

2017

**Osman Mohammed Noor, Petitioner/ Appellant, v. State of Utah,  
Respondent/ Appellee.**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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OSMAN MOHAMMED NOOR,

Petitioner/Appellant,

v.

STATE OF UTAH,

Respondent/Appellee.

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)  
) **REPLY BRIEF OF APPELLANT**  
)  
)  
) Supreme Court Case No. 20160797-SC  
)  
) District Court No. 130907566  
)  
) **Appellant is incarcerated.**  
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)  
)

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REPLY BRIEF OF APPELLANT

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Appeal from the Third Judicial District Court, Salt Lake County, State of Utah  
Honorable Vernice S. Trease, Presiding

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## ARGUMENT

### **I. ASSUMING RELATION BACK IS REQUIRED UNDER RULE 65C, THE CLAIMS IN MR. NOOR'S AMENDED PETITION SATISFY THIS REQUIREMENT.**

Although Mr. Noor disagrees that amended PCRA petitions are required to satisfy the relation back requirements of Rule 15(c), his amended claims nonetheless satisfy those requirements. Each of his amended claims directly relate to his trial counsel's ineffective assistance in failing to properly address his cultural background and lack of English fluency. The same core of operative facts formed the backbone for his claim of ineffective assistance in his original petition. Thus, Rule 15(c)'s "conduct, transaction, or occurrence" test is satisfied, and the trial court erred in failing to consider his petition on the merits.

The State argues for a narrow interpretation of Rule 15(c)'s relation back requirement by relying on *Mayle v. Felix*, 545 U.S. 644 (2005). In the federal habeas context, however, relation back is construed more narrowly than in other civil contexts. *See United States v. Turner*, 793 F. Supp. 2d 495, 499 (D. Mass. 2011), *aff'd*, 699 F.3d 578 (1st Cir. 2012) ("[I]n the habeas corpus context, the Rule 15 'relation back' provision is to be strictly construed . . . ."); *Murphy v. Archuleta*, No. CIVA06CV01899-MSKKLM, 2009 WL 1456727, at \*8 (D. Colo. May 21, 2009) ("'Relation back' in a habeas context is construed 'less broadly' than in other civil contexts."). The Court should not feel compelled to follow this narrow standard.

In the typical case, amendments under Federal Rule 15(c) are liberally construed. *See, e.g., Cooper v. Henderson*, 174 F. Supp. 3d 193, 202 (D.D.C. 2016) (“[I]t is well settled that the Federal Rules of Civil Procedure are to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits and to dispense with the technical procedural problems and thus that amendments pursuant to Rule 15(c) should be freely allowed.”); *Gladney v. SSM Health Care St. Louis*, No. 4:15CV704 RLW, 2015 WL 5813245, at \*2 (E.D. Mo. Oct. 5, 2015) (“Because the purpose of Rule 15(c) is to allow cases to be decided on their merits, . . . , courts liberally construe the rule.” (omission in original)). This broad reading of Rule 15(c) is in accordance with how Utah courts have interpreted the relation back doctrine, and is particularly appropriate given the requirement that pro se pleadings be liberally construed.

Under Utah law, an amendment will relate back to the original petition if the claim “arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading.” Utah R. Civ. P. 15(c)(2).<sup>1</sup> This test is generally satisfied when there is “a common core of operative facts.” *See Mayle*, 545 U.S. at 664. Moreover, if an amendment merely “expand[s] or modif[ies] the facts alleged in the earlier pleading [it will] meet the Rule 15(c)(1)(B) test and will relate back.” 6A Wright & Miller, Fed. Prac. & Proc. Civ. § 1497 (3d ed.). Utah courts have held, however, that “[a]llegations of ‘new

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<sup>1</sup> Mr. Noor acknowledges that in his opening brief he cited to an earlier version of Rule 15(c). Mr. Noor believes the Court’s analysis will be the same under either version of the rule.

or different acts of misconduct’ amount to new claims that cannot relate back to the original complaint.” *Highlands at Jordanelle, LLC v. Wasatch Cty.*, 2015 UT App 173, ¶ 52, 355 P.3d 1047, 1061, *cert. denied*, 366 P.3d 1213 (Utah 2016) (quoting *Yearsley v. Jensen*, 798 P.2d 1127, 1129 (Utah 1990)).

