

1
2
3 **UNITED STATES DISTRICT COURT**4 **DISTRICT OF NEVADA**

5 RONALD ROSS,

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

6 Petitioner,

**ORDER GRANTING IN PART
MOTION TO DISMISS
FOLLOWING REMAND**

7 v.

8 CALVIN JOHNSON, et al.,

9 Respondents.

10 Counseled petitioner Ronald Ross filed a first amended petition for writ of habeas corpus
11 pursuant to 28 U.S.C. § 2254 on June 8, 2015. (ECF No. 17.) Respondents moved to dismiss Ross's
12 amended petition, Ross opposed, and respondents replied. (ECF Nos. 30, 36, 38.) This court
13 granted the motion to dismiss, finding that all grounds in the first amended petition were untimely
14 and did not relate back to Ross's original *pro se* petition. (ECF No. 39.) Judgment was entered in
15 favor of respondents. (ECF No. 40.)

16 Ross appealed, and the United States Court of Appeals for the Ninth Circuit (hereinafter
17 "Court of Appeals") reversed and remanded on February 24, 2020. *See Ross v. Williams*, 950 F.3d
18 1160 (9th Cir. 2020) (en banc). The Court of Appeals stayed the mandate pending the filing of a
19 petition for a writ of certiorari in the United States Supreme Court. (ECF No. 47.) Respondents'
20 petition for a writ of certiorari was placed on the United States Supreme Court's docket on July
21 28, 2020. (ECF No. 48.) The United States Supreme Court denied the petition for a writ of
22 certiorari on November 9, 2020. *See Daniels v. Ross*, 141 S.Ct. 840 (2020). The Court of Appeals
23 issued a mandate on November 10, 2020, ordering that its February 24, 2020, judgment take effect.

1 (ECF No. 50.) This court ordered the mandate spread upon the records of this court on December
2 7, 2020. (ECF No. 52.)

3 In its February 24, 2020, judgment, the Court of Appeals “remand[ed] for the district court
4 to consider which of the claims in the amended petition (beyond the claim regarding the failure to
5 object to expert testimony . . .) are supported by facts incorporated into the original petition.”

6 (ECF No. 46 at 27.) On May 27, 2022, this court ordered the clerk of the court to reopen this action
7 and set a briefing schedule regarding the remand. (ECF No. 54.) Ross responded to this court’s
8 order, respondents filed a response, and Ross replied. (ECF Nos. 55, 60, 63.)

9 I. DISCUSSION

10 A. Timeliness and relation back

11 Ross timely filed his original *pro se* petition for a writ of habeas corpus. (*See* ECF No. 39
12 at 3.) Ross’s first amended petition was filed after the one-year period of limitations expired. (*Id.*;
13 *see also Ross*, 950 F.3d at 1165 (“As the parties agree, Ross’s September 14, 2014 original petition
14 fell within the limitations period, while his June 8, 2015 amended petition did not.”).) As such, the
15 grounds in the first amended petition are untimely unless they relate back to the grounds in Ross’s
16 original *pro se* petition. *See Mayle v. Felix*, 545 U.S. 644 (2005).

17 In his original *pro se* petition, Ross attempted to raise the following ineffective assistance
18 of counsel arguments: failure to (1) secure a speedy trial, (2) review evidence prior to trial and
19 adequately prepare, (3) file pretrial motions, (4) address the prejudice of evidence lost prior to trial,
20 (5) prepare for jury selection, (6) prepare for trial, (7) retain defense experts, and (8) object to the
21 prosecution’s use of expert witnesses. (ECF No. 10 at 5.) Ross attached the Nevada Supreme
22 Court’s order affirming the denial of his state post-conviction petition to his original *pro se*

23

1 petition. (*Id.* at 14–19.) Ross’s first amended petition raised the following grounds for relief:
2 grounds 1, 2, 3, 4(a), 4(b), 4(c), 4(d), 4(e), 4(f), 4(g), and 4(h). (ECF No. 17.)

