No. 16-16533
(Before the Honorable Milan D. Smith, Jr., Sandra S. Ikuta, CJJ, and John D. Bates, DJ; Opinion filed July 19, 2018)

UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

RONALD ROSS,

Petitioner-Appellant,

v.

WILLIAMS, Warden, *et al.*,

Respondents-Appellees.

Appeal from the United States District
Court for the District of Nevada
District Court No. 2:14-cv-01527 JCM PAL (Hon. James C. Mahan)

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND AOKI CENTER FOR CRITICAL RACE AND NATION STUDIES IN SUPPORT OF PETITIONER-APPELLANT'S PETITION FOR REHEARING EN BANC

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STATEMENTS OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") regularly participates in litigation to ensure justice and due process for those accused of crime or misconduct.[1] NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in twenty-eight countries—and ninety state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges are committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it representation in the ABA's House of Delegates.

NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is

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[1] Pursuant to Rule 29(a)(4)(E), Federal Rules of Appellate Procedure, counsel for *Amici* state that no counsel for a party authored this Brief in whole or in part or made a monetary contribution to the preparation and submission of this Brief, and no person other than *Amici,* their members, or counsel made such a contribution. All parties consented to the filing of this Brief.

particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the proper construction of the habeas corpus statutes, rules, and common law. In furtherance of this and its other objectives, NACDL files numerous briefs *amicus curiae* each year in federal courts addressing a wide variety of criminal justice issues.

The Aoki Center for Critical Race and Nation Studies ("Aoki Center") is a program of the University of California, Davis School of Law. It was formed to critically examine legal issues through the lens of race, ethnicity, citizenship, and class. The Aoki Center seeks to advance civil rights, critical race theory, and immigration issues through furthering scholarly research on the intersection of race and the law.

INTRODUCTION

In this case, the district court deemed a timely pro se habeas corpus petition under 28 U.S.C. § 2254 to be insufficient for failing to plead the facts on which it was based. On that basis, the district court dismissed a concededly sufficient amended petition filed by appointed counsel after the statute of limitations expired. A divided panel of this Court affirmed. *Ross v. Williams*, 896 F.3d 958 (2018). In both the district court and this Court, the decision that the amended petition did not relate back to the pro se petition turned on a determination that a decision of the Nevada Supreme Court ("the Order"), which was attached to the pro se petition, could not be considered in evaluating the sufficiency of that petition. The Panel majority reasoned that the Order was not "incorporated by reference" in so many words. As a result, petitioner Ronald Ross, who is serving a sentence of 20 years to life, will have no federal review of his substantial constitutional claims. The majority's conclusion is factually erroneous and conflicts with decisions of the Supreme Court and this Court.

First, the Order was expressly incorporated by reference in one filed document and functionally incorporated in another. Neither of these documents was denominated a "habeas corpus petition," but decisions of the Supreme Court and this Court, including an opinion written by Judge Milan Smith, make clear that

the principle of liberally construing of pro se pleadings requires looking beyond the names to the substance of pleadings to avoid unnecessary dismissals.

Second, Habeas Rule 4 requires a court, in conducting a preliminary review of the petition, to consider the petition itself and "any attached exhibits."[2] Under Habeas Rule 4, the district court – and by the same token, the Panel on review – was therefore required to consider the attached Order whether or not Mr. Ross incorporated it by reference. The majority's policy rationale for departing from Habeas Rule 4 – including the avoidance of voluminous filings – is both unsupported and insufficient to justify rejecting the plain language of the rule.

There are many habeas corpus petitions filed in this Circuit every year.[3] Most of them are filed pro se, which means that clear pleading rules are of paramount importance. The majority opinion is inconsistent with the text of the civil and habeas rules. It also threatens significant confusion for all parties to habeas proceedings and would have widespread adverse consequences for

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[2] References to the Rules Governing Section 2254 Cases will be made as "Habeas Rule___," and to the Federal Rules of Civil Procedure as "Civil Rule___."