The State argues Mr. Noor’s claims do not satisfy Rule 15(c)’s “conduct, transaction, or occurrence” test because Utah courts have interpreted Rule 15(c) narrowly. (State’s Br. at 29-30.) This position is not supported by the cases the State relies on, or recent Utah Supreme Court precedent. For instance, the State relies on *Yearsley v. Jensen* where this Court held that allegations of malicious prosecution occurring on one day could not relate back to claims of assault and burglary that occurred the day before. 798 P.2d at 1128-30. In *Highlands at Jordanelle*, the Utah Court of Appeals held that an amended claim based on allegations of a fire district’s wrongful charging of fees did not relate back to the original claim alleging wrongful charging of fees against a different party at a different time. 2015 UT App 173, ¶¶ 47-52. The fact that these cases did not meet the relation back requirements does not mean that Utah law requires a narrow construction as the State seems to assert.

This Court’s recent decision in *2010-1 RAD/CADC Venture, LLC v. Dos Lagos, LLC*, 2017 UT 29, clarifies that the Court takes a practical approach to whether an amended claim properly relates back under Rule 15(c). There, the Court explained “rule 15(c) is designed to strike a balance between the policy of deciding a case on its merits



and allowing a party to enjoy the benefits of the statute of limitations.” *Id.* ¶ 18. In making this statement, it cited a United States Supreme Court opinion recognizing that “a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide.” *Id.* (quoting *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 149 n.3 (1984)).

Throughout the 2010-1 *RADC/CADC* decision, the Court suggests that a crucial consideration in the relation back analysis is whether a party had notice of the claims sought to be added through an amendment. *See id.* ¶¶ 17-28. Although the decision specifically addressed whether new parties would be on sufficient notice of a claim, the same consideration should apply for new claims or facts being added through an amendment. *See id.* ¶ 18 (quoting *Baldwin Cty.*, 466 U.S. at 149 n.3); *see* 6A Wright & Miller, Fed. Prac. & Proc. Civ. § 1497 (“Although not expressly mentioned in the rule, the courts also inquire into whether the opposing party has been put on notice regarding the claim or defense raised by the amended pleading”).

Here, the State does not even address Mr. Noor’s discussion of notice in the context of the relation back analysis. (*See* Noor’s Br. at 20 (citing 2010-1 *RADC/CADC Venture, LLC v. Dos Lagos, LLC*, 2016 UT App 89, ¶ 14, 372 P.3d 683). As the record shows, however, Mr. Noor’s original petition provided the State sufficient notice of the claims that Mr. Noor would later raise in his amended petition.

Both Mr. Noor's original and amended claims allege that his counsel was ineffective based on conduct occurring during a half-day trial conducted on January 4, 2011. (R. at 227-28.) Specifically, in his original pro se petition, Mr. Noor argued his counsel was ineffective for failing to properly address Mr. Noor's "cultural background" and his "lack of fluency in English" at trial. (R. at 6-8.) Contrary to the State's assertion, Mr. Noor was focusing on a cultural and linguistic misunderstanding between Mr. Noor and counsel, not Mr. Noor and the victim.<sup>2</sup> (R. at 6-8.) Similarly, in grounds one and two of his amended petition, he claimed that his counsel was ineffective for "failing to seek a competent interpreter." (R. at 190-91.) Thus, Mr. Noor's lack of English fluency and his counsel's failure to adequately address this language barrier is at the core of the ineffective assistance claims in his original and amended petition. Pro bono counsel simply assisted Mr. Noor to identify how counsel's failure to address this language barrier affected the representation in ways that Mr. Noor could not articulate in his original petition. This expansion or modification of claims is perfectly acceptable under the Rule 15(c) analysis. *See* 6A Wright & Miller, Fed. Prac. & Proc. Civ. § 1497. Because counsel's failure to address this issue is at the core of both of Mr. Noor's