3 Respondents originally argued that “[n]one of the claims presented in Ross’s amended
4 petition relate[] back to the initial petition.” (ECF No. 30 at 14.) This court agreed, dismissing this
5 case “with prejudice because all grounds in the first amended petition (ECF No. 17) are untimely.”
6 (ECF No. 39 at 8.) As noted above, the Court of Appeals reversed and remanded, determining that
7 ground 4(e) relates back to Ross’s original *pro se* petition and instructing this court “to consider
8 which of the [other] claims in the amended petition . . . are supported by facts incorporated into
9 the original petition.” (ECF No. 46 at 16–17, 27.) Following the reopening of this case, Ross argues
10 that every ground except grounds 3 and 4(h) of his amended petition relate back to his original *pro*
11 *se* petition and are timely. (ECF No. 55 at 11.) Because Ross does not argue that grounds 3 and
12 4(h) relate back to his original *pro se* petition and are timely, grounds 3 and 4(h) are dismissed.
13 Respondents concede that grounds 4(b), 4(e), and 4(f) relate back. (ECF No. 60 at 5.) As such, this
14 court must determine whether grounds 1, 2, 4(a), 4(c), 4(d), and 4(g) of Ross’s amended petition
15 relate back to his original *pro se* petition.

16 Congress has authorized amendments to habeas petitions as provided in the Federal Rules
17 of Civil Procedure. *Mayle*, 545 U.S. at 649. Under Rule 15, an untimely amendment properly
18 “relates back to the date of the original pleading” as long as it arises out of the same “conduct,
19 transaction, or occurrence.” Fed. R. Civ. P. 15(c). For habeas petitions, “relation back depends on
20 the existence of a common core of operative facts uniting the original and newly asserted
21 claims.” *Mayle*, 545 U.S. at 659 (internal quotation marks omitted). An amended habeas petition
22 “does not relate back (and thereby escapes AEDPA’s one-year time limit) when it asserts a new
23

1 ground for relief supported by facts that differ in both time and type from those the original
2 pleading set forth.” *Id.* at 650.

3 In the Court of Appeal’s order, it stated that “[i]f a petitioner attempts to set out habeas
4 claims by identifying specific grounds for relief in an original petition and attaching a court
5 decision that provides greater detail about the facts supporting those claims, that petition can
6 support an amended petition’s relation back.” *Ross*, 950 F.3d at 1167. “An amended petition
7 relates back if it asserts one or more claims that arise out of ‘the conduct, transaction, or
8 occurrence’ that the original petition ‘set out’ or ‘attempted to . . . set out’—in other words, if the
9 two petitions rely on a common core of operative facts.” *Id.* (quoting Fed. R. Civ. P. 15(c)(1)(B);
10 *Mayle*, 545 U.S. at 657, 664). “‘For all purposes,’ including relation back, the original petition
11 consists of the petition itself and any ‘written instruments’ that are exhibits to the petition.” *Id.*
12 (quoting Fed. R. Civ. P. 10(c) (internal brackets omitted)). “Like a brief, a court decision is a
13 written instrument.” *Id.* (citing *Dye v. Hofbauer*, 546 U.S. 1, 4 (2005)).

14 This court must “follow two steps to determine whether an amended petition relates back
15 to an original petition that relied on an appended written instrument to help set forth the facts on
16 which it based its claims.” *Id.* First, this court must “determine what claims the amended petition
17 alleges and what core facts underlie those claims.” *Id.* And “[s]econd, for each claim in the
18 amended petition,” this court must “look to the body of the original petition and its exhibits to see
19 whether the original petition ‘set out’ or ‘attempted to . . . set out’ a corresponding factual episode
20 . . . or whether the claim is instead ‘supported by facts that differ in both time and type from those
21 the original pleading set forth.” *Id.* (quoting Fed. R. Civ. P. 15(c)(1)(B); *Mayle*, 545 U.S. at 650,
22 664). “The central question under this framework is whether the amended and original petitions
23 share a common core of operative facts, as those facts are laid out in the amended petition and

1 ‘attempted to be set out’ in the original petition.” *Id.* at 1168. “Relation back may be appropriate
2 if the later pleading merely corrects technical deficiencies or expands or modifies the facts alleged
3 in the earlier pleading, restates the original claim with greater particularity, or amplifies the details
4 of the transaction alleged in the preceding pleading.” *Id.* (internal brackets, quotation marks, and
5 citation omitted). This court is “obligated to ‘liberally construe[]’ documents filed *pro se*, like
6 Ross’s original petition.” *Id.* at 1173 n.19.

