No. 20-86

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# In the
# Supreme Court of the United States

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**Charles Daniels, Director,**
**Nevada Department of Corrections, et al.,**

Petitioners,

**v.**

**Ronald Ross,**

Respondent.

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

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**Respondent's Brief in Opposition**

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## QUESTION PRESENTED

Whether the claims in Ross's counseled amended petition relate back to the timely-filed original pro se petition because Ross set out or attempted to set out claims in his original petition by identifying specific grounds for relief in his original petition and attaching a state court opinion that provided greater detail about the facts supporting those claims?

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## STATEMENT OF THE CASE

In an eight to three en banc decision, the Ninth Circuit concluded that, under Federal Rules of Civil Procedure 10(c) and 15(c)(1)(B), a habeas petitioner can relate back claims in an amended petition to an original pro se petition where the petitioner set out, or attempted to set out, claims in the original petition by identifying specific grounds for relief in the original petition and attaching a state court opinion that provides greater detail about the facts supporting those claims. *See* Petitioner's Appendix ("Pet. App.") 14.

In their petition for a writ of certiorari, Petitioners provided a skeletal account of what occurred in federal court. They do not raise any challenges to the lower court's factual findings. Ross presents this counterstatement because a more detailed account is necessary to demonstrate why the en banc decision is correct.

### A. Federal District Court Proceedings

On September 14, 2014, Ross filed a pro se federal petition pursuant to 28 U.S.C. § 2254 in the District of Nevada using the district's standard petition form. Brief In Opposition Appendix ("BIO App.") 2. The petition challenged Ross's theft-related convictions based on allegations he participated in a distraction theft in a casino and the unauthorized use of a credit card for which he was sentenced, as a habitual offender, to 20 years to life in prison. BIO App. 2, 17.

In relevant part, Ross identified his Sixth Amendment right to counsel as the constitutional basis for his claims. BIO App. 6. 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. *Id.* The list stated that trial 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." *Id.*

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. BIO App. 11-12. The affidavit included the notation, "see attached order." *Id.* Ross then attached that order as exhibit A to his petition, directly following the affidavit. *Id.* On that same day, Ross also filed a "request" for, among other things, leave to amend. BIO App. 1. It stated, "Petitioner incorporates by reference and fact, the attached Affidavit in support of this motion, and writ, with attached exhibits." *Id.*

The attached six-page Nevada Supreme Court order enumerated and discussed in detail many of Ross's claims. For example, the order described Ross's allegations 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 "a communication 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 where the witness was not noticed as an expert";
>
> (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 postverdict to dismiss the case for lack of evidence."

BIO App. 16-20.

While the claims Ross listed in his original pro se federal petition don't match up one-to-one with the Nevada Supreme Court's list of his claims, there's substantial overlap. For example, in his original federal petition, Ross listed one of his trial counsel ineffectiveness claims as challenging how his attorney "failed to object to the State's use of [an] expert witness." BIO App. 6. Likewise, the Nevada Supreme Court described how Ross alleged his attorney was ineffective for "failing to object to expert testimony pertaining to pickpockets and distraction thefts where the witness was not noticed as an expert." BIO App. 17.

Ross's original pro se petition was timely filed, as his one-year time period did not expire until October 27, 2014. Pet. App. 11 n. 2. The district court reviewed the petition and, on November 25, 2014, after the limitations period had expired, appointed counsel to file an amended petition. *See* BIO App. 24-25.

On June 8, 2015, with the assistance of appointed counsel, Ross filed an amended petition raising, among others, the following eight ineffective assistance of counsel claims: (I) failure to protect Ross's right to a speedy trial; (II) failure to communicate with Ross prior to trial; (III) failure to seek an appropriate sanction based on a discovery violation; (IV) failure to object based on the best evidence rule; (V) failure to object to expert testimony; (VI) failure to call a defense expert; (VII) failure to object to the admission of preliminary hearing testimony based on the State's inability to establish the witness's unavailability; and (VIII) failure to raise mitigating arguments at sentencing against the imposition of a habitual offender sentence. Pet. App. 9-10.