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<sup>2</sup> The State also critiques Mr. Noor because of the allegedly changing account of events in his original petition and amended petition, but these facts are not relevant to the current issue before the Court. Nonetheless, any such discrepancies are attributable to trial counsel's failure to properly communicate with Mr. Noor and the fact that Mr. Noor's lack of English fluency prevented him from understanding the content of the original PCRA complaint.

original and amended petitions, Rule 15(c)'s "conduct, transaction, or occurrence" test is satisfied. *See Highlands at Jordanelle*, 2015 UT App 173, ¶ 52. Additionally, because the State was on notice that Mr. Noor was raising ineffective assistance claims based on his lack of English fluency, allowing Mr. Noor's claims to relate back to his original claims "strike[s] a balance between the policy of deciding [Mr. Noor's] case on its merits and allowing [the State] to enjoy the benefits of the statute of limitations." *See 2010-1 RADC/CADC, LLC*, 2017 UT 29, ¶ 18.

Even if the Court determines Mr. Noor's amended claims do not relate back to the original claims based on the traditional standard set forth above, it satisfies the relation back standard when liberally construing Mr. Noor's original petition. *See McNair v. State*, 2014 UT App 127, ¶ 12, 328 P.3d 874 (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). In this case, a liberal construction should be understood to mean that the original filing is read as broadly as is reasonable. *Cf. Estelle*, 429 U.S. at 106 ("[A] pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (internal quotation marks omitted)). It is a reasonable reading to hold that Mr. Noor's original claims for ineffective assistance based on trial counsel's failure to adequately address his cultural background and English fluency arise out of the same conduct, transaction, or occurrence, as his claim that trial

counsel was ineffective for failing to obtain a competent interpreter, failing to let Mr. Noor aid in his defense, and in failing to advise him of the immigration consequences of a guilty verdict.

Numerous other courts have adopted a liberal construction of the relation back doctrine for pro se litigants in similar contexts. *See Bartling v. State*, 253 P.3d 798 (table), 2011 WL 2637430 (Kan. Ct. App. 2011) (unpublished) (holding that a petitioner's amended post-conviction relief petition filed with the assistance of counsel, related back to his original pro se petition "[b]ased on the rule of liberal construction of pro se pleadings, and the relation-back doctrine"); *see also Husbands v. McClellan*, 957 F. Supp. 403, 406 (W.D.N.Y. 1997) ("Analysis of whether an amended complaint relates back to the original complaint must be considered in the context of the liberal relation back policy expressed in Fed. R. Civ. P. 15(c) as well as the rule that pro se complaints must be liberally construed"); *Allen v. Morris*, No. 4:93CV00398 BSM-JWC, 2009 WL 3615963, at \*3 (E.D. Ark. Oct. 28, 2009) (allowing relation back of claims and holding "[p]laintiff's filings while he was proceeding pro se must be liberally construed and, as stated, leave to amend must be freely given"); *Jackson v. Corp. Serv. Co.*, No. CV H-11-4404, 2013 WL 12177339, at \*8 (S.D. Tex. Feb. 6, 2013) (holding that allowing relation back was "even more compelling in light of [Plaintiff's] pro se status [at the time of filing] and liberality accorded the pleadings of such parties" (alterations in original)); *Tucker v. Sch. Bd. of the City of Virginia Beach*, No. 2:13CV530, 2014 WL 5529723, at

\*5 (E.D. Va. Oct. 31, 2014) (holding that relation back applied where the defense was on notice of the claims and liberally construing the claims in the original complaint because they were filed pro se); *Jones v. Brown*, 2012 IL App (1st) 102663-U, ¶ 14 (liberal application of relation back to a pro se litigant).