7 **1. Grounds 1 and 4(g)**

8 In ground 1 of his amended petition, Ross argues that he “was deprived of his right to
9 confrontation . . . when the prosecution was allowed to admit the preliminary hearing testimony
10 of a witness even though the prosecution did not make a sufficient showing that the witness was
11 unavailable.” (ECF No. 17 at 7.) And in ground 4(g) of his amended petition, Ross argues that he
12 “was deprived of his right to the effective assistance of counsel” when his counsel “fail[ed] to
13 object to admission of preliminary hearing testimony based on [the] state’s inability to sufficiently
14 establish [Deja Jarmin’s] unavailability.” (*Id.* at 14, 23.) In his original *pro se* petition, Ross argued
15 that his “trial counsel and appellate counsel failed to . . . review evidence prior to trial and
16 adequately prepare,” “to file pretrial motions,” and “to prepare for a trial.” (ECF No. 10 at 5.) In
17 the Nevada Supreme Court’s order, which was attached to Ross’s original *pro se* petition, the
18 Nevada Supreme Court explained that Ross “argues that counsel was ineffective for failing to
19 properly challenge the use of a preliminary-hearing transcript in lieu of live testimony at the trial.”
20 (*Id.* at 17.) In rejecting this argument, the Nevada Supreme Court stated that Ross “did not specify
21 what additional efforts the State should have made to procure the witness.” (*Id.* at 17–18.)

22 Addressing ground 4(g) first, although the Nevada Supreme Court’s decision provides
23 details regarding Ross’s counsel’s failures regarding his lack of a challenge to the use of the

1 preliminary hearing transcript during *trial* whereas Ross’s original *pro se* petition dealt with
2 counsel’s failures *pretrial*, the court finds that Ross—although perhaps clumsily done—attempted
3 to set out his habeas claim. *See Ross*, 950 F.3d at 1169–70 (explaining that “a petition need not be
4 pleaded with sufficient particularity to support relation back,” an “original pleading may be
5 inadequately pleaded yet still support relation back,” and relation back has generous standards).
6 Indeed, Ross broadly attempted to set out his counsel’s failures in his original *pro se* petition,
7 attaching the Nevada Supreme Court’s decision to provide greater details about the facts of his
8 counsel’s deficiencies. As such, because Ross’s original *pro se* petition, including the Nevada
9 Supreme Court’s decision, and Ross’s first amended petition rely on a common core of operative
10 facts—that his counsel was ineffective in objecting to the preliminary hearing testimony of an
11 unavailable witness—ground 4(g) of the first amended petition relates back to Ross’s original *pro*
12 *se* petition. And turning to ground 1, the substantive confrontation claim, the court finds that it
13 relates back to Ross’s original *pro se* petition for the same reasons that ground 4(g)—the claim
14 that counsel was ineffective regarding confrontation issues—relates back to Ross’s original *pro se*
15 petition. *See Nguyen v. Curry*, 736 F.3d 1287, 1296–97 (9th Cir. 2013) (determining that a claim
16 that appellate counsel was ineffective for failing to raise double jeopardy related back to a timely
17 raised substantive double jeopardy claim), *abrogated on other grounds by Davila v. Davis*, 137 S.
18 Ct. 2058 (2017).