The State moved to dismiss the amended petition as untimely because it was filed after the one-year statute of limitations had run. They argued the claims in the amended petition did not relate back to claims in the timely, original pro se petition because the original petition lacked factual allegations. Pet. App. 10. Ross opposed dismissal, arguing that his amended petition included the necessary facts because the Nevada Supreme Court order was attached to the original petition. *Id.* The district court granted the motion, reasoning that Ross had not included any facts in

his original form petition and had not sufficiently incorporated by reference the state court opinion. Pet. App. 10-11.

Ross timely appealed to the Ninth Circuit. Pet. App. 11. On appeal, he argued that, as an attached written instrument, the state court opinion should be considered a part of the petition under Civil Rule 10(c) for relation back purposes.[1] Pet. App. 68.

A three-judge panel of the Ninth Circuit rejected this argument. *Id.* In a two to one published opinion, the panel majority held a petitioner cannot relate back to operative facts in an exhibit attached to an original petition unless the petitioner explicitly incorporated the exhibit into the original petition by making "clear and repeated" references to the exhibit in the petition itself. Pet. App. 69-70, 81-82.

Senior District Court Judge John D. Bates, sitting by designation from the District Court of the District of Columbia, dissented. He explained the court should liberally construe Ross's original pro se petition as setting out the facts discussed in the attached state court decision. Pet. App. 83. He argued that, where the factual bases of Ross's legal claim were plain from the face of the attachment to his pro se petition, Ross's failure to explicitly incorporate those facts into his form petition was precisely the kind of "technical mistake" courts generally don't hold against pro se petitioners. Pet. App. 86. He concluded, "Where, as here, a state-court decision denying postconviction relief is attached as an exhibit to a pro se habeas petition and

[1] The Federal Rules of Civil Procedure will be referred to as "Civil Rule," while the Rules Governing Section 2254 Petitions in the District Courts will be referred to as "Habeas Rule."

the petition lists claims that correspond to the claims addressed in that decision, principles of liberal construction require that the facts discussed in the decision be construed as 'set out' in the petition for purposes of relation back under Rule 15(c)." *Id.*

Ross sought rehearing en banc, asking the court to adopt either Judge Bates's liberal construction approach or the rules-based approach Ross had originally advanced on appeal. *See Ross v. Williams*, No.16-16533, Entry No. 39-1. The court granted the petition, vacated the original panel decision, and reheard the case en banc.

In an eight to three en banc decision, the Ninth Circuit adopted the rule-based approach. Pet. App. 12. The en banc court concluded that, under Civil Rule 10(c) and 15(c)(1)(B), both of which this Court has held applies to habeas petitions, a habeas petitioner can relate back claims in an amended petition to an original pro se petition when the petitioner set out, or attempted to set out, claims in the original petition by identifying specific grounds for relief in the original petition and attaching a state court opinion that provides greater detail about the facts supporting those claims. *See* Pet. App. 14. The en banc court stated that, "for all purposes," including relation back, the original petition consisted of the petition itself and any "written instrument" that was attached as an exhibit. Pet. App. 14-15. It added that a state court opinion qualifies as a written instrument for the purposes of Civil Rule 10(c). Pet. App. 15.

The en banc court then explained the two steps for determining 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 the claims were based. Pet. App. 15. First, a court determines what claims the amended petition alleges and what core facts underlie those claims. *Id.* Second, for each claim, the court looks 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.'" *Id.* (quoting *Mayle v. Felix*, 545 U.S. 644, 650, 664 (2005)). The en banc court stated, "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." Pet. App. 16.

Applying that framework to Ross's case, the en banc court concluded Ross's original form petition and attached exhibit contained core facts to which claims in his amended petition related back. Pet. App. 17. As an "obvious example," the en banc court pointed to the claim in the amended petition asserting ineffectiveness based on counsel's failure to object to the lack of notice of expert testimony on distract thefts. *Id.* The en banc court stated that, in the original form petition, Ross listed as one of his claims the similar contention that "'counsel . . . failed to object to the State's use of [an] expert witness.'" *Id.* And the attached state court opinion provided the operative facts for the claim, specifically addressing a claim that "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." *Id.* The

en banc court concluded that a comparison of the claims "clearly reveals a common core" of operative facts. *Id.* The court declined to conduct a claim-by-claim relation back analysis for each claim in the amended petition and instead instructed the district court to perform that analysis on remand. Pet. App. 28

The three-judge dissent, which consisted of the two judges from the original panel's majority opinion and only one new judge, asserted a position similar to the original panel majority, namely that a petitioner must specifically incorporate an exhibit into the original petition through clear and repeated references in order to rely on that exhibit for relation back purposes. Pet. App. 29-51.

