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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MANUEL SAUCEDO LOPEZ,

Petitioner,

v.

WILLIAM GITTERE, *et al.*,

Respondents.

Case No. 2:01-cv-00406-RCJ-NJK

ORDER

Petitioner Lopez has filed a motion for partial reconsideration of this court's order of September 27, 2018 (ECF No. 182), which included a determination that several of Lopez's habeas claims are time-barred under § 2244(d). ECF No. 217. Lopez argues that the Ninth Circuit's en banc decision in *Ross v. Williams*, 950 F.3d 1160 (9th Cir. 2020), requires this court to revisit its ruling that many of the claims in his second amended petition do not relate back to his initial petition under Fed. Rule Civ. Proc. 15(c)(2). For reasons that follow, the motion is granted in part and denied in part.

In *Ross*, the court reversed a three-judge panel's decision¹ and held that "for all purposes,' including relation back, the original petition consists of the petition itself and any 'written instruments' that are exhibits to the petition," which may include a state court brief or court decision. 950 F.3d at 1167 (quoting Fed. R. Civ. P. 10(c), internal

¹ *Ross v. Williams*, 896 F.3d 958 (9th Cir. 2018).

1 brackets omitted). Determining “whether an amended petition relates back to an original
2 petition that relied on an appended written instrument to help set forth the facts on
3 which it based its claims” requires a two-step analysis. *Id.* First, the court must
4 “determine what claims the amended petition alleges and what core facts underlie those
5 claims.” *Id.* Second, “for each claim in the amended petition,” the court must examine
6 “the body of the original petition and its exhibits” to see whether the pleading set out or
7 attempted to set out “a corresponding factual episode,” or “whether the claim is instead
8 supported by facts that differ in both time and type” from those in the original petition. *Id.*

9 Lopez correctly argues that this court, relying on the three-judge panel decision
10 in *Ross*, rejected the notion that attachments to his initial petition could provide the facts
11 to form the basis for relation back. See ECF No. 182 at 8-12 (citing *Ross*, 896 F.3d at
12 967). Accordingly, he asks the court to reconsider its dismissal of the following claims:
13 Grounds 2, 8(B), 9, 10, 11(A), 11(D), 11(M), 11(S), 11(X), 16, and 21(B).²

14 Respondents advance the following three arguments in opposition to
15 reconsideration. First, this court should hold off deciding Lopez’s motion for
16 reconsideration until the U.S. Supreme Court rules on the State’s petition for writ of
17 certiorari in *Ross*. Second, Lopez’s case is factually distinguishable from *Ross*. Third,
18 Lopez’s claims do not relate back even when the holding in *Ross* is applied.

19 Respondents’ first argument is a non-starter as the U.S. Supreme Court denied
20 certiorari on November 9, 2020. See *Daniels v. Ross*, No. 20-86, 2020 WL 6551908
21 (U.S. Nov. 9, 2020).

22 In claiming that this case is factually distinguishable, respondents first argue that
23 Lopez, unlike the petitioner in *Ross*, did not “set out or attempt to set out” facts
24 contained in attachments to his initial petition because he did not incorporate the
25 attachments by reference within the body of the petition. The court in *Ross* did not,

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27 ² While the court concluded that Ground 10 did not relate back to the initial petition, it determined that
28 the claim was timely for a separate reason. ECF No. 182 at 18. In addition, respondents have answered
the claim on the merits. ECF No. 207 at 12-13. Thus, Ground 10 is omitted from further consideration in
this order.

1 however, impose such a requirement and rejected the State’s argument that a petition
2 can only incorporate an attachment by “clear and repeated” references to it. *Ross*, 950
3 F.3d at 1169.

4 Even so, while attachments can provide the necessary facts to support relation
5 back, the initial petition itself must at least identify specific grounds for relief to which the
6 facts relate. *Id.* at 1167. (“If a petitioner attempts to set out habeas claims by identifying
7 specific grounds for relief in an original petition and attaching a court decision that
8 provides greater detail about the facts supporting those claims, that petition can support
9 an amended petition's relation back.”). Thus, even under *Ross*, facts contained in
10 attachments to the initial petition cannot provide the basis for relation back if they are
11 not related to grounds for relief asserted within the initial petition. *Id.* at 1168 (“If an
12 exhibit to the original petition includes facts unrelated to the grounds for relief asserted
13 in that petition, those facts were not ‘attempted to be set out’ in that petition and cannot
14 form a basis for relation back.”).

15 The other factual distinction respondents cite is that Lopez had the assistance of
16 counsel when he filed his initial petition while the petitioner in *Ross* did not. This
17 argument is also without merit in that the *Ross* court noted in a footnote that *Ross*’s pro
18 se status provided an *additional* ground for reversal beyond reasons outlined in the
19 body of its opinion. *See id.* at 1173 n. 19 (“Although the reasons given above suffice to
20 require reversal here, we also note that courts are obligated to ‘liberally construe[]’
21 documents filed pro se, like *Ross*'s original petition.”).

