S. 225, 231 (2004); *see Barnett v. Duffey*, 621 Fed. App'x 496, 496–97 (9th Cir. 2015) (unpublished) (affirming the district court's refusal to consider a claim that was "'buried,' by [the petitioner's] own description, amid hundreds of pages of evidentiary exhibits appended to his petition"). They are well versed in the practice of parsing *pro se* pleadings, and faithfully applying the rule of liberal construction here would by no means leave them at sea.

II

Like Ross's briefing, the majority's analysis focuses primarily on a different issue: whether Federal Rule of Civil Procedure 10(c), which provides that "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes," should be applied here under Habeas Rule 12, which states that "[t]he Federal Rules of Civil Procedure . . . may be applied to a [habeas] proceeding," but only "to the extent that they are not inconsistent with any statutory provisions or these rules." The majority concludes that Civil Rule 10(c) does not apply because Ross's original petition did not "expressly incorporate[]" the attached state-court decision. Majority Op. at 15. This is so, the majority explains, because applying Rule 10(c) in such a case would conflict with Habeas Rule 2,

which states that a petition "must . . . state the facts supporting each ground [for relief]." *See id.* at 12–18.

I express no opinion on the majority's analysis of the interplay between Habeas Rule 2, Habeas Rule 12, and Civil Rule 10(c), because I do not think it is necessary to resolve this case. But the majority also rejects the narrow course here—liberally construing Ross's *pro se* habeas petition as attempting to set out, for purposes of relation back, the facts discussed in the attached state-court decision that denied him postconviction relief—as inconsistent with Habeas Rule 2. *See id.* at 20–28. In my view, this is error.

To begin with, it is important to recognize what is *not* at stake. The question here is not whether the district court should have considered the facts discussed in the attached state-court decision to evaluate the factual sufficiency of Ross's original petition under Habeas Rule 2. Indeed, there is no dispute that Ross's *amended* petition clearly states the factual basis for each of the claims it asserts. The question, rather, is whether the district court should have considered the facts discussed in the attached state-court decision as "set out"—or at least "attempted to be set out"—in his original petition for purposes of relation back under Civil Rule 15(c).

In concluding that allowing relation back here would conflict with Habeas Rule 2, the majority conflates these two inquiries. For example, the majority relies on three cases in which this Court refused to apply liberal-construction principles to "supply 'essential elements of [a] claim that were not initially pled'" in a *pro se* plaintiff's civil complaint. Majority Op.

at 22(quoting *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)); *see id.* at 21 (quoting *Byrd v. Maricopa Cty. Sheriff's Dep't*, 629 F.3d 1135, 1139–40 (9th Cir. 2011), and citing *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992)). In *Byrd* and *Pena*, however, the plaintiffs sought to rely on facts outside of their complaints to survive a motion to dismiss under Civil Rule 12(b)(6). And *Ivey* simply affirmed the dismissal of a complaint having no specific factual allegations that defendants engaged in the misconduct alleged. None of these cases involved relation back under Civil Rule 15(c).

This distinction matters because Civil Rule 15(c) requires less for relation back than Habeas Rule 2 requires to survive dismissal. Civil Rule 15(c) is satisfied if the original petition "set[s] out"—or even "attempt[s]" to set out—the factual basis for the amendment's claims. Habeas Rule 2, by contrast, requires that the petition's claims be pleaded with "particularity," a standard that the Supreme Court has called "demanding." *Mayle*, 545 U.S. at 655. This differential makes sense, because the two doctrines serve different purposes. Habeas Rule 2's pleading standard seeks to discourage "lengthy and often illegible petitions" that require "hours [to] decipher[]," as well as petitions "contain[ing] mere conclusions of law, unsupported by any facts." *See* Habeas Rule 2 advisory committee's note. But relation back simply ensures that the respondent has fair notice of what the petitioner might later assert in an amendment to his petition. *See Anthony*, 236 F.3d at 576.

The majority's real argument, then, is that permitting relation back here would conflict with the policy considerations that Habeas Rule 2 was intended to advance. *See* Majority Op. at 16–17, 23–25. But while those policy concerns might control in the mine run of cases, they carry less force here. As one might expect of a decision from a state's highest court, the Nevada Supreme Court's order was neither "lengthy" nor "illegible." On the contrary, it stated the facts underlying Ross's claims clearly, concisely, and in a manner that highlighted their legal significance. *See* Habeas Rule 2 advisory committee's note ("[I]t is the relationship of the facts to the claim asserted that is important . . . ."). And since this will likely be true of most reasoned state-court opinions denying postconviction relief,[2] relation back here implicates none of the efficiency concerns that animate Habeas Rule 2.

