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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT LOGAN BERRY, JR.,

Petitioner,

v.

ISIDRO BACA, *et al.*,

Respondents.

Case No. 3:16-cv-00470-MMD-WGC

**MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(B)**

Petitioner Robert L. Berry, by and through counsel, Assistant Federal Public Defender S. Alex Spelman, hereby moves this court for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). Berry respectfully requests this court to set aside its September 26, 2017 final order and judgment (ECF Nos. 10, 11), to deny the motion to dismiss (ECF No. 7) without prejudice, and to allow Berry to amend the petition to include his exhausted jurisdictional claim that the Nevada Supreme Court

adjudicated on the merits.[1] This motion is based upon the attached points and authorities and all pleadings and papers filed herein.

## POINTS AND AUTHORITIES

### I. Factual and procedural background

Petitioner Robert L. Berry was charged and convicted pursuant to a plea agreement for attempted robbery and sentenced as a habitual criminal to life with the possibility of parole after 10 years. ECF No. 8-19; ECF 8-25. The first amended information alleged that Berry "attempted to rob Fox Peak." ECF No. 8-19 at 2. "Fox Peak Station," a gas station located on tribal lands, is owned and operated by members of the Fallon Paiute-Shoshone Tribe. ECF No. 9-29 at 3.

Just before sentencing, Berry's counsel challenged the state's jurisdiction over this crime, arguing that it falls exclusively within federal jurisdiction because the alleged crime was in Indian country and against Indians. ECF 8-24. The trial court rejected the argument. *Id.* at 10. The court assumed that the clerk working the register at the time of the alleged offense was not a tribal member, and identified only this individual—not the owners of the store—as a victim of the attempted robbery of the store. *Id.* On October 19, 2015, the Nevada Supreme Court affirmed on the same grounds. ECF No. 9-29.

On August 8, 2016, well within a year of the date of finality of the direct appeal, Berry filed the instant timely *pro se* federal habeas corpus petition. ECF No. 1-1. He discussed the exhausted jurisdictional issue at great length in his petition, but also raised issues with his trial counsel's performance.

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[1] Concurrently with this motion, Mr. Berry is filing a motion for leave to file an amended petition. *See* LR IC 2-2(b) (a separate motion must be filed for each type of relief requested). He is also moving for a stay of proceedings in case number 3:17-cv-00659-HDM-VPC.

While the court considered the petition, the statute of limitations expired. Mr. Berry does not waive any procedural arguments he may raise in defense of the timing of this or any other petition for habeas corpus. That said, the Nevada Supreme Court filed its order of affirmance on October 19, 2015. Over one year and ninety days passed thereafter, while this court was still considering Berry's instant *pro se* federal habeas petition. *See Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) ("We hold that section 2244(d)(2) does not toll the AEDPA limitations period while a federal habeas petition is pending.").

On September 26, 2017, after noting that "[u]nder NRS § 41.430, jurisdiction might have been with the federal courts, not the state courts, to handle the case," the court nonetheless dismissed the petition as fully unexhausted, interpreting each of his claims as ineffective assistance of counsel claims. Despite the petition's extensive discussion of the sole claim he litigated before the Nevada Supreme Court, the court did not liberally construe his *pro se* petition as raising, at least as one of several claims, his exhausted jurisdictional claim. Nor was he provided the option for a stay.

Just over one month later, on November 2, 2017, Mr. Berry promptly filed another *pro se* federal habeas corpus petition in order to more clearly assert his exhausted jurisdictional claim, apparently in an attempt to cure the problems this court found with his first federal petition. *See* Case No. 3:17-cv-00659-HDM-VPC, ECF No. 1-1; Exhibit A. Less than two weeks later, the court appointed the Federal Public Defender as counsel, noting that "[p]etitioner challenges whether Nevada could prosecute the crime in question because it allegedly was subject to exclusive federal jurisdiction because it occurred at a store owned by the Fallon Paiute Shoshone Tribe and operated in Indian country." Case No. 3:17-cv-00659-HDM-VPC, ECF No. 3 at 2; Exhibit B.

While Berry's timely *pro se* petition in the instant case was inartfully drafted and disorganized, his exhausted, jurisdictional claim remains at the center of his case and arguments. Given equitable concerns with the statute of limitations, the caselaw requiring liberal construction of *pro se* pleadings, the caselaw providing for courts to give petitioners the option for a stay of fully unexhausted petitions, and Berry's earnest, good faith attempt to litigate his exhausted jurisdiction claim, Berry moves for FRCP 60(b) relief from the court's dismissal of his *pro se* petition and for leave to amend the petition to correct the instant petition.