[3] Two thousand, nine hundred and eighty-five prisoners filed habeas petitions in the district courts of this Circuit during the 12-month period ending June 30, 2018. Administrative Office of the United States Courts, *Statistical Tables for the Federal Judiciary*, *tbl. C-3*, U.S. DISTRICT COURTS (available at: http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables). This figure represents approximately 20% of the 14,566 prisoners nationwide who filed habeas petitions. *Ibid.*

petitioners in particular. This Court's en banc time, which is both valuable and limited, would be well spent in resolving the confusion sown by the majority opinion.

ARGUMENT

I. THE PANEL'S DETERMINATION THAT THE ORDER WAS NOT INCORPORATED BY REFERENCE IS CONTRARY TO THE RECORD AND DECISIONS OF THE SUPREME COURT AND THIS COURT.

There is no dispute that habeas corpus petitions may incorporate documents by reference. *Dye v. Hofbauer*, 546 U.S. 1 (2005) (per curiam). In this case, in two timely filed documents separate from the petition itself, Mr. Ross incorporated the Order by reference.[4] The incorporated Order in turn provides a more than sufficient basis to support relation back of the amended petition.

The first paper filed in this case is a one-page document titled "Request for Filing and Stay" dated September 14, 2014 and filed September 18, 2014. It is marked District Court Document 1-1, and is attached to this Brief. Attachment 1. As illustrated below, it plainly states, "Petitioner incorporates by reference and fact, the attached Affidavit in support of this motion, and writ, with attached exhibits":

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[4] While Mr. Ross does not focus on these two documents in his petition for rehearing, amici believe consideration of the documents, which are plainly part of the record, is a necessary step in the incorporation-by-reference analysis in this case. Such documents, which may not fit neatly into defined categories of pleadings, are also common in pro se habeas proceedings, and this Court's guidance in analyzing their significance will be valuable in clarifying proceedings in this area generally.

Case 2:14-cv-01527-JCM-PAL Document 1-1 Filed 09/18/14 Page 1 of 1

FILED ____ RECEIVED
ENTERED ____ SERVED ON
COUNSEL/PARTIES OF RECORD
SEP 18 2014
CLERK US DISTRICT COURT
DISTRICT OF NEVADA
BY: ____ DEPUTY

Ronald Ross #1003485
P.O. Box 208 SDCC
Indian Springs, Nevada 89070
In Proper Person

United States District Court
District of Nevada

Ronald Ross,
Petitioner,
-VS-
Warden Williams,
Respondent.

2:14-cv-1527-JCM-PAL

Request for filing and Stay

. . . .

Petitioner incorporates by reference and fact, the attached Affidavit in support of this Motion, and writ, with attached exhibits.

Dated this date, 14 September 2014.

Submitted
Ronald Ross
Ronald Ross
In Proper Person

Attachment 1. The documents attached and incorporated by reference included the form petition itself, and the Order. See EOR 22-40. Document 1-1 is in itself a sufficient habeas corpus petition, specifically incorporating by reference both the completed form petition and the Order.

The second document that incorporates the Order by reference is the Affidavit attached to the petition. EOR 31. In paragraph 2 of the Affidavit, Mr.

Ross "ma[de] application . . . for writ of habeas corpus." In paragraph 3, Mr. Ross asserted that "by the actions and inactions of trial counsel and appellate counsel, I have been denied due process of law as well as being denied the effective assistance of counsel guaranteed by the 5th, 6th, and 14th Amendments at both the trial and direct appeal levels." And critically, in paragraph 4, Mr. Ross incorporated the Order by reference, stating that "on 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)." *Ibid*. The Affidavit, like Document 1-1, is a sufficient habeas corpus petition, even standing alone.

The Panel did not address the status or effect of Document 1-1. The Panel did acknowledge that the Affidavit attached and referred to the Order, but apparently attributed dispositive weight to the conclusion that Mr. Ross' "reference to the state court affirmance in his affidavit makes clear he intended to use it for a different purpose, namely, to support his affidavit's explanation of the timing when he learned of the state court's ruling." *Ross v. Williams*, 896 F.3d 958, 973 (9th Cir. 2018). In other words, after concluding that Mr. Ross filed the Affidavit for the purpose of addressing issues of timeliness and notice, the Panel declined to consider any other function the Affidavit – including its incorporation by reference of the Order – may have performed.