22 Having concluded that its prior relation back rulings must be reconsidered under
23 the framework established in *Ross*, the court will address the specific claims identified
24 for reconsideration by Lopez. With respect to some of the claims Lopez presents
25 labyrinthine arguments attempting to connect the allegations in his initial petition and
26 exhibits to the those in his second amended petition. Those arguments notwithstanding,
27 this court adheres to the two-step analysis explained in *Ross* and confines its
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1 consideration to claims in the initial pleading and the facts in the attachments that
2 correspond to those claims.

3 1. Grounds 2(A, B, C) and 11(X).

4 In Ground 2, Lopez alleges numerous instances of prosecutorial misconduct,
5 including presentation of false evidence and failure to disclose material exculpatory and
6 impeachment evidence. This court previously determined that parts of Ground 2 are
7 procedurally defaulted in addition to being time-barred. The parts of Ground 2 that are
8 not procedurally defaulted are Grounds 2(A, B, C).

9 In Ground 2(A), Lopez alleges the State presented the false testimony of Arturo
10 Montes and failed to disclose material exculpatory and impeachment evidence related
11 to Montes. In Ground 2(B), Lopez alleges the State presented the false testimony of his
12 wife Maria Lopez and failed to disclose material exculpatory and impeachment evidence
13 related to Maria. In Ground 2(C), Lopez alleges the State presented false testimony
14 related to forensic evidence and failed to disclose material exculpatory and
15 impeachment evidence related to that evidence. In Ground 11(X), Lopez claims counsel
16 was ineffective by not challenging the State's failure to comply with its constitutional
17 disclosure obligations.

18 Lopez cites to two claims in his initial petition as providing the basis for relation
19 back for Grounds 2(A, B, C) and 11(X). First, he cites to this claim in Ground 1 of his
20 initial petition: "Counsel unreasonably failed to obtain a complete sworn statement
21 which were [sic] crucial to the motion for new trial based on false testimony given at
22 trial." ECF No. 1 at 5. He contends that this claim was raised in his first-state post-
23 conviction proceeding wherein he presented Maria's written recantation of her trial
24 testimony, which includes statements in her testimony and Montes's testimony that
25 were false. However, neither his state petition nor the written recantation was included
26 as an attachment to his federal initial petition.

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1 Lopez did attach the state district court decision denying post-conviction relief in
2 that proceeding. ECF No. 1 at 39-53 (Exhibit 2 to the initial petition). That decision
3 includes the following excerpt:

4 After the trial concluded, Maria Lopez returned to Mexico.
5 Petitioner's former counsel was informed that Maria was willing to recant
6 her testimony. Counsel arranged for a taped video interview of Maria in
7 Mexico. However, counsel did not follow procedures which would have
8 made Maria's testimony admissible in a Nevada court. Petitioner now says
9 that was ineffective assistance of counsel. This view is without merit. The
taped interview was considered on the issue of whether a motion for a
new trial should have been granted. This court concluded that the new
statement did not merit a new trial. Therefore, whether or not the
statement was admissible for trial purposes is irrelevant. Counsel's tactical
decision is not ineffective assistance of counsel.

10 *Id.* at 51-52.

11 The second claim on which Lopez relies is included in Ground 3 of his initial
12 petition and states: "The trial court arbitrarily denied petitioner's motions for new trial
13 and/or that certain material evidence demonstrated the unfairness and impartiality [sic]
14 of the trial." *Id.* at 9. Lopez attached to his initial federal petition the Nevada Supreme
15 Court's decision ruling on the claim, which included the following relevant excerpt:

16 Ten months after trial, appellant's attorney observed a TV interview
17 of Arturo Montez.¹⁷ The words "Brother of Maria Lopez" were
18 superimposed on the screen. Appellant's attorney contacted the reporter
19 and obtained an affidavit—signed under strong protest—that during the
interview Mr. Montez advised her that he was Maria's brother and
Jessica's uncle. Montez submitted an affidavit denying he ever told
anyone, including the reporter, that he was related to Maria Lopez.

20 Based on the conflicting affidavits, appellant's counsel concluded
21 that Montez committed perjury at trial. He simply chose to ignore two other
22 possibilities: that the reporter was mistaken or dissembling. In any event,
Lopez filed a motion for a new trial. However, at the hearing Lopez
23 proffered no evidence or witnesses, but relied wholly on the reporter's
affidavit. Arturo Montez took the stand and in no uncertain terms testified
that he was not the brother of Maria Lopez.