19 Because grounds 1 and 4(g) both relate back to Ross’s original *pro se* petition, they are
20 timely.

21 **2. Grounds 2 and 4(a)**

22 In ground 2 of his amended petition, Ross argues that he “was deprived of his right to a
23 speedy trial . . . when the case was continued at the state’s request for 541 days.” (ECF No. 17 at

1 9.) And in ground 4(a) of his amended petition, Ross argues that he “was deprived of his right to
2 the effective assistance of counsel” when his counsel “fail[ed] to protect [his] right to a speedy
3 trial.” (ECF No. 17 at 14.) In his original *pro se* petition, Ross argued that his “trial counsel and
4 appellate counsel failed to . . . secure a speedy trial.” (ECF No. 10 at 5.) Relatedly, in the Nevada
5 Supreme Court’s order, which was attached to Ross’s original *pro se* petition, the Nevada Supreme
6 Court explained that Ross “argues that counsel was ineffective for violating [his] rights to a speedy
7 trial.” (*Id.* at 15.)

8 Addressing ground 4(a) first, the court finds that Ross attempted to set out this habeas claim
9 in his original *pro se* petition. In fact, Ross argued that his counsel failed to secure a speedy trial,
10 which is sufficient to alert this court of the factual predicate of the claim—there was too much
11 delay between when Ross was charged and his trial, and his counsel failed to address the issue. As
12 such, because Ross’s original *pro se* petition and Ross’s first amended petition rely on a common
13 core of operative facts—that his counsel was ineffective regarding his right to a speedy trial—
14 ground 4(a) of the first amended petition relates back to Ross’s original *pro se* petition. And turning
15 to ground 2, the substantive speedy-trial claim, the court finds that it relates back to Ross’s original
16 *pro se* petition for the same reasons that ground 4(a)—the claim that counsel was ineffective
17 regarding speedy trial issues—relates back to Ross’s original *pro se* petition. *See Nguyen*, 736 F.3d
18 at 1296–97, *abrogated on other grounds by Davila*, 137 S. Ct. 2058.

19 Because grounds 2 and 4(a) both relate back to Ross’s original *pro se* petition, they are
20 timely.

21 **3. Ground 4(c)**

22 In ground 4(c) of his amended petition, Ross argues that he “was deprived of his right to
23 the effective assistance of counsel” when his counsel “fail[ed] to seek [an] appropriate sanction

1 based on a discovery violation,” namely a lost surveillance videotape. (ECF No. 17 at 14, 17.) In
2 his original *pro se* petition, Ross argued that his “trial counsel and appellate counsel failed to . . .
3 address the prejudice of evidence lost prior to trial.” (ECF No. 10 at 5.) Relatedly, in the Nevada
4 Supreme Court’s order, which was attached to Ross’s original *pro se* petition, the Nevada Supreme
5 Court explained that Ross “argues that counsel was ineffective for failing to engage in pretrial
6 discovery, because had counsel done so, he would have obtained the surveillance video from the
7 shoe store.” (*Id.* at 15.) The Nevada Supreme Court rejected Ross’s argument, explaining that (1)
8 “the video was destroyed before [Ross] was arrested or counsel was appointed,” and (2) “several
9 witnesses had viewed the video before it was destroyed in the store’s ordinary course of business
10 and testified that it depicted [Ross] purchasing merchandise with the stolen credit card.” (*Id.*)

11 In his original *pro se* petition, Ross attempted to set out his habeas claim that his counsel
12 failed to address the issue of lost evidence. The Nevada Supreme Court’s decision provided greater
13 details regarding that failure, namely that the lost evidence was a surveillance video from the shoe
14 store. Although Ross’s original *pro se* petition asserts that counsel failed to argue the prejudice of
15 the lost evidence as compared to his first amended petition that asserts that counsel failed to seek
16 an appropriate sanction for the lost evidence, the court finds that this difference is simply an issue
17 with legal framing. *See Mayle*, 545 U.S. at 664 n.7 (noting that relation back is allowed when the
18 claim is based on the same facts as the original pleading even though the legal theory has been
19 changed). As such, because Ross’s original *pro se* petition, including the Nevada Supreme Court’s
20 decision, and Ross’s first amended petition rely on a common core of operative facts—that his
21 counsel was ineffective regarding the lost video surveillance from the shoe store—ground 4(c) of
22 the first amended petition relates back to Ross’s original *pro se* petition and is timely.