This was error. The majority's focus on the category in which it believed the Affidavit belonged – a category of documents addressing issues of timeliness and notice – is contrary to the principle of liberally construing pro se pleadings established by the Supreme Court and this Court. If that principle means anything, it means that substantively sufficient pleadings are sufficient regardless of category or name. Judge Milan Smith recognized this principle in *Trigueros v. Adams*, 658 F.3d 983 (9th Cir. 2011), where, writing for the Court, he noted that a petitioner had used an inappropriate name for a document – a "traverse" – but accorded no legal significance to that fact. *Id*. at 988; *see also Papantony v. Hedrick*, 215 F.3d 863, 864 (8th Cir. 2000) (construing pro se habeas petition as a *Bivens* action); Civil Rule 8(e) ("[a]ll pleadings shall be so construed as to do substantial justice").

Judge Smith's approach in *Trigueros* was clearly correct. Courts 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. They may do so in order to avoid an unnecessary dismissal." *Castro v. United States*, 540 U.S. 375, 381 (2003) (citing, inter alia, *United States v. Eatinger*, 902 F.2d 1383, 1385 (9th Cir. 1990) (per curiam)); *see also, e.g.*, *Woods v. Carey*, 525 F.3d 886, 889–90 (9th Cir. 2008) ("we hold that the district court should have construed [Woods'] pro se habeas petition as a motion to amend his pending habeas petition"); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1196 (3d ed. 2004)

("[f]ortunately, under federal practice the technical name attached to a motion or pleading is not as important as its substance").[5]

Based on these decisions, each of the two documents incorporating the Order by reference was both sufficient in itself and sufficient to allow the later pleading to relate back to the former. The two documents themselves should have been considered under the authorities discussed above. The law is also clear that the attachments to the documents – including the Order – should have been

[5] The majority's error in disregarding Mr. Ross' Affidavit on the basis of its apparent purpose is compounded by the fact that the Affidavit was not in reality directed solely at the issues of timeliness and notice. The text of the Affidavit also addresses the substance of the claims. EOR 31 ("by the actions and inactions of trial counsel and appellate counsel, I have been denied due process of law as well as being denied the effective assistance of counsel guaranteed by the 5th, 6th, and 14th Amendments at both the trial and direct appeal levels"). More generally, it is clear that by filing the Affidavit, Mr. Ross sought to engage the district court's habeas processes, not merely to show he was doing so in a timely fashion. And his filing was consistent with the Nevada form, which thrice invites petitioners to attach "extra pages stating additional grounds and/or supporting facts." EOR 24, 26, 27-28. Liberal construction would seem to prohibit discounting the facts after such invitations. Finally, the majority's view of Mr. Ross' purpose in filing the Affidavit is inconsistent with the principle that a party's subjective intent in filing a document is not dispositive – if, indeed, it is even relevant. *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 402–03 (2008) (rejecting the notion that "the filer's state of mind is somehow determinative"; instead, "the filing must be examined from the standpoint of an objective observer to determine whether, by a reasonable construction of its terms, the filer requests the agency to activate its machinery and remedial processes").

considered in evaluating the adequacy of Mr. Ross' petition.[6] The Panel should grant rehearing.

II. UNDER THE HABEAS RULES, THE DISTRICT COURT JUDGE SHOULD BE DEEMED TO HAVE FOUND THE PETITION SUFFICIENT WHEN, AFTER EXAMINATION, HE DID NOT DISMISS THE PETITION, BUT INSTEAD ORDERED FURTHER PROCEEDINGS.

The Rules Governing Section 2254 Cases lay out a clear roadmap for district courts to receive, file, and preliminarily review habeas corpus petitions. Under these rules, the district judge implicitly and properly held the original petition to be sufficient, because the Order should have been considered part of the petition.