## Reasons for Denying the Petition

### I. There is no circuit split on this issue.

Petitioners make absolutely no effort to identify a circuit split on this issue. It does not appear one exists. Respondent is not aware of any contrary decisions from any other circuit. The Ninth Circuit appears to be the first circuit court to address the specific situation presented here. To the extent there are any related decisions on this issue, those decisions are not inconsistent with the Ninth Circuit's opinion; if anything, they are *more* permissive in allowing relation back to insufficiently pled petitions. *See 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); *see* Pet. App. 20 & 20 n.9 (citing *Dean*); *see*

*also 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").

The lack of any circuit court authority on this issue—much less a split of authority—demonstrates the unusual nature of this issue, which occurs so infrequently that this Court need not intervene. In Ross's case, this unique relation back argument arose because Ross had filed a timely but unprofessionally pled petition, and counsel was not appointed to represent Ross until after the one-year time period had expired. Because this situation—where the unprofessionally pled original pro se petition was timely filed and the fully-pled amended petition must necessarily be filed outside the one-year time period—is relatively unusual, other circuit courts have not needed to address relation back in this context, which demonstrates why certiorari is unnecessary.

## II. Petitioners' arguments are wrong and do not present a compelling justification for certiorari

Petitioners' primary argument for seeking review from this Court is that the en banc opinion is inconsistent with this Court's prior decision in *Mayle v. Felix*, 545 U.S. 644 (2005). For reasons discussed below, the en banc opinion is not in any way inconsistent with *Mayle*. To the contrary, the opinion is consistent with this Court's prior case law, the Habeas Rules, and the Civil Rules. Petitioners' complaints about the en banc opinion are nothing more than disguised merits arguments on the ways they believe the en banc opinion got the analysis wrong. But this Court typically does

not grant certiorari just to review a lower court decision on those grounds. In any event, as shown below, Petitioners' reasons for this Court's review are not valid.

### A. The en banc opinion is correct

The en banc opinion faithfully followed this Court's prior precedent and appropriately harmonized the Habeas Rules and the Civil Rules. The court began its analysis by explaining that, in addition to a statute specifically incorporating Civil Rule 15 into habeas procedure, this Court has held that relation back under Rule 15 applies to habeas proceedings, *see Mayle*, 544 U.S. at 656-64, as do the pleading provisions of Civil Rule 10(c), *see Dye v. Hofbauer*, 546 U.S. 1, 4 (2005). Pet. App. 12-14.

Civil Rule 15(c)(1)(B) allows for relation back when "the amendment asserts a claim . . . that arose out of conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Civil Rule 10(c) provides, "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

Relying upon a straightforward reading of these two Civil Rules, the en banc court concluded that a petitioner can relate back to an original petition where the petitioner set out or "attempt[ed] to set out" habeas claims by identifying specific grounds for relief and attaching a court decision that provides greater detail about the facts supporting those claims. Pet. App. 14. Consistent with this Court's finding in *Dye*, the en banc court concluded the attached state court opinion, like a brief, qualified as a written instrument under Civil Rule 10(c). Pet. App. 15, 18-19.