Indeed, the only sense in which the narrow approach that I have proposed could conceivably conflict with the policies underlying the Habeas Rules is that, in some cases, it would allow Habeas Rule 2's pleading requirement to be met by an amended petition filed after the running of AEDPA's oneyear statute of limitations. The majority asserts such a result would

[2] Under the approach I think we should take, federal habeas courts might have to consider the facts set out in lengthier state-court decisions. But surely even these decisions will not be "illegible," and length alone is no reason to ignore such a decision when it is included as an attachment to a *pro se* habeas petition. Time is a valuable resource in state courts as well, and there is no reason to believe that a state court will recite more facts than are necessary to resolve whatever claims the petitioner raised below.

run afoul of *Mayle*, where the Supreme Court rejected a reading of the phrase "conduct, transaction, or occurrence" in Civil Rule 15(c) that would have encompassed the petitioner's entire trial and conviction in state court. *See* 545 U.S. at 662 ("If claims asserted after the one-year period could be revived simply because they relate to the same trial, conviction, or sentence as a timely filed claim, AEDPA's limitation period would have slim significance.").

But Ross's case is distinguishable from *Mayle* in two important respects. First, unlike the petitioner in *Mayle*, whose proposed application of Civil Rule 15(c) would have allowed his claims to be "raised later rather than sooner and relate back," *id.* at 661, many of Ross's claims *were* raised in his original petition—he simply failed to substantiate them with sufficient facts.[3] Second, the set of Ross's claims that, in my view, should be allowed to relate back is far narrower than the set of claims at issue in *Mayle*: a habeas petitioner

[3] The majority disputes this, asserting that Ross's original petition "raised only ineffective assistance of counsel claims." Majority Op. at 27 n.17. But the majority again reads Ross's petition too narrowly. The petition alleged that "counsel was ineffective for failing to" do a number of things—including to "[s]ecure a speedy trial." Liberally construed, this allegation states a freestanding speedy trial claim. Moreover, even if Ross's original petition were properly read as asserting only ineffective assistance of counsel claims, such claims make up the bulk of Ross's amended petition. Finally, although some of the claims in the amended petition do not seem to appear in the original (even with the state-court order attached), the match between the two petitions was not fully addressed in the parties' briefs—indeed, the state did not address the issue at all. Thus, we should have done as the state suggested and remanded this case to the district court to perform the relation-back analysis in the first instance.

should be allowed to amend his petition only to clarify claims whose factual bases were clearly addressed in an attached state-court decision denying him postconviction relief. Such a limited rule would hardly "swallow AEDPA's statute of limitation." *Mayle*, 545 U.S. at 662 (citation omitted).

Nor are the finality concerns cited by the majority sufficient to justify withholding the benefit of liberal construction from a *pro se* petitioner. Ross by no means seeks a complete reprieve from AEDPA's filing deadline, since he indisputably filed his original petition within the applicable one-year limitations period. In many cases, moreover, a district court will have the power to deny leave to file an amendment if it finds that the petitioner delayed unjustifiably in preparing that amendment. *See* Fed. R. Civ. P. 15(a)(2). Finally, the fact remains that when Ross filed his original petition, he was proceeding *pro se*. The majority is undoubtedly correct that AEDPA's one-year deadline was meant to "advance the finality of criminal convictions." Majority Op. at 17 (quoting *Mayle*, 545 U.S. at 662). But this finality interest should not be advanced on the basis of fairly trivial mistakes made by prisoners who proceed without the advice of an attorney.[4]

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[4] According to the majority, "*Mayle* expressly rejected the argument that a more liberal relation back scheme was necessary to protect the interests of pro se prisoners." *See* Majority Op. at 25–26. True, the Court in *Mayle* rejected the petitioner's broad reading of Civil Rule 15(c) despite the dissent's observation that "in the overwhelming majority of cases, the original petition is the work of a *pro se* petitioner." 545 U.S. at 675 (Souter, J., dissenting). But the rule proposed by the petitioner in *Mayle* was far broader than the one advocated here. Moreover, the *Mayle* Court described