## II. Legal overview of Indian country jurisdiction in Nevada

This case is about which sovereign had the power to charge and convict Mr. Berry for a crime in Indian country. A brief overview of this area of law is helpful. On direct appeal, Mr. Berry argued that "[t]he Tenth Judicial District Court, Churchill County, State of Nevada did not have jurisdiction to entertain this case, but rather, it should have been prosecuted under federal law." ECF No. 9-25 at 9. He cited Nevada Revised Statute (NRS) 41.430, which states, among other things, as follows:

> 1. Pursuant to the provisions of section 7, chapter 505, **Public Law 280** of the 83d Congress, approved August 15, 1953, and being 67 Stat. 588, and sections 401 to 403, inclusive, of Title IV, Public Law 284 of the 90th Congress, approved April 11, 1968, and being 82 Stat. 78, et seq., the State of Nevada does hereby assume jurisdiction over public offenses committed by or against Indians in the areas of Indian country in Nevada, as well as jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country in Nevada, subject only to the conditions of subsections 3 and 4 of this section.

This is commonly referred to as a "Public Law 280" jurisdictional statute, based on the name of the first, 1953 federal statute granting the federal government's consent to the states to assume such jurisdiction. Subsections 3 and 4 of NRS 41.430 clarify that the state does not—and as a matter of federal law, explained further below, the state *cannot*—assume jurisdiction over any area of Indian country wherein

the Indian tribe occupying the area has not consented to state jurisdiction. NRS 41.430(3) & (4). As subsection 1 of NRS 41.430 states, this statute is the state of Nevada's acceptance of whatever jurisdiction the federal government has offered to the state in Indian country, subject to the limitations Congress placed on this cession of jurisdiction. That said, as subsection 1 of this statute explicitly indicates, this state statute does not exist in isolation. Rather, "[j]urisdiction in 'Indian country,' . . . is governed by a complex patchwork of federal, state, and tribal law." *Duro v. Reina*, 495 U.S. 676, 680 (1990), *superseded by statute on other grounds as stated in United States v. Lara*, 541 U.S. 193 (2004).

The starting point is federal law, which places the limits and conditions on the jurisdiction a state may assume in Indian country. Generally, the federal government has exclusive jurisdiction over public offenses committed by or against Indians in Indian country. *See* 18 U.S.C. § 1152; *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016), as revised (July 7, 2016). The governing federal statute here grants Congress's consent to the states to assume jurisdiction over such public offenses only when the state first obtains the consent of the tribe via a special election called by the Secretary of the Interior. 25 U.S.C. § 1321(a)(1); 25 U.S.C. § 1326. This statute constitutes a positive—yet limited—grant of jurisdiction to the states from Congress's "plenary power over the Indian tribes,"[2] against a backdrop of otherwise exclusive federal jurisdiction in Indian country for public offenses by or against Indians. *See id.*; 18 U.S.C. § 1152. However, despite this limited grant of power to the states, "[m]ost States lack jurisdiction over crimes committed in Indian country against Indian victims." *Bryant*, 136 S. Ct. at 1960. That is the case in Nevada.

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[2] *Las Vegas Tribe of Paiute Indians v. Phebus*, 5 F. Supp. 1221, 1227–28 (D. Nev. 2014) (citing *Lone Wolf v. Hitchock*, 187 U.S. 553, 565 (1903); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)).

Nevada does not exercise Public Law 280 jurisdiction over any of the Indian country in this state. There were two opportunities for the state to assume jurisdiction: pursuant to a 1953 federal statute or pursuant to a 1968 amendment to the federal statute. Congress enacted Public Law 280 in its original form in 1953. *See* Exhibit C (available at https://www.gpo.gov/fdsys/pkg/STATUTE-67/pdf/STATUTE-67-Pg588.pdf). The statute as originally enacted granted Congress's consent for states to assume jurisdiction over crimes by or against Indians in Indian country without the requirement of tribal consent to the state's assumption of jurisdiction. *See id.* Pursuant to this 1953 federal statute, Nevada enacted its first version of NRS 41.430 in 1955, in which Nevada assumed jurisdiction over crimes by or against Indians in Indian country in each county that the governor did not exclude by formal proclamation within a set time. NRS 41.430 (1955); Exhibit D (1955 bill containing the original language of NRS 41.430). According to public records in the State Archives, Churchill County was one of the several counties that the governor excluded from Public Law 280 jurisdiction in 1955. *See* Exhibit E. The state assumed Public Law 280 jurisdiction over other counties.