The en banc court explained how this rule was consistent with the Habeas

Rules. In the first instance, the en banc court pointed out that the standard form required Ross to attach the state court opinion to the petition. Pet. App. 24. As the en banc court noted, Habeas Rule 4 explicitly directs a federal court to consider both the petition "and any attached exhibits" in its initial screening of a petition. *Id.* The Advisory Committee Notes to the rule more specifically identify state court opinions as an attachment the court should consider. *Id.* As the en banc court noted, reviewing a state court order is a standard part of the habeas review process. *Id.*

Moreover, the en banc court explained that its relation back rule was not inconsistent with the "particularity-in-pleading" standard of Habeas Rule 2(c). Pet. App. 26. It explained that, when a petitioner files an insufficiently pled petition, the Advisory Committee Note to Habeas Rule 2 instructs 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).'" *Id.* (quoting Habeas R. 2(c) advisory committee's note to 2004 amendment). It said that this was a change from an earlier version of Habeas Rule 2, which had permitted a court to return an insufficient petition to the petitioner without filing it. *Id.* But after the enactment of AEDPA's one-year statute of limitations, the Advisory Committee cautioned that rejecting and declining to file an insufficient petition "'may pose a significant penalty for a petitioner, who may not be able to file another petition . . . within the limitations period.'" *Id.* (quoting Habeas R. 2(c) Advisory Committee's note to 2004 amendment).

The en banc court concluded that, rather than retroactively prejudicing a

petitioner who filed a timely but insufficiently pled petition, the Habeas Rules support the "commonsense" approach of having a district court accept original petitions and then enforce Rule 2(c) by requiring petitioners to make any necessary adjustments through the amendment process. Pet. App. 26-27. "Indeed, a key purpose of Rule 15 is to permit pleading deficiencies to be fixed through amendment." Pet. App. 21 (citing Wright & Miller § 1497). As the en banc court explained in a footnote, this is precisely how the Habeas Rule 4 screening process—during which the court must review both the petition and any attachments—is meant to be used. Pet. App. 27 n.18. That is what essentially occurred here with Ross. At the Habeas Rule 4 screening stage, the court reviewed the petition and its attachments and then appointed counsel to file an amended petition, presumably to fix the deficiencies in the original petition.

The en banc opinion adopts a workable standard for district courts to apply. The en banc court's rule requires a petitioner to meet the requirements of the Civil Rules in order to support relation back. The timely-filed original petition must at least attempt to plead specific legal claims. If such an attempt was made, a petitioner can argue that an attached state court opinion can provide the operative facts for those claims. Federal courts routinely engage in this type of relation back analysis. Further, federal judges regularly consult opinions attached to a habeas petition as part of the Habeas Rule 4 screening process. There is nothing burdensome or unusual about the en banc court's holding. To the contrary, it is a commonsense approach consistent with the intended purpose of procedural rules. *See Schiavone v. Fortune*,

477 U.S. 21, 27 (1986) (noting "principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the court").

### B. Petitioners' arguments that the opinion is inconsistent with *Mayle* are not valid

Petitioners' primary argument is the en banc opinion is inconsistent with *Mayle* because *Mayle* requires any interpretation of Civil Rule 15(c) to be "strict" and "narrow" in light of the Habeas Rules and the policy underlying the statute of limitations. Petition at 8.

Preliminarily, this is an unjustifiably overbroad reading of *Mayle*. In *Mayle*, the Supreme Court looked to the heightened pleading requirements of Habeas Rule 2 and the policy underlying the statute of limitations to determine the scope of the term "conduct, transaction, or occurrence" in Civil Rule 15(c). *Mayle*, 545 U.S. at 655-56. The habeas petitioner in *Mayle* argued for a broad understanding of a term that would encompass an entire trial; in other words, if a petitioner pled one claim raising an alleged trial error, the petitioner could then file new untimely amended petitions raising different trial errors and relate those new claims back to the original petition, under the view that the trial was the single underlying occurrence. The Court rejected that argument, instead treating each alleged trial error as a distinct occurrence. In support of that conclusion, the Court noted that under Habeas Rule 2, legal claims in a § 2254 petition have to be pleaded "discretely." *Id.* at 661. This view of Rule 2 limited the scope of what qualified as an "occurrence" for relation back. *Id.*

That was the extent of the Court's reliance on any broader habeas principles. Nowhere in *Mayle* did the Court limit how relation back under Civil Rule 15(c) would apply to a habeas petition, much less how it would apply to a petition that attaches a state appellate court's written order. Nor did the Court say that relation back would operate any differently in habeas cases than it would in a typical civil case. As the en banc opinion explained, *Mayle* did not adopt a habeas-specific meaning of Rule 15 that is less "capacious" than the standard civil definition. Pet. App. 22. "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." *Id.* The general 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." Pet. App. 22-23 (internal quotation omitted). Overall, *Mayle* did nothing more than apply "normal relation back principles to determine relation back in a habeas case." Pet. App. 22 n.12.