* * *

When applying a Federal Rule of Civil Procedure in a habeas case, courts must construe the rule in light of the basic policies that underlie the habeas framework. *See Mayle*, 545 U.S. at 661–663 (interpreting the term "conduct, transaction, or occurrence" in Civil Rule 15(c) in light of the policy concerns underlying Habeas Rule 2); *see also* Habeas Rule 12. But when the application of that rule involves a *pro se* filing, courts must also heed traditional principles of liberal construction. *See Porter*, 620 F.3d at 958. In the narrow circumstances presented by this case, the efficiency and finality concerns advanced by Habeas Rule 2 carry diminished force, while the fairness concerns underpinning the rule of liberal construction are directly implicated. Thus, Ross's original *pro se* petition should have been liberally construed as setting out—or at least attempting to set out—the facts stated in the attached state-court decision for purposes of Civil Rule 15(c), and the claims in his amended petition should have been allowed to relate back to the date of his original petition to the extent that they arose out of those facts.

I respectfully dissent.

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the dissent's concerns as "understandable" and noted that "in [this] case, counsel was appointed, and had some two and a half months to amend the petition before AEDPA's limitation period expired." *Id.* at 664 n. 8. Here, Ross's counsel was appointed *after* his AEDPA deadline had run. By the *Mayle* Court's own estimation, then, Ross's *pro se* status should carry greater weight here.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 2:14-cv-01527-JCM-PAL

[Filed August, 26, 2016]

RONALD ROSS,	)
Petitioner,	)
	)
vs.	)
	)
WARDEN WILLIAMS, et al.,	)
Respondents.	)
	)

ORDER

Before the court are the first amended petition for writ of habeas corpus (ECF No. 17), respondents' motion to dismiss (ECF No. 30), petitioner's opposition (ECF No. 36), and respondents' reply (ECF No. 38). The court finds that none of the grounds in the first amended petition relate back to the original, proper-person petition (ECF No. 10), and that they all are untimely. The court also finds in the alternative that petitioner has not exhausted his state-court remedies for two of his grounds. The court grants respondents' motion to dismiss in part. The court will address respondents' arguments out of the order that they present the arguments. First, respondents argue that

all of the grounds in the first amended petition are untimely because they do not relate back to the original, proper-person petition.

> 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;
> (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). If the judgment is appealed, then it becomes final when the Supreme Court of the United States denies a petition for a writ of certiorari or when the time to petition for a writ of certiorari expires. Jimenez v. Quarterman, 555 U.S. 113, 119-20 (2009). See also Sup. Ct. R. 13(1). Any time spent pursuing a properly filed application for state post-conviction review or other collateral review does not

count toward this one-year limitation period. 28 U.S.C. § 2244(d)(2). The period of limitation resumes when the post-conviction judgment becomes final upon issuance of the remittitur. Jefferson v. Budge, 419 F.3d 1013, 1015 n.2 (9th Cir. 2005). A federal habeas corpus petition does not toll the period of limitation. Duncan v. Walker, 533 U.S. 167, 181-82 (2001). The petitioner effectively files a federal petition when he delivers it to prison officials to be forwarded to the clerk of the court. Rule 3(d), Rules Governing Section 2254 Cases in the United States District Courts.

On December 5, 2008, after a jury trial, petitioner was convicted of two counts of burglary and one count each of larceny from the person, possession of a credit card without the cardholder's consent, fraudulent use of a credit card, theft, and conspiracy to commit larceny. Ex. 47 (ECF No. 20-1). Petitioner appealed. The Nevada Supreme Court issued its order affirming the judgment of conviction on November 8, 2010. Ex. 53 (ECF No. 20-7). The judgment of conviction became final when the time to petition for a writ of certiorari expired, on February 7, 2011, taking into account that the ninety-day period otherwise would have ended on a Sunday. Petitioner filed a state habeas corpus petition, appendix of exhibits, and supporting memorandum on November 30, 2011, two hundred ninety-six (296) days later. Ex. 55 (ECF No. 20-9), Ex. 56 (ECF No. 20-10), Ex. 57 (ECF No. 20-11). The state habeas corpus petition tolled the federal period under 28 U.S.C. § 2244(d)(2). The state district court appointed counsel, who filed a supplement. Ex. 65 (ECF No. 20-19). The state district court denied the petition on June 12, 2013, and mailed notice of the

denial on June 17, 2013. Ex. 70 (ECF No. 20-24).[1] Petitioner appealed. The Nevada Supreme Court issued its order affirming the denial of the petition on July 22, 2014. Ex. 81 (ECF No. 20-35). Remittitur issued on August 18, 2014. Ex. 82 (ECF No. 20-36). Tolling stopped and the one-year period resumed running.