There can be little dispute that the State was on notice that Mr. Noor's cultural background and lack of English fluency were at the heart of his ineffective assistance claims. In fact, the State does not dispute that it had such notice. If the State were concerned that Mr. Noor's petition would run afoul of the statute of limitations, it should have raised that issue at the hearing allowing Mr. Noor time to make an amendment. (R. at 906-915.) The State argues that it did not waive the statute of limitations defense by failing to object at that time because it was not aware that Mr. Noor would be raising claims that it believed were time barred. (State's Br. at 44-45.) At the time of the hearing, the one-year statute of limitations had long since passed. The State should not be permitted to represent to trial courts and petitioners that it has no objection to an amendment raised after the statute of limitations, and then use the alleged untimeliness of any amended claims to its strategic advantage. Such litigation tactics should not be tolerated and should result in waiver of the defense under Utah Code section 78B-9-106.

Justice Souter's dissent in *Mayle v. Felix*, succinctly explains why the Court should liberally allow relation back where an original petition was filed pro se and counsel is later appointed:

Where a petition (even in its pro se form) has survived [the trial court's initial] review by showing enough merit to justify appointing counsel, it makes no sense to say that counsel (appointed because of that apparent merit) should be precluded from exercising professional judgment when that judgment calls for adding a new ground for relief that would relate back to the filing of the original petition. For by hobbling counsel this way, the Court limits the capacity of appointed counsel to provide the professional service that a paid lawyer, hired at the outset, can give a client. The lawyer hired at the start of the proceeding will be able to draft an original petition containing all the claims revealed to his trained eye; if the same lawyer is appointed by the court only after the petitioner has demonstrated some merit in an original pro se filing, he and his prisoner client will have no right to state all claims by adding to the original petition, unless the lawyer happens to be appointed and able to get up to speed before the statute of limitations runs out. The rule the Court adopts today may not make much difference to prisoners with enough money to hire their own counsel; but it will matter a great deal to poor prisoners who need appointed counsel to see and plead facts showing a colorable basis for relief.

545 U.S. at 676 (Souter, J., dissenting).

Furthermore, there is no reason to fear the parade of horrors cited by the State—that is, that a more liberal reading of the original petition would allow petitioners an unlimited number of amendments. First, any amendment will be bound by the limits of reasonability as determined by the trial court who is the ultimate gatekeeper of whether amended claims will be allowed. Second, any future amendments would relate back to amendments drafted by counsel, meaning that a liberal pro se reading reserved for pro se litigants would not be warranted for further petitions. This creates a natural limiting principle, which allows the court to decide this case on very narrow grounds. This is not a case where Mr. Noor has sought multiple amendments. Mr. Noor is simply seeking one

amendment with the assistance of his court appointed counsel so that he can fully and fairly present his claims before the trial court.

Accordingly, for the reasons set forth in this section, Mr. Noor requests that the Court should take a practical approach to the relation back doctrine and determine that the claims raised in Mr. Noor's amended petition relate back to his original petition.<sup>3</sup>

## **II. THE TEXT OF RULE 65C ALLOWS AMENDED PCRA CLAIMS, SO LONG AS THE TRIAL COURT APPROVES SUCH AMENDMENTS – RELATION BACK UNDER RULE 15(C) IS NOT REQUIRED.**

### **A. The Utah Supreme Court Has Constitutional Authority to Review Petitions for Post-Conviction Relief.**

In various portions of its brief, the State suggests that this Court's review must be limited by the specific provisions of the PCRA, and that this Court must be guided by legislative history. (*See, e.g.*, Appellee's Br. At 24, 33-34, 37, 38.) However, "[u]nder the Utah Constitution, 'the power to review post-conviction petitions quintessentially . . . belongs to the judicial branch of government.'" *E.g., Lucero v. Kennard*, 2005 UT 79, ¶ 13, 125 P.3d 917, 923 (quotation marks omitted) (omission in original); *Gardner v.*

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<sup>3</sup> If the Court adopts the State's proposed narrow application of the relation back doctrine in PCRA cases, Mr. Noor contends this would amount to a change in the law that would warrant applying that rule prospectively only. *Holmes v. Cannon*, 2016 UT 42, ¶ 15, 387 P.3d 971, 974–75. As indicated in Mr. Noor's opening brief, case law suggests that Utah courts have not consistently applied the relation back doctrine in analyzing amendments under the PCRA. (Appellant's Br. at 15-19.) Moreover, applying the doctrine retroactively, would significantly disadvantage Mr. Noor and other similarly situated individuals who have relied on the prior state of the law in raising their PCRA petitions.