The rules create the following review process:

- The habeas petitioner sends the court: (1) the original habeas corpus petition (which can be the form prescribed by the local district-court rule or a

[6] *Redeker v. Neven*, 2014 WL 953553, *3 (D. Nev. March 11, 2014) ("exhibits incorporated by reference in the [second amended petition], which were appropriately filed in this habeas action, are considered part of the SAP itself"); *Imber v. Johnson*, 2014 WL 128365, *1 (S.D. Ohio Jan. 13, 2014), *report and recommendation adopted*, 2014 WL 842980, *1 (Mar. 4, 2014) ("Imber has not pleaded his claims in the way required by the standard § 2254 form by setting forth a constitutional violation followed by supporting facts. Rather, the claims are set forth in an attachment without following the standard pleading. As a *pro se* litigant, Imber is entitled to a liberal construction of his pleadings"); *Irizarry v. Ercole*, 2009 WL 3151358, *2 (S.D.N.Y. Sept. 30, 2009) ("[a]lthough Petitioner left section 13 blank, he attached four pages that clearly indicate the grounds he seeks to raise in his habeas petition, viz., the same grounds he pressed in his direct appeal"); *Birch v. Neven*, 2013 WL 3367622, *7 (D. Nev. July 3, 2013) (considering the state court's order of affirmance, which was attached to the federal petition, where "state court addressed the very claims that respondents argue are now untimely"); *Cisneros v. Warden*, 3:13-cv-00033-LRH-VPC (D. Nev. Mar. 6, 2013) ("[t]he court will construe the claims raised in these [attached opinions] as being intended as claims in this action"). Attachment 2.

petition that "substantially follows" such form, Habeas Rules 2(d), 3(a); (2) two copies of the petition, Habeas Rule 3; (2) the five-dollar filing fee, Habeas Rule 3(a)(1), 28 U.S.C. § 1914(a), or a motion for leave to proceed in forma pauperis along with an affidavit and certificate from the warden showing the amount of money the petitioner has in her account, Habeas Rule (3)(a)(2).

- The petition must, among other things, "specify all the grounds for relief available to the petitioner," and "state the facts supporting each ground." Habeas Rule 2(c)(1) & (2).

- Before the 2004 change in the Habeas Rules, the clerk could refuse to file a deficient petition and instead return it to the petitioner. Habeas Rule 2(e) (2003). But to avoid unfair dismissals with prejudice, the Rules Committee adopted the approach in Civil Rule 5(e), which provides the clerk may not refuse to accept a filing solely because it fails to comply with the national or local rules. Current Habeas Rule 3(b) reads, simply: "The clerk *must* file the petition and enter it on the docket." (Emphasis added.)

- After the petition is filed, the clerk "must promptly forward" it to a judge, and the judge "must promptly examine it." Habeas Rule 4. The duty to act "promptly" echoes the statute's command that the court must act "forthwith." 28 U.S.C. § 2243.

- The Habeas Rules guide courts on how to deal with deficient petitions that fail to "state the facts": they must "accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2(c)." Advisory Committee Notes.

- The judge's preliminary "examin[ation]" is not limited to the petition itself; Habeas Rule 4 requires consideration of "any attached exhibits." The reference to exhibits was not a scrivener's error; the Advisory Committee Notes confirm that the preliminary examination "may properly encompass *any* exhibits attached to the petition, *including but not limited to* transcripts, sentencing records, and copies of state court opinions." Habeas Rule 4 and Advisory Committee Notes (emphasis added).

- The Civil Rules provide district courts the tools to manage petitions with unreasonably voluminous or unclear pleadings or exhibits. For example, Civil Rule 12(e) allows courts to order a more definite statement, and Civil Rule 12(f) permits courts to strike redundant or impertinent pleadings.[7]

- After the preliminary examination, if it plainly appears the petitioner is not entitled to relief, the judge "must" dismiss the petition. If the petition is not dismissed, however, the judge "must" order the respondent either to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. Habeas Rule 4.

Based on Habeas Rule 4, the district court should have considered the Order in evaluating the sufficiency of the petition. The majority held to the contrary, in part based on its speculation that petitioners "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." 896 F.3d at 967.