The original petition (ECF No. 10) contains conflicting dates about when petitioner mailed it to the court. Petitioner stated at page 1 of the petition that he mailed the petition on August 14, 2014. However, a few lines above that statement petitioner stated that the remittitur issued on August 18, 2014. The dates on the signature and the verification at the end of the petition are September 14, 2014. In an attached declaration, dated September 14, 2014, petitioner refers to other events that occurred after August 14, 2014. Petitioner could not have mailed his petition before those events occurred. The court concludes that petitioner mailed his petition on September 14, 2014. However, the original petition still was filed timely. The one-year period of 28 U.S.C. § 2244(d) expired at the end of October 27, 2014, taking into account that it otherwise would have expired on a Sunday. Petitioner filed the first amended petition (ECF No. 17) on June 8, 2015, after the one-year period expired. The grounds in the first amended petition are untimely unless they relate back to the grounds in the original petition. Relation back, pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, is allowed "[s]o long as the original and amended petitions state claims that are tied to a

[1] The cover sheet of this exhibit erroneously states that it is exhibit 71. The listing in the court's electronic docket is correct.

common core of operative facts . . . ." Mayle v. Felix, 545 U.S. 644, 664 (2005).

The claims in the first amended petition cannot relate back to the original petition by itself. The original petition contained three repetitive grounds of ineffective assistance of counsel. In each ground, petitioner claimed that counsel:

1. Failed to secure a speedy trial;
2. Failed to review evidence prior to trial and adequately prepare;
3. Failed to file pretrial motions;
4. Failed to address the prejudice of evidence lost prior to trial;
5. Failed to prepare for jury selection;
6. Failed to prepare for trial;
7. Failed to retain defense experts for trial;
8. Failed to object to the state's use of expert witness.

Petition, at 5 (ECF No. 10). Petitioner alleged no facts in support of those claims. The grounds in the first amended petition do not share a common core of operative fact with the grounds in the original petition because petitioner did not allege any facts in the original petition.

To overcome that problem, petitioner points to the decision of the Nevada Supreme Court in the appeal from the denial of the state habeas corpus petition. Petitioner attached that decision to his original petition (ECF No. 10). Petitioner then argues that he incorporated the Nevada Supreme Court's decision as

grounds in his original petition. The court is not persuaded.

Petitioner relies upon Dye v. Hofbauer, 546 U.S. 1 (2005) (per curiam). Dye was convicted in Michigan state court of two counts of murder and one count of possession of a firearm during commission of a felony. His state-court appeals were unsuccessful. Dye pursued federal habeas corpus relief, including a claim of prosecutorial misconduct. The details are more complicated than necessary for the purposes of this order. Ultimately the Sixth Circuit upheld the denial of habeas corpus relief for two reasons. The Supreme Court held that both were erroneous. First, the Sixth Circuit held that the prosecutorial misconduct claim was not exhausted because the state appellate court did not mention any federal law in its decision and because the state-court appellate brief, which purportedly exhausted the claim, was not in the record. The Supreme Court held that ruling on exhaustion was erroneous because the state-court appellate brief was in the federal district court's record, and it did present the claim of prosecutorial misconduct as an issue of federal law. 546 U.S. at 3-4. Second, the Sixth Circuit held that the claim of prosecutorial misconduct in the federal habeas corpus petition was too vague and general. The Supreme Court held that this ruling was erroneous because "[t]he habeas corpus petition made clear and repeated references to an appended supporting brief, which presented Dye's federal claim with more than sufficient particularity." Id. at 4 (citing Fed. R. Civ. P. 81(a)(2), 10(c)).

The court is not persuaded. The first holding of Dye, regarding exhaustion, is not applicable to the current situation before the court, and petitioner does not argue that it is applicable. The second holding of Dye could be pertinent, but Dye's situation and petitioner's situation are different. Unlike Dye, the original petition did not refer at all to the Nevada Supreme Court's order, let alone make clear and repeated references. Each ground contained only the list quoted above, without any facts. Simply attaching a state-court order to a petition does not mean that petitioner is asserting claims based upon that order. Petitioner needed to allege the claims and the facts in the original petition itself, or, as in Dye make clear and repeated references to supporting exhibits. Nothing in the original petition alerted the court to a desire that petitioner was trying to make the Nevada Supreme Court's rulings part of his claims. Consequently, none of the grounds in the first amended petition relate back to the original petition, and they all are untimely.