In 1968, Congress amended 25 U.S.C. § 1321 to its modern form, which now affirmatively requires that a state obtains tribal consent before the state can assume Public Law 280 jurisdiction in Indian country. *See* 25 U.S.C. § 1321(a)(1); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 879 (1986). Further, for any tribes over which a state had already obtained Public Law 280 jurisdiction pursuant to the original 1953 statute, the 1968 amendment allowed states to "retrocede" jurisdiction back to the United States. *See* 25 U.S.C. § 1323. In response, Nevada amended NRS 41.430 in 1973 to its modern form. The new statute (a) announced that the "State of Nevada hereby recedes from and relinquishes jurisdiction over" all Indian country for which the state had already assumed

jurisdiction, unless the tribe occupying that area affirmatively consented to continuing state jurisdiction, and (b) acknowledged 25 U.S.C. 1321's new, 1968 requirement of tribal consent for all future assumptions of state jurisdiction.

The result was that Nevada stopped exercising Public Law 280 jurisdiction anywhere in the state. M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 Gonz. L. Rev. 663, 703 (2011) ("Nevada is the only optional P.L. 280 state to effect full retrocession of criminal jurisdiction, and did so with respect to all fifteen tribes."); *id.* at 703 n. 320 ("At present, Nevada does not exercise any jurisdiction under Public Law 280."); Carole Goldberg, Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 Conn. L. Rev. 697, 729 (2006) ("Nevada, an optional state, eventually retroceded jurisdiction over all of the reservations for which it had obtained jurisdiction."); 1-6 Cohen's Handbook of Federal Indian Law § 6.04 (2017) ("Jurisdiction has now been retroceded for all reservations."). The U.S. Department of Justice's Nevada office, which prosecutes crimes in Indian country in Nevada, appears to concur. *See* Daniel G. Bogden, United States Attorney, *District of Nevada Informational Resource Guide for Tribal Matters* 1 (Feb. 2010) (https://www.justice.gov/sites/default/files/usao-nv/legacy/2013/05/23/tribal_matters.pdf) (stating that crimes involving a non-Indian offender and an Indian victim fall under "[f]ederal jurisdiction for both felonies and misdemeanors."). Thus, Nevada does not exercise any Public Law 280 jurisdiction.

Therefore, now, the only way the State of Nevada can prosecute a crime in Indian country is if the crime was not committed "by or against Indians" or otherwise did not affect Indians. *See* 25 U.S.C. § 1321; 18 U.S.C. § 1152.

## III. Mr. Berry's jurisdictional claim

This case raises serious questions about the state court's jurisdiction to prosecute Mr. Berry for an alleged robbery against an Indian-owned store in Indian country. There were two arguments for the state exercising jurisdiction over this crime in Indian country: (a) the state has Public Law 280 jurisdiction over the Indian country in which this crime took place, *see* 25 U.S.C. § 1321; NRS 41.430, and (b) the state has jurisdiction because the attempted robbery of an Indian-owned store was not a crime "against Indians." Mr. Berry's judgment and life sentence are void as a matter of federal law because this state does not exercise any Public Law 280 jurisdiction and because Mr. Berry's charges clearly allege that he committed a crime in Indian country against Indians.

### a. Public Law 280 jurisdiction

The Nevada Supreme Court held that Mr. Berry failed to prove that the Fallon Paiute-Shoshone Tribe has not consented to state jurisdiction and that therefore, Mr. Berry failed to prove that the state does not have Public Law 280 jurisdiction. The court's analysis of this issue was deeply flawed because, despite the legal reality that Nevada does not exercise Public Law 280 jurisdiction over *any* Indian country in the state, the court decided that it can nonetheless presume that the state does exercise Public Law 280 jurisdiction whenever the defendant fails to somehow prove that it does not. *See* ECF No. 9-29. This bizarre holding was erroneous for multiple reasons.