24 At the hearing for a new trial the judge noted: "It defies credulity to
25 think that, as I have reviewed the transcripts, that they—Mr. Lopez was
totally ignorant of a brother who was living right down the street for some
26 time and never knew—they never knew each other, that they never spoke.
It just doesn't make any sense, that he is the brother or that perjury has
27 been committed on the stand, and therefore I'm going to deny the motion
for a new trial." The trial judge was correct; this issue is without merit.

1 ¹⁷ Mr. Montez was the state's witness who testified of having seen Lopez
2 grab Jessica by the hair and drag her home. He also testified that Lopez
3 responded "no" and shut the door in Mr. Montez' face when Mr. Montez invited
4 the Lopez family over for Thanksgiving.

5 *Id.* at 37-38.

6 In the same decision, the Nevada Supreme Court also addressed a claim that
7 the State failed to timely disclose a written report by Ted Salazar that stated Maria had
8 organic brain damage and provided details "as to the extent Maria was abused as a
9 child." *Id.* at 25-27.

10 Even after considering the facts contained in the attachments to Lopez's initial
11 petition, it cannot be said that his initial pleading contains a core of operative facts that
12 corresponds to the core of operative facts supporting his prosecutorial misconduct
13 claims in Ground 2. The State's alleged failure to timely disclose the Salazar report is
14 the only operative factual allegation in the attachments that corresponds to the
15 operative facts supporting Ground 2. That is not sufficient correspondence for relation
16 back. Simply put, the claims in the initial petition and Ground 2 do not arise out of the
17 same factual episode. See *Ross*, 950 F.3d at 1168 ("Sufficient correspondence exists if
18 the two claims arise out of the same episode-in-suit." (citing *Mayle v. Felix*, 545 U.S.
19 644, 664 n.7 (2005))).

20 Thus, Grounds 2(A, B, C) do not relate to the initial petition. And, because
21 Ground 11(X) is based on the operative facts supporting Ground 2, it does not relate
22 back either.

23 2. Ground 11(M).

24 In Ground 11(M), Lopez alleges that counsel was ineffective by failing to cross-
25 examine Maria at trial with a note she sent to him while both were confined in jail. He
26 also faults counsel for not using the note to rehabilitate his testimony on redirect
27 examination. Lopez's argues the claim relates back to allegations in his initial petition
28 that trial counsel "did not utilize information and evidence made available to him and did
not preserve important documentary evidence" and "unreasonably failed to preserve an
exculpatory piece of documentary evidence." ECF No. 1 at 4. He again cites to the state

1 district court decision denying post-conviction relief as providing the factual basis
2 necessary to support relation back.

3 The cited portion of the state district court decision discusses Lopez's allegation
4 that counsel was ineffective by failing "to save and introduce both a sado-masochistic
5 magazine found in the Lopez apartment and a note written by Maria to Lopez" ECF No.
6 1 at 44. The excerpt focuses mostly on the magazine and makes no reference to the
7 content of the note or counsel's failure to use it as tool for cross-examination or witness
8 rehabilitation. In addition, the allegations in the initial petition make no reference to the
9 note, much less indicate that the note was the "piece of documentary evidence" counsel
10 failed to preserve.

11 The initial petition and attachments do not attempt to set out a corresponding
12 factual episode to the one supporting Ground 11(M). Thus, Ground 11(M) does not
13 relate back to the initial petition.

14 3. Ground 11(A).

15 In Ground 11(A), Lopez alleges that trial counsel did not have sufficient
16 resources to put on an adequate defense in the guilt and penalty phases of trial and that
17 he was ineffective by not asking the trial court to appoint second counsel. Lopez's
18 argues the claim relates back to allegations in his initial petition that trial counsel did not
19 adequately prepare for trial. ECF No. 1 at 4. And, again, he cites to the state district
20 court decision denying post-conviction relief to support his relation back argument.

21 The state court decision merely noted, however, that counsel had cited "lack of
22 funds" as a justification for not pursuing "further investigation" beyond what the court
23 determined was "extensive" pretrial preparation. *Id.* at 43-44. Even with the attached
24 decision, Lopez's initial petition did not set out or attempt to set out "a corresponding
25 factual episode" to the one alleged in Ground 11(A). Thus, Ground 11(A) does not relate
26 back to the initial petition.

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1 4. Grounds 11(D) and 16.

2 In Ground 11(D), Lopez claims counsel was ineffective by failing to seek a
3 change of venue due to pre-trial publicity. Ground 16 is a claim that the trial court erred
4 by failing to change the venue of the trial. Lopez contends the claims relate back to his
5 initial petition because the initial petition contains an allegation that trial counsel failed to
6 conduct an adequate voir dire which corresponds with an ineffective assistance claim
7 discussed in the state district court decision that counsel “should have sought limited
8 media coverage and/or a change of venue.” ECF No. 1 at 4, 46.