Petitioner also relies upon Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426 (9th Cir. 1978). The court of appeals noted that documents attached to a complaint are part of the complaint, and that a district court may review them, not just the allegations in the pleading, when determining whether the plaintiff had failed to state a claim upon which relief may be granted. Id. at 429-30 (citing Fed. R. Civ. P. 12(b)(6)). It was the plaintiff in Amfac who was objecting to the use of the documents attached to the complaint in the district court's determination that the plaintiff had failed to state a claim. The district court determined, and the court of appeals affirmed, that

securities were not involved in the loan transaction at issue, thus making federal and state securities law inapplicable, and that the plaintiff had not stated a claim under state tort law. In other words, the plaintiff in Amfac did itself no favors when attaching those documents to the complaint.

The court agrees with respondents that a decision applying Rule 12(b)(6) to a civil complaint for violation of securities and tort law is of no utility in a habeas corpus action. The court does not deny a habeas corpus petition under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts at the start of a case simply because an attached state-court order had denied the same grounds on their merits.

Reasonable jurists might debate this conclusion, and the court will grant a certificate of appealability for the issue of timeliness.

Respondents also argue that some of the grounds in the first amended petition are not exhausted. The court considers respondents' argument in the alternative to the untimeliness of the first amended petition.

Before a federal court may consider a petition for a writ of habeas corpus, the petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a petitioner must fairly present that ground to the state's highest court, describing the operative facts and legal theory, and give that court the opportunity to address and resolve the ground. See Duncan v. Henry, 513 U.S. 364, 365 (1995) (per curiam); Anderson v. Harless, 459 U.S. 4, 6 (1982).

Ground 3 is a claim that the evidence was insufficient to support the verdict. Respondents argue that any facts beyond those alleged in the direct-appeal brief are not exhausted. See Ex. 49, at 27-29 (ECF No. 20-3, at 33-35). The court agrees with petitioner that the additional facts that petitioner presents now do not fundamentally alter the claim from what petitioner presented in state court. Ground 3 is exhausted.

Ground 4(C) is a claim that counsel provided ineffective assistance because counsel did not seek an appropriate for a discovery violation. In the appeal from the denial of the state habeas corpus petition, petitioner argued that counsel failed to obtain a recording from a security camera. Ex. 79, at 32-34 (ECF No. 20-33, at 38-40). The Nevada Supreme Court's decision shows that this is a claim distinct from what petitioner presents now. The Nevada Supreme Court held that petitioner did not demonstrate deficient performance or prejudice because the recording was destroyed before petitioner was arrested, let alone before counsel was appointed. Ex. 81, at 2 (ECF No. 20-35, at 3). The claim in the first amended petition is different, because petitioner argues now that counsel should have moved to preclude mention of the destroyed video or for an adverseinference instruction. The claim has transformed from counsel's failure to obtain evidence to counsel's failure to hold the prosecution responsible for destruction of evidence. Ground 4(C) is unexhausted.

Ground 4(D) is a claim that counsel failed to object to a violation of the best-evidence rule. At trial, Kevin Hancock and Detective Darrell Flenner testified about

what they saw on the securitycamera recording before it was destroyed. At the preliminary hearing, Deja Jarmin (also spelled "Jarmon") testified about what was on the security-camera recording. Jarmin was determined to be unavailable to testify at trial, and Jarmin's preliminary-hearing testimony was read at trial. On direct appeal, the Nevada Supreme Court held that petitioner did not make this objection at trial, and that the video was lost because none of the employees at the store knew how to preserve it. This satisfied the best-evidence rule under a plain-error standard. Ex. 53, at 2 (ECF No. 20-7, at 3) (citing Nev. Rev. Stat. § 52.255(1) and Valdez v. State, 196 P.3d 465, 477 (Nev. 2008)). In the state habeas corpus proceedings, petitioner made this argument in his appellate brief:

> Finally, trial counsel failed to renew his best evidence objection from the Preliminary Hearing or to properly challenge the use of a Preliminary Hearing transcript in lieu of live testimony. Trial counsel made not [sic] offer of proof regarding questions he was not able to ask Deja Jarmon at the preliminary hearing. This was a huge issue as Mr. Jarmon testified about the contents of a video that was destroyed before the defense was able to review it.