First, when determining upon whom to place the burden of proof for this jurisdictional question, the court apparently relied on the structure of the state statute, rather than relying on the governing federal statute. *See id.* The structure of the state statute, NRS 41.430, implies that the lack of tribal consent is a mere "negative exception" to the state's otherwise presumed broad jurisdiction over crimes in Indian country, rather than an affirmative prerequisite to the exercise of

jurisdiction. Accordingly, the Nevada Supreme Court held that the burden falls on the defendant to prove the existence of a negative exception to this jurisdiction statute. *See* ECF No. 9-29.

But federal law is supreme and clearly governs here. *See* U.S. Const. art. IV (supremacy clause); Art. I § 8 (Indian Commerce Clause). Despite Nevada's purported broad assumption of jurisdiction over crimes in Indian country by the language of NRS 41.430, the jurisdiction available to the state to assume is limited to, at most, that jurisdiction which the federal government has consented to the state to assume. U.S. Const. art. VI; 25 U.S.C. § 1321(a)(1). Indeed, NRS 41.430 explicitly limits itself to assume Public Law 280 jurisdiction "[p]ursuant to the provisions of section 7, chapter 505, Public Law 280 of the 83d Congress, approved August 15, 1953, and being 67 Stat 588, and sections 401 to 403, inclusive, of Title IV, Public Law 284 of the 90th Congress, approved April 11, 1968, and being 82 Stat. 78, et seq. . . .". NRS 41.430(1). And the structure of the federal statute is clear that tribal consent is an affirmative prerequisite to the state's assumption of jurisdiction, 25 U.S.C. § 1321(a)(1) (granting jurisdiction to a state only "with the consent of the Indian tribe occupying the particular Indian country"), and is not a mere "negative exception" to jurisdiction. As the United States Supreme Court held decades ago, in 1986, "Title IV of the Civil Rights Act of 1968 amended Pub.L. 280 to require that all subsequent assertions of jurisdiction [by a state] be *preceded* by tribal consent." *Three Affiliated Tribe of Fort Berthold Reservation*, 476 U.S. at 879 (emphasis added). Therefore, unlike in the case of a "negative exception[] in [a] jurisdictional statute," *see Pendelton v. State*, 103 Nev. 95, 99 (1987); ECF No. 9-29 at 3 (Nevada Supreme Court order of affirmance), federal law is clear that the tribe must consent *before* the state has jurisdiction—the presumption otherwise is that federal jurisdiction is exclusive.

Second, there is only one form of proof allowed by federal law for the state to demonstrate tribal consent: the results of a special election held by the tribe, called by the United States Secretary of Interior for this purpose. 25 U.S.C. § 1326. It would be truly absurd for Congress to have intended for defendants to somehow prove that such a special election has never occurred, rather than simply requiring the state to place on the record the necessary proof that it has. Rather, as is clear by the structure of the federal statute, the presumption is that the state *lacks* jurisdiction over crimes in tribal land committed by or against Indians unless the state proves that the tribe has voted in favor of state jurisdiction by a special election. *See* 25 U.S.C. §§ 1321, 1326. Thus, once the defendant raises the issue of jurisdiction or the court notices it *sua sponte*, the state must prove tribal consent or the judgment is void.[3]

Here, despite the fact that Mr. Berry raised this for the first time over four years ago, the state has never produced evidence that the Fallon Paiute-Shoshone Tribe in Churchill County has consented to state jurisdiction by a special election—this is the case, of course, because the tribe never has.

**b. Crimes not "by or against Indians"**

Nevada does not exercise Public Law 280 jurisdiction anywhere in the state. Therefore, the only way the state would have had jurisdiction over this crime is if 25 U.S.C. § 1321 and NRS 41.430 did not apply, which is the case when a crime is strictly

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[3] Further, the cornerstone rule of statutory construction of federal Indian law supports this conclusion. *Byran v. Itasca County*, 426 U.S. 373, 392 (1976) ("[W]e must be guided by that 'eminently sound and vital canon' . . . that 'statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'"). When Congress granted the tribes the right to vote over whether to consent to state jurisdiction in a special election, this change in law was designed to promote tribal sovereignty and tribal interests. But a reading of the statute that would allow a state to nonetheless assume jurisdiction over crimes in tribal territory, when a tribe has not consented to state jurisdiction, just because the defendant was unable to somehow prove a negative that the tribe has never consented (as opposed to simply requiring the state to prove that the tribe *did* consent), would needlessly impede tribal interests and allow the state to assume jurisdiction in cases, like here, even where the tribe has not consented.

between non-Indians—*i.e.* the crime was not "against" Indians and did not affect Indians. *Duro*, 495 U.S. at 680 ("For Indian country crimes involving only non-Indians, longstanding precedents of this Court hold that state courts have exclusive jurisdiction despite the terms of [18 U.S.C. §1152]."); *People of State of N.Y. ex rel. Ray v. Martin*, 326 U.S. 496, 500 (1946) (holding that states, by virtue of their statehood, have jurisdiction over "crimes between whites and whites which do not affect Indians."). If the crime was against or affected Indians, then jurisdiction rested exclusively with the federal government as a matter of federal law.