Leaving aside considerations of exhaustion and preservation, there is no realistic danger of voluminous filings because copies cost money. Prisoners are generally indigent (surely, affluent inmates would hire counsel, not themselves

[7] *De Witt v. Pail*, 366 F.2d 682, 685 (9th Cir. 1986); *Friedman v. Nevada*, 2012 WL 1901050, *1 (D. Nev. May 23, 2012) (Civil Rule 12(f)); *Davis v. Humphrey*, 2010 WL 11537834, *4 (D. Nev. Jan. 27, 2010) (Civil Rule 12(f)); *Bibby v. Nevada*, 2009 WL 1514391, *1 (D. Nev. May 27, 2009) (Civil Rule 12(e)); *Adams v. McDaniel*, 2009 WL 224967, *1 (D. Nev. Jan. 29, 2009) (Civil Rule 12(f)); *see also Walton v. Hill*, 652 F. Supp.2d 1148, 1171 (D. Or. 2009) (notwithstanding failure of pleading to satisfy Habeas Rule 2 requirements, dismissing claims as either procedurally defaulted or failing to overcome AEDPA deference standard).

prepare large, meaningless pro se petitions). California's regulation limiting access to free legal copies has often been upheld. *See* 15 Cal. Code Regs. § 3162; *Barno v. Hernandez*, 2009 WL 734145, *5 (S.D. Cal. Mar. 17, 2009). Prisons in Nevada and elsewhere in this Circuit typically charge prisoners even for legal copies; "costs for legal materials [may] be recouped at a time when the inmate no longer is indigent . . . inmates are not denied access to the courts when they are charged for, e.g., legal copying." *Schenker v. Rowley*, 2013 WL 321688, *3 (D. Nev. Jan. 28, 2013) (citing *Johnson v. Moore*, 926 F.2d 921, 925, *superseded on other grounds*, 948 F.2d 517 (9th Cir. 1991)); *Sands v. Lewis*, 886 F.2d 1166, 1169 (9th Cir. 1989); *see also Parker v. Adu-Tutu*, 2012 WL 3150092, *1 (D. Ariz. Aug. 2, 2012); *Grindling v. Loo*, 2006 WL 3191237, *3 (D. Haw. Oct. 31, 2006). In any event, as noted above, cases in this Court and in the District of Nevada make clear that judges have ample ability to manage excessive or confusing pleadings and attachments, or order re-pleading if a petition fails to satisfy the requirements of Habeas Rules 2(c) and (d).

Unfortunately, at several points along the road, the district court, including the clerk's office, failed to follow these rules while adjudicating Mr. Ross' case:

- Habeas Rule 2(c)(2) was amended to require petitioners to "state the facts" supporting each ground; the prior rule read "briefly summarize the facts." The Advisory Committee explained that the reason for the change was that "the current language may actually mislead the petitioner and is also

redundant." The Nevada form asked petitioners to "[s]ummarize briefly the facts supporting each ground," the former, misleading formulation. EOR 24.

- The Nevada form also stated, "You may attach up to two extra pages stating additional grounds and/or supporting facts." It stated this three times, once in the instructions for each ground on the form. EOR 24, 26, 27-28. The Order is six pages long. EOR 35-41.

- Instead of *filing* Mr. Ross' petition, as Habeas Rule 3 requires, the clerk *received* it. Dkt. 1. It was not actually filed until the district court's order of November 25, 2014. Dkt. 9.

- Of the papers Mr. Ross initially sent the district court, the clerk filed only one document, Dkt. 1-1, entitled "Request for Filing and Stay." Attachment 1.

- Within 7 days after their receipt, acting promptly as required by the rule, the district court preliminarily examined the etition and attachments. But the court apparently overlooked the fact the clerk failed to follow Habeas Rule 3 by receiving rather than filing the petition and attachments. Instead, the court ordered Mr. Ross to pay the $5 filing fee or submit an application to proceed in forma pauperis within 30 days. Dkt. 2.

- Mr. Ross promptly paid the filing fee on October 23, 2014. Dkt. 3.

- Not until November 25, 2014, about a month after the statute of limitation expired, did the district court order that the petition be filed. The court must have concluded that the petition had potential merit because (a) it did not dismiss under Habeas Rule 4, and (b) it expressly concluded that "the issues presented warrant the appointment of counsel." Dkt 9.