23 **4. Ground 4(d)**

1 In ground 4(d) of his amended petition, Ross argues that he “was deprived of his right to
2 the effective assistance of counsel” when his counsel “fail[ed] to object based on [the] best
3 evidence rule” based on the prosecution’s failure to obtain the surveillance video. (ECF No. 17 at
4 14, 19.) In his original *pro se* petition, Ross argued that his “trial counsel and appellate counsel
5 failed to . . . review evidence prior to trial and adequately prepare” and “to prepare for a trial.”
6 (ECF No. 10 at 5.) Relatedly, in the Nevada Supreme Court’s order, which was attached to Ross’s
7 original *pro se* petition, the Nevada Supreme Court explained that Ross “argues that counsel was
8 ineffective for failing to renew at trial his preliminary-hearing objection for violating the best
9 evidence rule.” (*Id.* at 18.) In rejecting Ross’s argument, the Nevada Supreme Court summarized
10 the argument it believed Ross was attempting to make: “counsel should have renewed an objection
11 to testimony about the shoe store surveillance video on the grounds that it was not the best
12 evidence.” (*Id.*)

13 Although the Nevada Supreme Court’s decision provides details regarding Ross’s
14 counsel’s failures during *trial* regarding the prosecution’s failure to obtain the surveillance video
15 in violation of the best evidence rule whereas Ross’s original *pro se* petition dealt with counsel’s
16 failures *pretrial*, the court finds that Ross—although perhaps again clumsily done—attempted to
17 set out his habeas claim. Indeed, like ground 4(g), Ross broadly attempted to set out his counsel’s
18 failures in his original *pro se* petition, attaching the Nevada Supreme Court’s decision to provide
19 greater details about the facts of his counsel’s deficiencies. As such, because Ross’s original *pro*
20 *se* petition, including the Nevada Supreme Court’s decision, and Ross’s first amended petition rely
21 on a common core of operative facts—that his counsel was ineffective regarding the prosecution’s
22 failure to obtain the surveillance video in violation of the best evidence rule—ground 4(d) of the
23 first amended petition relates back to Ross’s original *pro se* petition and is timely.

1 **B. Exhaustion**

2 In this court’s previous order, it determined that grounds 4(c) and 4(h) are unexhausted.
3 (ECF No. 39 at 6, 8.) Although ground 4(h) is dismissed as untimely for the reasons stated
4 previously in this order, ground 4(c) is still unexhausted for the reasons discussed in this court’s
5 previous order.

6 **C. Conclusory claims**

7 In their prior motion to dismiss, respondents argued that grounds 1, 4(a), 4(b), 4(f), and
8 4(h) are conclusory. (ECF No. 30 at 10.) This court declined to “address this argument because
9 the court [was] dismissing the action as untimely.” (ECF No. 39 at 8.) The court now revisits
10 respondents’ conclusory argument as it pertains to grounds 1, 4(a), 4(b), and 4(f).

11 Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts
12 (“Habeas Rule(s)”) requires a federal habeas petition to specify all grounds for relief and “state the
13 facts supporting each ground.” Notice pleading is not sufficient to satisfy the specific pleading
14 requirements for federal habeas petitions. *Mayle*, 545 U.S. at 655–56 (noting that Rule 8(a) of the
15 Federal Rules of Civil Procedure requires only “fair notice” while Habeas Rule 2(c) “is more
16 demanding,” mere legal conclusions without facts are not sufficient—“it is the relationship of the
17 facts to the claim asserted that is important”). Mere conclusions of violations of federal rights
18 without specifics do not state a basis for habeas corpus relief. *Id.* at 649; *Jones v. Gomez*, 66 F.3d
19 199, 205 (9th Cir. 1995). A claim for relief is facially plausible when the pleading alleges facts
20 that allow the court to draw a reasonable inference that the petitioner is entitled to relief. *Ashcroft*
21 *v. Iqbal*, 556 U.S. 662, 678 (2009).