The record is replete with evidence—and representations by the state—that this alleged crime took place in Indian country and was against Indians, involved Indians, or affected Indians. *See, e.g.*, ECF No. 8-19 (first amended information) ("attempted to rob Fox Peak"); ECF No. 9-29 at 3 (order of affirmance) (noting that the owners of Fox Peak Station were tribal members). Simply put, the state specifically alleged that Mr. Berry attempted to take money from an Indian-owned store in Indian country. *See* ECF No. 8-19 ("Defendant attempted to rob Fox Peak"); *see also* ECF No. 8-1 at 11 (declaration of probable cause arrest and detention). This attempted robbery of an Indian-owned store was clearly "against" Indians.

Even if a court were to conclude that this crime was committed "against" multiple parties for the purposes of 25 U.S.C. § 1321(a)(1)—*e.g.* there were multiple affected parties, some Indian and some not—the plain language of the federal statute and caselaw still triggers federal jurisdiction: nothing in the language of the statute limits its application to crimes committed *exclusively* against Indians; according to the statute's plain language, once a crime involves Indians—either because the crime was "against" them or affected them—as here, tribal consent to state jurisdiction pursuant to 25 U.S.C. §§ 1321, 1326 is required.

The state clearly alleged that Mr. Berry attempted to rob an Indian-owned store and attempted to take the store's money. Thus, the crime was "against" the Indian owners and operators of the store for the purposes of 25 U.S.C. § 1321 and 18 U.S.C. § 1152, and federal jurisdiction was exclusive absent evidence of a special election granting tribal consent to state jurisdiction.

Mr. Berry's judgment and life sentence are void under federal law.

**IV. Jurisdictional claims in federal habeas corpus**

Whether a state court lacked jurisdiction to convict a federal habeas petitioner is a claim of paramount importance to federal courts and is a core, historical function of the writ of habeas corpus. Even those jurists and scholars with the most limited view of the role federal habeas corpus proceedings should play in our criminal justice system agree that the Great Writ should exist to remedy convictions entered where the court lacked jurisdiction, as it always has. *See, e.g.* Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 Duke L.J. 947, 970–71, 1037 (2000) (arguing for limiting habeas corpus to claims that the state court lacked jurisdiction, or that state proceedings were fundamentally unfair, or that the defendant is actually innocent). Indeed, some commentators have argued that at common law, "the writ of habeas corpus assured little more than a conviction in a court of competent jurisdiction," and have suggested that the supreme court did not expand the writ much beyond jurisdictional inquiries until the early twentieth century. *Id.* at 970 (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 456 (1963)). Thus, this is a historical function of the writ protected by the Suspension Clause of Article I, section 9 of the United States Constitution. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001) (holding that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789'" (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996))).

Indeed, AEDPA does not purport to eliminate jurisdictional claims. 28 U.S.C. § 2254 mandates that a district court shall entertain an application for a writ of habeas corpus submitted by a state prisoner "on the ground that he is in custody in violation of the *Constitution* or *laws* or treaties of the United States." Thus, if federal law denies state jurisdiction over a crime, 28 U.S.C. § 2254 provides a means of relief for the petitioner. *Cf. Petition of Carmen*, 165 F. Supp. 942, 949 (N.D. Cal. 1958), aff'd sub nom. *Dickson v. Carmen*, 270 F.2d 809 (9th Cir. 1959) ("the federal habeas corpus statute, which was interpreted by the United States Supreme Court, makes no distinction between violations of constitutional rights and violations of rights accorded by statute. It extends the writ of habeas corpus to all cases of persons 'in custody in violation of the Constitution or laws or treaties of the United States.'").

Mr. Berry has a meritorious federal jurisdictional claim for which he seeks vindication before this court by his federal petition for a writ of habeas corpus.