As the en banc opinion pointed out, the result here was not inconsistent with the core holding of *Mayle*. Ross identified discrete legal errors in the original petition. The relation back analysis was not an attempt to rely on his entire trial as the transaction or occurrence, but solely those facts in the attached state court opinion that provided greater detail about the specific claims listed in the petition.

Nevertheless, Petitioners offer three different ways in which "the lack of

guidance" in the en banc opinion triggers concerns similar to those expressed in *Mayle*. Petition at 11-14. Specifically, they assert that the en banc opinion did not provide enough clarity as to the meaning of "written instrument" or "all purposes" under Civil Rule 10(c), and "attempt to set out" under Civil Rule 15(c). *Id.* However, none of these supposed inadequacies provide a basis for this Court's intervention. The facts in Ross, as well as the specific holding in the en banc opinion, provide more than sufficient guidance for the lower courts. Further, to the extent any further guidance is necessary, the lower court can provide it in subsequent opinions.

Similarly, Petitioners' underlying concerns about the en banc opinion's lack of guidance provide no cause for concern from this Court. In the first instance, as mentioned before, Petitioners' concerns are simply disguised merits arguments and an attempt to secure review on the basis of error correction. In any event, none of them provide any justifiable reason for this Court to grant review of the en banc opinion.

First, Petitioners claim that, in relying upon the "for all purposes" language of Civil Rule 10(c), the en banc opinion's rule makes no distinction between whether an attached state court opinion can be relied upon for relation back purposes as opposed to for pleading purposes. Petition at 11. According to Petitioners, to comply with the strict pleading requirement of Rule 2(c), there must be an incorporation requirement for any exhibits attached to the petition. *Id.*

But the sufficiency of the factual allegations in a petition is not an issue in this case. The petition was not dismissed for that reason. The central question here was

whether an amended petition can relate back to an arguably insufficiently pled petition. As such, the lower court was clearly not offering an opinion as to whether an attached state court opinion, without more, could be used to judge the sufficiency of the allegations in the petition for the purposes of Habeas Rule 2(c).

Respondent's argument thus conflates two distinct inquiries: pleading requirements and relation back. These are different inquiries governed by different standards. As Judge Bates reasoned in his dissent from the panel opinion, "Civil Rule 15(c) requires less for relation back than Habeas Rule 2 requires to survive dismissal." Pet. App. 90 (Judge Bates in dissent). The en banc opinion agreed, stating that Civil Rule 15(c) "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." Pet. App. 21 n.10 (emphasis in original). As such, there is nothing in the en banc opinion to suggest that its holding extended to whether the sufficiency of a pleading could be judged using an attached state court opinion. To the contrary, that court made clear its understanding that the standard for relation back is lower than the one for the sufficiency of the pleading. Pet. App. 20 ("[A] petition need not be pleaded with sufficient particularity to support relation back").

In sum, there is nothing in the en banc opinion to suggest that it was interpreting the "for all purposes" clause to allow an attached exhibit, without more, to satisfy the Habeas Rule 2(c) pleading requirements.

Next, Petitioners argue that the en banc opinion's failure to create a clear

workable standard for when a claim is "attempted to be set out" provides no limit for what would qualify as an attempt, creating a boundless relation back standard. Petition at 13. According to Petitioners, this incentivizes "the savvy habeas petitioner" to sneak numerous new claims in by alleging broad undefined claims in the petition and attaching a plethora of documents. *Id.* This concern is obviously not justified from the en banc opinion. The court's limited holding and the specific facts in this case provide more than enough guidance as to what an attempt to set out a claim looks like. Further, no "savvy habeas petitioner" would follow Petitioners' misguided plan. To the contrary, a savvy habeas petitioner seeking the best chance at relief will plead distinct claims in as much detail as possible, like Ross did in his counseled amended petition. Indeed, as the en banc opinion notes, the failure to allege specific and distinct legal claims would potentially result in dismissal. Pet. App. 25-27 & 27 n.18.