Ex. 79, at 36-37 (ECF No. 20-33, at 42-43). The Nevada Supreme Court ruled first that counsel did not make a best-evidence objection at the preliminary hearing, and thus there was no objection to renew. The Nevada Supreme Court then ruled that the law of the case was that the best-evidence rule was satisfied and thus no reasonable probability existed that the trial court

would have sustained the objection had counsel made it. Ex. 81, at 5 (ECF No. 20-35, at 6). The Nevada Supreme Court's ruling on this issue did not depend upon who testified about events depicted on the video recording. The addition of Hancock and Flenner to the claim in the first amended petition does not fundamentally alter the claim. Ground 4(D) is exhausted.

Ground 4(E) is a claim that counsel failed to object to the expert testimony of Detective Flenner. Respondents argue that petitioner never presented such a claim with respect to Detective Flenner. Petitioner did present on habeas corpus appeal a claim that counsel should have objected to the expert testimony of Detective Rader. Ex. 79, at 35 (ECF No. 20-33, at 41). However, the Nevada Supreme Court evaluated the claim with respect to Detective Flenner because the reference to Detective Rader was an error. Ex. 81, at 3-4 & n.1 (ECF No. 20-35, at 4-5 & n.1). The Nevada Supreme Court's treatment of the claim has exhausted ground 4(E).

Ground 4(G) is a claim that counsel did not object to Deja Jarmin's unavailability before Jarmin's preliminary-hearing testimony was read at trial. At some point, Jarmin was believed to be in a hospital, and the prosecutor stated that they could not confirm that because of privacy regulations. Ground 4(G) refers to a federal regulation that allows a hospital to disclose whether a person, mentioned by name, is in the hospital. Otherwise, the Nevada Supreme Court ruled on this claim. Ex. 81, at 4-5 (ECF No. 20-35, at 5-6). The additional facts do not fundamentally alter the

claim that was presented to the state courts. Ground 4(G) is exhausted.

Ground 4(H) is a claim that counsel failed to raise mitigating arguments against imposition of the habitual-criminal sentence. The brief on appeal from the denial of the habeas corpus petition contains a brief mention that counsel failed to adequately prepare for sentencing, but petitioner alleged no supporting facts. Ex. 79, at 26 (ECF No. 20-33, at 32). Petitioner argues that he clearly intended to incorporate his more detailed arguments in the memorandum supporting his state habeas corpus petition. See Ex. 57, at 19-21 (ECF No. 20-11, at 20-22). The Nevada Supreme Court was not obligated to read through the record to find petitioner's claim. Petitioner needed to present his argument entirely inside his appellate brief. See Baldwin v. Reese, 541 U.S. 27, 32 (2004); Castillo v. McFadden, 399 F.3d 993, 999-1000 (9th Cir. 2005). Ground 4(H) is not exhausted.

Reasonable jurists would not find the conclusions regarding exhaustion to be debatable or wrong, and the court will not issue a certificate of appealability.

Respondents argue that grounds 1, 4(A), 4(B), 4(F), and 4(H) are conclusory. The court will not address this argument because the court is dismissing the action as untimely.

IT IS THEREFORE ORDERED that respondents' motion to dismiss (ECF No. 30) is **GRANTED**. This action is **DISMISSED** with prejudice because all grounds in the first amended petition (ECF No. 17) are

untimely. The clerk of the court shall enter judgment accordingly and close this action.

IT IS FURTHER ORDERED that a certificate of appealability is **GRANTED** on whether the court was correct in its determination that the grounds in the first amended petition (ECF No. 17) do not relate back to the original petition (ECF No. 10).

DATED: August 26, 2016.

_____
JAMES C. MAHAN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 2:14-cv-01527-JCM-PAL

[Filed August 29, 2016]

RONALD ROSS,

Petitioner,

v.

WARDEN WILLIAMS, et al

Respondents.

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ **Notice of Acceptance with Offer of Judgment.** A notice of acceptance with offer of judgment has been filed in this case.

IT IS ORDERED AND ADJUDGED

that Judgment is hereby entered in favor of defendant against plaintiff Dismissing action pursuant to Order #39.

August 29, 2016
Date

/s/ Lance S. Wilson
Clerk

/s/ Justin Matott
(By) Deputy Clerk