*Galetka*, 2004 UT 42, ¶ 17, 94 P.3d 263. Accordingly, “the legislature may not impose restrictions which limit [post-conviction relief] as a judicial rule of procedure, except as provided in the constitution.” *Gardner*, 2004 UT 42, ¶ 17, 94 P.3d 263 (quoting *Julian v. State*, 966 P.2d 249, 253 (Utah 1998)). Thus, while this Court “afford[s] deference” to the legislature, it is entitled to exercise its “constitutionally vested authority where appropriate.” *Id.* ¶ 18.

In interpreting the PCRA, this Court seeks “to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve.” *Houskeeper v. State*, 2008 UT 78, ¶ 21, 197 P.3d 636 (internal quotation marks omitted). “The best evidence of the legislature’s intent is the plain language of the statute itself.” *Id.* (internal quotation marks omitted). In examining the statutory language, the Court “assume[s] the legislature used each term advisedly and in accordance with its ordinary meaning.” *Id.* (internal quotation marks omitted). “If, in reading the statute, the meaning of the language is clear, [the Court] need look no further to discern the legislature’s intent.” *Id.*

Similarly, when interpreting the Utah Rules of Civil Procedure, this Court interprets the rules like statutes and “read[s] each term in the rule ‘according to its ordinary and accepted meaning.’” *Drew v. Lee*, 2011 UT 15, ¶ 16, 250 P.3d 48 (*State v. Harker*, 2010 UT 56, ¶ 12, 240 P.3d 780)). As part of this analysis, “it is most important that the rules be understood, and applied, with clarity and consistency, and that the defendant, the court, the state, and others be able to determine the meaning of the rule.”



*Drew*, 2011 UT 15, ¶ 16 (*Arbogast Family Trust v. River Crossings, LLC*, 2010 UT 40, ¶ 16, 238 P.3d 1035, 1038.))

Courts “presume[] that the expression of one [term] should be interpreted as the exclusion of another” and “seek to give effect to omissions in statutory language by presuming all omissions to be purposeful.” *Marion Energy, Inc. v. KFJ Ranch P’ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 (internal quotation marks omitted) (alterations in original). It is only when a provision is ambiguous that the Court will “look to legislative history and other policy considerations for guidance.” *Summit Water Distribution Co. v. Summit Cty.*, 2005 UT 73, ¶ 17, 123 P.3d 437 (internal quotation marks omitted).

**B. The Plain Language of Rule 65C Does Not Incorporate the Requirements of Rule 15(c).**

The State contends that Rule 65C’s silence on amendments raised outside of the statute of limitations period requires that Rule 15(c) be viewed as a requirement of any such amendments to a PCRA petition. This assumption is incorrect.

While Mr. Noor recognizes that PCRA provisions “are civil and are governed by the rules of civil procedure,” the legislature has specifically provided that Rule 65C governs the filing and commencement of PCRA petitions. *See* Utah Code § 78B-9-102. Rule 65C is unique and provides district courts significant powers that it simply does not have in an ordinary civil case. Thus, where Rule 65C speaks to a specific area of procedure, it supplants the typical rules of civil procedure. For instance, once a PCRA petition is assigned to a judge that judge is required to dismiss any claim that “appears

frivolous on its face.” Utah R. Civ. P. 65C(g). The judge’s dismissal of any claims is final. *Id.* The PCRA judge may also sua sponte change the venue of the proceeding if it is filed in the wrong county. (65C(c)). *Compare with* Utah Code § 78B-3-309 (“The court may, on motion, change the place of trial . . . .”). Additionally, as it did here, the court may appoint pro bono counsel after undertaking its initial review of the case. Utah R. Civ. P. 65C(j).