9 There is nothing to suggest a connection between the allegation in the initial
10 petition and the cited portion of the state district court decision. Lopez cannot plausibly
11 argue that he attempted to set out the facts supporting Grounds 11(D) and 16 in his
12 initial petition. These grounds do not relate back.

13 5. Grounds 9 and 11(S).

14 Ground 9 challenges the torture instructions given in the guilt phase and the
15 penalty phase of Lopez’s trial. In Ground 11(S), Lopez claims ineffective assistance of
16 counsel premised on counsel’s alleged failure to move to strike the depravity of mind
17 and torture aggravating circumstances. Lopez contends the claims relate back to his
18 initial petition because the initial petition contains an allegation that the “trial court
19 erroneously instructed the jury on two aggravating circumstances rather than one” and
20 “[c]ounsel unreasonably failed to object to an instruction which enlarged the statutory
21 factors of aggravation.” ECF No. 1 at 5, 9. He further argues that the state district court
22 decision rejecting his challenge to the depravity of mind instruction provided additional
23 factual and legal allegations. *Id.* at 50.

24 The initial petition and its attachments contain no allegations asserting the
25 invalidity of the torture instruction. They do, however, allege counsel’s ineffectiveness
26 for failing to object to the aggravating circumstances instructions. Thus, Ground 9 does
27 not relate back, but Ground 11(S) does.

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1 6. Ground 8(B).

2 In Ground 8(B), Lopez contends the involuntary manslaughter instruction used at
3 his trial was unconstitutionally defective because it was inconsistent with the statutory
4 definition of manslaughter. Lopez contends the claim relates back to his initial petition
5 because the initial petition contains an allegation the trial court erred by failing to permit
6 further instruction on the definition of involuntary manslaughter which in turn
7 corresponds to the Nevada Supreme Court's discussion of the alleged error in its direct
8 appeal decision, which is attached to the initial petition. ECF No. 1 at 8-9, 28.

9 The allegations in the initial petition and attached Nevada Supreme Court opinion
10 involve the trial court's denial of trial counsel's request to supplement the instruction in
11 response to a jury inquiry. Because the allegations supporting Ground 8(B) differ in both
12 time and type from those in the initial pleading and attachments, Ground8(B) does not
13 relate back.

14 7. Ground 21(B).

15 In Ground 21(B), Lopez alleges that his rights under the Confrontation Clause
16 were violated by the admission of statements Maria made to state expert Dr. Paul U.
17 Strauss. Lopez contends the claim relates back to his initial petition because the initial
18 petition contains allegations that trial counsel were ineffective for failing to object to the
19 testimony of Dr. Strauss and that the trial court erred by allowing "the state's expert
20 witness, Dr. Strauss, to give unfounded and prejudicial testimony that Maria Lopez, the
21 state's key witness and petitioner's wife, was beaten and sexually abused by petitioner."
22 ECF No. 1 at 4, 8. He further cites to the state district court's decision discussing his
23 claim that trial counsel was ineffective in failing to object to Dr. Strauss's testimony. *Id* at
24 48-49.

25 This court agrees that the initial petition and attached exhibits attempt to set out a
26 corresponding factual episode to the one supporting Ground 21(B). Thus, Ground 21(B)
27 relates back to the initial petition.

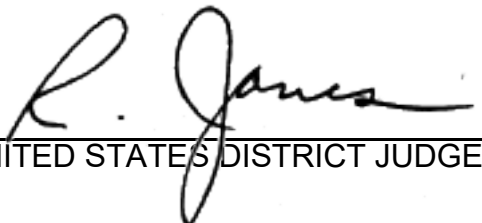
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1 IT IS THEREFORE ORDERED that petitioner's motion for partial reconsideration
2 (ECF No. 217) is GRANTED in part and DENIED in part. Contrary to this court's prior
3 ruling, Grounds 11(S) and 21(B) relate back to Lopez's initial federal petition and,
4 therefore, are not time-barred. In all other respects, the court affirms its order of
5 September 27, 2018 (ECF No. 182), with respect to the timeliness of Lopez's claims.

6 IT IS FURTHER ORDERED that respondents shall have **30 days** from the date
7 on which this order is entered within which to supplement their answer to address
8 Grounds 11(S) and 21(B) in petitioner's second amended petition (ECF No. 126).
9 Petitioner shall have **60 days** following service of the supplement to file and serve a
10 reply to respondents' answer and supplements. In all other respects, the scheduling of
11 this matter is governed by the scheduling order entered June 28, 2016 (ECF No. 124).

12 IT IS FURTHER ORDERED that respondents' motions for extension of time
13 (ECF Nos. 219/220/222) are GRANTED *nunc pro tunc* as of their respective filing dates.
14 Petitioner's unopposed motion to stay (ECF No. 225) is DENIED as moot in light of the
15 foregoing.

16 DATED THIS 29th day of March, 2021.

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20 UNITED STATES DISTRICT JUDGE
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