At the preliminary review, the district judge should have noticed that the clerk failed to file the documents in accordance with the habeas rules, and ordered them filed. The judge was then obligated to promptly review the petition.

In doing so, the judge had several choices. First, the judge could have determined that the petition was insufficient because it did not plead sufficient facts. At that point, Mr. Ross would have been entitled to, as this Court has explained, a "statement of the grounds for dismissal and an opportunity to amend the complaint to overcome the deficiency unless it clearly appears from the complaint that the deficiency cannot be overcome . . . . Even in the habeas context, we remain guided by the underlying purpose of [Civil] Rule 15 to facilitate decision on the merits, rather than on pleadings or technicalities." *James v. Giles*, 221 F.3d 1074, 1077-78 (9th Cir. 2000) (citations omitted); *see also Price v. Johnston*, 334 U.S. 266, 293 (1948) (courts disposing of habeas petitions should "mak[e] clear just what issues are determined and for what reasons").

Alternatively, the judge, using the equitable authority to adopt "appropriate modes of procedure" for habeas cases, *Bracy v. Gramley*, 520 U.S. 899, 904 (1997), could have deemed the Order to have been incorporated by reference – as, indeed, it was, and as has occurred in other cases in the same district.[8] Rather than, say, ordering the petition dismissed, unless within 30 days Mr. Ross wrote on it, "The attached Order is incorporated for all purposes as if fully set out herein" and returned it to the court, the judge was free to construe the petition as if it said just

[8] *See Cisneros v. Warden*, 3:13-cv-00033-LRH-VPC (D. Nev. Mar. 6, 2013) ("[t]he court will construe the claims raised in these [attached opinions] as being intended as claims in this action"). Attachment 2.

that. This would have been particularly appropriate because the Nevada form itself invited petitioners to attach additional facts.

What the district court could not do was (1) elect not to review the petition under Habeas Rule 4 at all; (2) temporarily deem the Order incorporated by reference and then change his mind after the statute of limitations had run; or (3) review the petition under Habeas Rule 4, find it insufficient, and not dismiss it or take other action. Indeed, the Supreme Court has held that failing to dismiss a petition constitutes a ruling that it is sufficient. In *Holiday v. Johnston*, 313 U.S. 342, 350 (1941), a habeas case, the Supreme Court held that "the judge, by calling on the respondent to show cause, adjudged that, in his view, the petition was sufficient."

It is, of course, presumed that district judges follow the law. *S.E.C. v. Worthen*, 98 F.3d 480, 483 (9th Cir. 1996) (citing *Parke v. Raley*, 506 U.S. 20, 29 (1992)). It would be appropriate here to presume the district judge found the petition sufficient, through application of Habeas Rule 4, by observing and accepting the textual incorporation by reference, or by deeming the Order to be incorporated by reference, or that he should have done one of these things within the statute of limitations, and his failure to do so warrants relief. *Sossa v. Diaz*, 729 F.3d 1225, 1234-35 (9th Cir. 2013).

The Panel should grant rehearing to address this issue. If it does not, this Court should reconsider this case en banc to evaluate the district court's "departure from the plain mandate" of the Habeas Rules, *Holiday*, 313 U.S. at 351.

CONCLUSION

For the foregoing reasons, the Panel should grant rehearing and reverse the judgment below. In the alternative, this Court should grant reconsideration en banc, and reverse the judgment below.

Date: October 11, 2018

Respectfully Submitted,

/s/ *Gabriel J. Chin & David M. Porter*
Gabriel J. Chin
David M. Porter

Attorneys for Amici Curiae
The National Association of
Criminal Defense Lawyers and Aoki Center
*for Critical Race and Nation Studies**

* Counsel for *Amici Curiae* gratefully express their appreciation to the following students at the University of California, Davis School of Law, who assisted with this brief:

Samantha Castanien
David Fox
Evan Reid
Christopher Stansell
August Wissmath
Jie Yu

CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. The foregoing Brief complies with the type-volume limitation of Circuit Rule 29-2(c) (2). The Brief is printed in proportionally spaced 14-point type, and there are 4,196 words in the Brief according to the word count of the word-processing system used to prepare the Brief (excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

2. The Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and with the type style requirements of Fed. R. App. P. 32(a)(6). The Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman.