Petitioners' final concern is that the lack of specific guidance on what qualifies as a "written instrument" creates a conflict with the Habeas Rules because it will inspire petitioners to file petitions with numerous exhibits, hoping they can later use those exhibits for relation back purposes. Petition at 13-14. There is no merit to this contention, as it demonstrates a misunderstanding of a typical relation back analysis. Under the en banc court's approach, a habeas petitioner is unlikely to secure relation back simply because a petition attaches a document that mentions certain facts. Rather, a petitioner needs to plead the claim or at the very least make a discrete attempt to plead the claim in the petition. If a pro se petition fails to make it plain

what claims, exactly, the petitioner is attempting to raise, it's unlikely a petitioner will be able to rely on that petition for relation back purposes.

Nor does the en banc opinion's framework put an undue burden on district courts. As the en banc opinion explains, district courts face no obligation to wade unguided through a voluminous set of exhibits to determine whether relation back is appropriate. Pet. App. 25. The burden is on the petitioner to establish the timeliness of a claim. *Id.* The court will only be required to review those exhibits to which it has been directed. *Id.* Rather than an unbounded review of the exhibits, the court has "familiar remedies" at its disposal to put the petitioner to his burden: dismiss the claim for failure to show relation back, decline to grant leave to amend, or request supplemental briefing to better explain the relationship between the amended petition and the original one—for example, by identifying the particular exhibit from which the petitioner seeks to draw the operative facts. *Id.*

Overall, there is no inconsistency between the en banc opinion and *Mayle*, the Civil Rules, or the Habeas Rules. Petitioners' concerns with the en banc opinion are unjustified and certainly do not provide any reason for this Court to grant certiorari.

### III. This case is not a good vehicle for this Court's review

Outside of articulating a commonsense rule consistent with this Court's prior decisions as well as the Civil and Habeas Rules, the en banc opinion reached the correct and equitable result. Ross listed out discrete ineffectiveness claims in the original petition. In particular, one claim alleged counsel "failed to object to the State's use of expert witness." Indisputably, the attached state court opinion provided

the operative facts for this claim. BIO App. 17 (counsel "fail[ed] to object to expert testimony pertaining to pickpockets and distraction thefts where the witness was not noticed as an expert"). No reasonable person can deny this combination gave sufficient notice of this particular legal claim and its operative facts. *See* Pet. App. 17; Pet. App. 86 (Judge Bates in dissent from original panel decision).

Separately, throughout the entire course of this litigation, Petitioners have never articulated how relation back under these circumstances would prejudice them. Without such a showing, there truly is no reason why this case provides a good vehicle to address the issue of the appropriate relation back standard for a pro se petitioner who relies on a state court decision attached to his petition in order to provide the factual underpinnings of his claims.

Finally, this case is a poor vehicle because Ross arguably wins even under Petitioners' proposed incorporation rule. In a "request" Ross submitted with his petition, he asked for leave to amend and stated, "Petitioner incorporates by reference and fact, the attached Affidavit in support of this motion, and writ, with attached exhibits." BIO App. 1. This language sufficiently incorporates the attached state court opinion.

But a pro se habeas petitioner should not be required to include talismanic incorporation language in his petition to avail himself of relation back. Petitioners' proposed incorporation rule, or the one advocated by the dissenting judges, is the type of archaic and technical pleading requirement that should not be used to trap an unwary pro se petitioner. *See Slack v. McDaniel*, 529 U.S. 473, 487 (2000); *see also*

*Foman v. Davis*, 371 U.S. 178, 181 (1962) (merits review is not to be avoided on basis of "mere technicalities"). This Court should not grant review just to enforce this sort of rigid and formulistic rule, which would have the effect of extinguishing Ross's ability to pursue habeas relief even though he filed a timely pro se petition with specific and discernible legal claims.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated October 6, 2020

Respectfully submitted,

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