As applicable here, Rule 65C also permits PCRA judges to allow amendments in various circumstances, without any reference to Rule 15(c) or a similar relation back requirement. For instance, under Rule 65(h)(3), if a PCRA petition contains a pleading error or fails to comply with the requirements of Rule 65C, the Court is required to return the petition to the petitioner who has 21-days to amend the petition, and in the Court’s discretion, it may allow an additional 21-day period to amend. Additionally, Rule 65C(k) provides that after an answer or other response is filed, further pleadings or amendments may be permitted if ordered by the court.

None of Rule 65C’s provisions relating to amendments indicate that if the statute of limitations has passed, the amendments must relate back to the original petition. This is likely because the statute of limitations only applies to the filing of the initial petition, not subsequent amendments. *See* Utah Code § 78B-9-107(1). The State argues, however, that Rule 65C’s silence must mean that the default provisions of Rule 15(c) should be read into the text of Rule 65C. In interpreting rules, however, this Court “seek[s] to give

effect to omissions in statutory language by presuming all omissions to be purposeful.”

*Marion Energy, Inc.*, 2011 UT 50, ¶ 14. Accordingly, the omission of any requirement of relation back or mention of Rule 15(c) should be presumed purposeful under Rule 65C.

For instance, Rule 65C could have easily incorporated language stating that amendments are only allowed if they relate back pursuant to Rule 15(c), but it did not do so. This omission is particularly telling given that several other provisions of Rule 65C incorporate by reference other rules of the Utah Rules of Civil Procedure. For instance, subpart 65C(k), indicates that service of an answer must be accomplished according to Rule 5(b). Subpart 65C(n) references discovery under Rules 26 through 37. Subpart 65C(o) incorporates the Utah Rules of Appellate Procedure. And finally, subpart 65C(p) provides that the court can award costs “as allowed under Rule 54(d).” In contrast, rule 65C(h) and (k) dealing with amendments, do not reference Rule 15(c) or any other rules of the Utah Rules of Civil Procedure. Silence on this point is a strong indication that amendments to PCRA petitions are not intended to be governed by Rule 15(c), but are instead left to the discretion of the trial court. This conclusion is consistent with this Court’s recognition that “the PCRA grants broad discretion to reviewing courts to fashion appropriate remedies.” See *Houskeeper*, 2008 UT 78, ¶ 25.

To avoid this conclusion, the State relies on the United States Supreme Court Case of *Mayle v. Felix*, to argue that relation back is required under Utah’s PCRA. Federal law, however, is not analogous on this point. Under the federal habeas corpus statute for

instance, specific direction is provided as to how amendments should be treated under the Federal Rules of Civil Procedure. Specifically, 28 U.S.C. § 2242 provides that a habeas corpus application “may be amended or supplemented as provided in the rules of procedure applicable to civil actions.” *See Mayle*, 545 U.S. at 655. Thus, as the Court acknowledged in *Mayle v. Felix*, the relation back requirements of Federal Rule 15(c) must be satisfied if a habeas application is amended after the statute of limitations expires. *See Mayle*, 545 U.S. at 655.

Rule 65C, however, provides no indication that an amendment to a PCRA petition must comply with the other provisions of the Utah Rules of Civil Procedure. This omission should be presumed purposeful. *Marion Energy, Inc.*, 2011 UT 50, ¶ 14. Rule 65C should be read as it is written and amendments to PCRA petitions should be subject to the discretion of the trial Court.

Not only is this conclusion required by the text of Rule 65C and Utah Code § 78B-9-102, it is supported by sound policy. Courts in other states interpreting their own post-conviction relief statutes have reached similar conclusions. For instance, in *Poole v. State*, 203 Md. App. 1, 3, 36 A.3d 513, 514 (2012), the Court of Special Appeals of Maryland held that “amendments . . . to timely filed petitions for postconviction relief—including amendments that add new non-frivolous issues to the original petition—‘shall be freely allowed in order to do substantial justice.’” 36 A.3d at 521. In that case, the petitioner timely filed his original petition for post-conviction relief pro se in March