October 11, 2018

By: s/ *David M. Porter*

David M. Porter
Attorney for Amicus Curiae The National Association of Criminal Defense Lawyers and Aoki Center for Race and Nation Studies

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2018, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

October 11, 2018 By: /s/ *Alex Moyle*

Attachment 1

Ronald Ross #1003485
P.O. Box 208 SDCC
Indian Spring, Nevada 89070
In Proper Person

United States District Court
District of Nevada

Ronald Ross,
Petitioner,
-VS-
Warden Williams,
Respondent.

2:14-cv-1527-JCM-PAL

Request for filing and Stay

In the instant matter, petitioner, Ronald Ross, fully acknowledges that the filing deadline under the AEDPA draws nigh and that due to the late hour of the filing of the petitioner's state writ, that at best, about 21 day remain for the filing of the 28 USC §2254 writ.

As access to the prisons Law Library requires a two week advanced request for an appointment, petitioner is unable to obtain forms, get photo-copies made, nor utilize this prisons so called legal mail system.

Petitioner does now submit a 28 USC §2254 form for filing and does now formally request that said writ be provisionally filed with a stay being issued to allow for the appropriate forms to be submitted and for leave to Amend the writ within 45 days, as well as requesting this court to allow the Federal Public Defender's Office to represent him in these proceedings.

Petitioner incorporates by reference and fact, the attached Affidavit in support of this motion, and writ, with attached exhibits.

Dated this date, 14 September 2014.

Submitted
Ronald Ross
Ronald Ross
In Proper Person

Attachment 2

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MAXIMILLIANO CISNEROS, Petitioner, vs. WARDEN R. BAKER, Respondent.	)	3:13-cv-00033-LRH-VPC ORDER

Petitioner Maximilliano Cisneros has paid the required filing fee and the Court has reviewed his petition and motion for appointment of counsel.

Petitioner was convicted on charges of second degree murder with the use of a deadly weapon. He is serving a sentence of two consecutive terms of ten years to life. He has presented claims alleging a denial of due process and ineffective assistance of counsel in the state court. The petition as presented herein raises only a claim that petitioner received ineffective assistance of post-conviction counsel where he may have been misled as to how much time he had to file his federal petition. He encloses a copy of the Nevada Supreme Court's order affirming his conviction entered October 31, 2007, and a copy of his state post-conviction petition which was filed in November, 2008. The Court will construe the claims raised in these documents as being intended as claims in this action. The timeliness of the petition may be at issue.

Therefore, the Federal Public Defender for the District of Nevada (FPD) shall be appointed to represent petitioner. If the FPD is unable to represent petitioner, due to a conflict of interest or other

reason, then alternate counsel for petitioner shall be located, and the Court will enter a separate order appointing such alternate counsel. In either case, counsel will represent petitioner in all future federal proceedings relating to this matter (including subsequent actions) and appeals therefrom, unless allowed to withdraw.

IT IS THEREFORE ORDERED that the petition and motion for appointment of counsel shall be **filed and electronically served upon respondents.** Respondents shall file a notice of appearance within twenty days of entry of this Order

IT IS FURTHER ORDERED that petitioner's Motion for Appointment of Counsel is **GRANTED**. The Federal Public Defender is appointed to represent Petitioner.

IT IS FURTHER ORDERED that the Clerk shall **ELECTRONICALLY SERVE** the Federal Public Defender for the District of Nevada (FPD) a copy of this Order, together with a copy of the petition for writ of habeas corpus and its attachments (ECF No. 1-1). The FPD shall have thirty (30) days from the date of entry of this Order to file a notice of appearance or to indicate to the Court its inability to represent petitioner in these proceedings.

IT IS FURTHER ORDERED that, after counsel has appeared for petitioner in this case, the Court will issue a scheduling order, which will, among other things, set a deadline for the filing of a First Amended Petition.

DATED this 6th day of March, 2013.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE