

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 21 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MARVIN MOSBY,

Petitioner-Appellant,

v.

RENEE BAKER, Warden; ATTORNEY
GENERAL FOR THE STATE OF
NEVADA,

Respondents-Appellees.

No. 17-16565

D.C. No.

3:14-cv-00251-MMD-WGC

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, District Judge, Presiding

Argued and Submitted February 8, 2019
San Francisco, California

Before: PAEZ and BERZON, Circuit Judges, and FEINERMAN,** District Judge.

Marvin Mosby was convicted of stealing a camera and sentenced by a Nevada judge to life in prison without the possibility of parole. Proceeding pro se, Mosby unsuccessfully attempted to file a series of state and federal habeas

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

petitions. At issue here is the federal district court’s dismissal of Mosby’s final federal habeas petition (“*Mosby III*”), filed more than a year after his conviction was final, as time-barred. Mosby, now represented by counsel, argues that the district court wrongly dismissed his first federal habeas petition (“*Mosby I*”), filed before the statutory deadline. The parties agree that, if the district court wrongly dismissed *Mosby I*, *Mosby III* is timely, and at least one claim, Ground 1, relates back to the initial filing. We hold that the original dismissal was improper, reverse the district court’s dismissal of *Mosby III*, and remand for further proceedings.

Rule 2(d) of the Rules Governing § 2254 Cases requires a petition to “substantially follow either the form appended to the[] rules *or* a form prescribed by a local district-court rule” (emphasis added). Mosby filed his first federal habeas petition using a state habeas form rather than either of the forms identified by Rule 2(d). However, Rule 2(d) requires only that petitioners “substantially follow” one of the two federal forms, not, as the district court appears to have assumed, that they actually write their answers on it. The three forms are similar enough that, even though Mosby used the wrong form, he provided the material information that the specified federal options would have elicited. As a result, Mosby’s conformance was substantial. *See Substantial*, *Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/substantial> (last visited Jan. 24, 2019) (“[B]eing largely but not wholly that which is specified”);

Substantial, *Oxford English Dictionary* (3d. ed. 2012) (“That is, constitutes, or involves an essential part, point, or feature; essential, material”).

The district court ordered Mosby to refile and then dismissed *Mosby I* because District of Nevada Local Rule LSR 3-1 requires “pro se petitioners [to] use the local § 2254 form.” Mosby is correct that this rule conflicts with Rule 2(d) of the Rules Governing § 2254 Cases. The local rule requires use of a specific local form; the federal rule requires only that the petition “substantially follow” either the local *or* the model form. District of Nevada Local Rule LR IA 1-2 is clear that the local rules “apply to all actions and proceedings, except where [they] may be inconsistent with rules or other laws specifically applicable to those types of actions or proceedings.” The Rules Governing § 2254 Cases are “rules . . . specifically applicable” to the filing of habeas proceedings, so the federal rule takes precedence: Mosby need have only *substantially* followed *one* of the forms prescribed by Rule 2(d).

REVERSED and REMANDED.