1 The court defers ruling on respondents’ conclusory arguments about grounds 1, 4(a), 4(b),
2 and 4(f) until the merits stage because the arguments asserted by respondents are intertwined with
3 the merits of the grounds and can be better considered at that point.

4 **II. OPTIONS REGARDING UNEXHAUSTED CLAIM**

5 A federal court may not entertain a habeas petition unless the petitioner has exhausted
6 available and adequate state court remedies with respect to all claims in the petition. *Rose v. Lundy*,
7 455 U.S. 509, 510 (1982). A “mixed” petition containing both exhausted and unexhausted claims
8 is subject to dismissal. *Id.* In the instant case, the court previously concluded that ground 4(c) is
9 unexhausted. Because the court finds that the petition contains an unexhausted claim, Ross has
10 these options:

- 11 1. He may submit a sworn declaration voluntarily abandoning ground 4(c) and
proceed only on his exhausted claims;
- 12 2. He may return to state court to exhaust ground 4(c), in which case his federal
habeas petition will be denied without prejudice;¹ or
- 13 3. He may file a motion asking this court to stay and abey his exhausted federal
habeas claims while he returns to state court to exhaust ground 4(c).

14
15 Ross’s failure to choose any of the three options listed above, or seek other appropriate relief from
16 this court,² will result in his federal habeas petition being dismissed.

17 **III. CONCLUSION**

18 **IT IS THEREFORE ORDERED** that, following the Court of Appeal’s reversal and
19 remand, respondents’ motion to dismiss (ECF No. 30) is granted, in part, as follows:

- 20 1. Grounds 3 and 4(h) are dismissed as untimely.

21 _____
¹ This court makes no assurances as to the timeliness of any future-filed petition.

22 ² If Ross has any argument as to why ground 4(c) is technically exhausted by procedural default
23 but that default can be overcome under *Martinez v. Ryan*, 566 U.S. 1 (2012), Ross must raise that
argument in the alternative in a motion seeking either dismissal of grounds 4(c) and/or other
appropriate relief, such as a stay.

1 2. Grounds 4(c) is unexhausted.

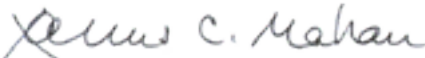
2 **IT IS FURTHER ORDERED** that Ross shall have 30 days to either: (1) inform this court
3 in a sworn declaration that he wishes to formally and forever abandon ground 4(c) and proceed on
4 the exhausted grounds; (2) inform this court in a sworn declaration that he wishes to dismiss this
5 petition without prejudice in order to return to state court to exhaust ground 4(c); or (3) file a
6 motion for a stay and abeyance asking this court to hold his exhausted grounds in abeyance while
7 he returns to state court to exhaust ground 4(c) or file a motion for other appropriate relief. If Ross
8 chooses to file a motion or seek other appropriate relief, respondents may respond to such motion
9 as provided in Local Rule 7-2.

10 **IT IS FURTHER ORDERED** that if Ross elects to abandon ground 4(c), respondents
11 shall have 30 days from the date Ross serves his declaration of abandonment in which to file an
12 answer to Ross's remaining grounds for relief. The answer shall contain all substantive and
13 procedural arguments as to all surviving grounds of the petition and shall comply with Rule 5 of
14 the Rules Governing Proceedings in the United States District Courts under 28 U.S.C. §2254.

15 **IT IS FURTHER ORDERED** that Ross shall have 30 days following service of
16 respondents' answer in which to file a reply.

17 **IT IS FURTHER ORDERED** that if Ross fails to respond to this order within the time
18 permitted, this case may be dismissed.

19 Dated: December 19, 2022

20 
21 JAMES C. MAHAN
22 UNITED STATES DISTRICT JUDGE
23