2006. *Id.* at 514. After the statute of limitations expired, Mr. Poole was assigned a public defender who filed an amended petition. *Id.* The state argued Mr. Poole's amended petition was filed outside the 10-year statute of limitations and should be dismissed. *Id.* at 515. The trial court agreed and dismissed Mr. Poole's amended petition. *Id.*

The appeals court reversed. It recognized two competing provisions under Maryland law. The first provision stated that "unless extraordinary cause is shown" a petition may not be filed outside of the statute of limitations period. *Id.* at 517. The second provision held that amendments to postconviction petitions "shall be freely allowed in order to do substantial justice." *Id.* It concluded that so long as an original petition was filed within the statute of limitations period, amended petitions would be allowed "in order to do substantial justice." *Id.*

The Court bolstered its conclusion by relying on the provision of Maryland's post-conviction statute providing for the assistance of counsel. *Id.* (citing Md. Code Ann., Crim. Proc. § 7-108). It explained that "the right to counsel means the right to the effective assistance of counsel" and that "[i]n the context of postconviction proceedings, the right to effective assistance of counsel necessarily includes the right to add non-frivolous issues developed by counsel, which were not included in the original petition." *Id.* (internal quotation marks omitted). Furthermore, it noted that:

If amendments were not freely allowed to timely filed pro se petitions, a petitioner's right to assistance of counsel would be reduced to a mere right to have an attorney appear at a hearing to argue the issues as presented in the pro se petition, which are often frivolous. It is only appropriate that counsel have the

opportunity to remove frivolous claims as well as to add non-frivolous claims by freely amending a postconviction petition.

*Id.*

Similar to Maryland, several other states provide trial courts the discretion to allow amendments to post-conviction petitions, even after the time bar has passed. *See State v. Farinas*, 09-396 (La. App. 5 Cir. 11/24/09), 28 So. 3d 1132, 1135, *writ denied*, 2010-0086 (La. 6/25/10), 38 So. 3d 335 (“The trial judge has discretion to allow the defendant to amend and supplement a timely-filed application for post-conviction relief. . . . This is so even if the supplementation arises after the expiration of [the post-conviction relief act’s] time bar.”); *Ploof v. State*, 75 A.3d 811, 821 (Del. 2013), as corrected (Aug. 15, 2013) (holding that under Connecticut’s postconviction remedy act, the initial time limit applies only to the initial filing, and that Connecticut’s post-conviction remedies act grants Superior Court judges discretion to permit defendants to amend their motions when justice so requires; however, the court noted that the parties did not raise the relationship with Delaware Rule of Civil Procedure 15); *Ex parte Jenkins*, 972 So. 2d 159, 164 (Ala. 2005) (rejecting application of the relation back doctrine to petitions for post-conviction relief).

As suggested by these decisions, there are practical reasons for allowing amendments to PCRA petitions after the statute of limitations has expired. First, under Utah’s PCRA, a petition is only timely if “filed within one year after the cause of action has accrued.” Utah Code § 78B-9-107(1). Thus, as in *Poole*, it follows that if the initial

petition is timely filed, the plain language of Rule 65C provides amendments should be permitted if allowed by the trial court. Second, after pro bono counsel is appointed, it logically follows that counsel will be able to assist the petitioner in bolstering their claims and raising other claims that the petitioner overlooked. As one court explained, "It is a meaningless gesture to appoint counsel, if that counsel is afforded no opportunity, by suggesting amendments to the petition or otherwise, to assist the applicant." *O'Connor v. Director*, 238 Md. 1, 2, 207 A.2d 615 (1965).

Thus, as illustrated in this section, if the Court reaches this issue, it should conclude that trial courts can allow amendments to PCRA petitions without requiring that such amendments relate back to the original petition.

#### CONCLUSION

For the foregoing reasons, this Court should reverse the order of the district court, and remand with instructions to consider the merits of Mr. Noor's claims.

DATED this 19<sup>th</sup> day of June, 2017.

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I HEREBY CERTIFY that on the 19<sup>th</sup> day of June, 2017, I caused a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** to be filed with notice sent via email to the following:

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