## V. FRCP 60(b) grounds to set aside the judgment

Federal Rule of Civil Procedure 60(b) "is to be given a liberal construction so as to do substantial justice and to prevent the 'judgment from becoming a vehicle of injustice.'" *MIF Realty L.P. v. Rochester Assoc.*, 92 F.3d 752, 755 (8th Cir. 1996) (quoting *United States v. Walus*, 616 F.2d 283, 288 (7th Cir. 1980)). Rule 60(b) allows a court to set aside a judgment for the following reasons, among others:

> (1) mistake, inadvertence, . . . or excusable neglect;
> (5) . . . applying [the judgment] prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Such motions must be made within a reasonable time and if for reasons (1) or (2) above, no more than a year after the judgment. Fed. R. Civ. P. 60(c).

Here, FRCP 60(b) relief is justified under subsections (1), (5), and (6).

**a. Mistake, inadvertence, or excusable neglect**

Mr. Berry has diligently pursued this jurisdictional claim in state court and before this court. On direct appeal, he brought a single claim: "Does the state of Nevada or the federal government have jurisdiction to prosecute this case?" ECF No. 9-25 at 3. He argued that the state did not have jurisdiction to prosecute his case and requested the judgment of conviction be set aside. *Id.* at 15.

On October 19, 2015, the Nevada Supreme Court resolved this claim on the merits. ECF No. 9-29. Thus, Berry diligently exhausted this claim without procedural default.

Mr. Berry brought his original, *pro se* federal petition in this case on August 4, 2016, well within AEDPA's one-year statute of limitations. ECF No. 1-1.

Although 28 U.S.C. § 2254(a) allows federal habeas petitioners to claim that the state is holding him in violation of federal "law," not just in violation of constitutional amendments, the *pro se* petition form asks petitioners to fill in the following: "I allege that my state court conviction and/or sentence are unconstitutional, in violation of my _____ Amendment right to _____ based on these facts: . . . ." *See, e.g.*, *id.* at 9. Accordingly, Berry attempted to couch his jurisdictional argument in terms of a violation of an Amendment-based constitutional claim, as required by the form, to the best of his ability as a *pro se* petitioner. *Id.*

Nonetheless, the vast majority of Mr. Berry's discussion in his "points and authorities" of ground 1 focusses on the jurisdictional claim. He also adds complaints that counsel did not raise this issue before the trial court sooner and was otherwise ineffective for various other reasons. *See generally* ECF No. 1-1. Ground 3 of Berry's petition also discusses many ways in which this jurisdictional issue affected his other rights, such as how he entered his plea before counsel had ever mentioned a potential jurisdictional defect to him that he might have wanted to pursue. *Id.* at 20, 23.

During the pendency of this court's consideration of the petition, the one-year mark after the date of finality passed. Thereafter, on September 26, 2017, the court dismissed the petition as fully unexhausted without an opportunity for a stay, for the appointment of counsel, or to amend the petition.

Mr. Berry has since been appointed counsel, and counsel has learned that the wording of his *pro se* petition—not clearly listing his jurisdictional claim as an independent claim—constituted a mistake, inadvertence, or excusable neglect for a *pro se* petitioner. The petition form provides fill-in-the-blank answers only for Amendment-based constitutional claims, not federal statutory jurisdictional claims as Mr. Berry raises here—thus, the form affirmatively misled him. Given this, he did his best to discuss the exhausted jurisdictional issue within the confines of the *pro se* form and the information he had.

Even still, two of his three "grounds" for relief contain detailed discussion of his jurisdictional claim. Thus, given the United States Supreme Court's requirement that federal district courts liberally construe *pro se* pleadings,[4] and especially given that the *pro se* form here provided fill-in-the-blank "grounds" only for violations of constitutional amendments, defects in the organization or structure of Mr. Berry's petition are excusable and constitute mistake, inadvertence, or excusable neglect.

Further, it is quite safe to conclude that Mr. Berry had no strategic reason or interest in waiving the single claim he exhausted before the Nevada Supreme Court, given both the strength of the claim and the length at which he discusses it in his petition. Thus, the *pro se* petition should not be construed as Mr. Berry intentionally waiving this claim. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007); Fed. R. Civ. P.

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[4] "A document filed *pro se* is to be liberally construed, . . . and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citations omitted) (internal quotation marks omitted); Fed. R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice").

8(f). Indeed, after this court dismissed his petition, Mr. Berry filed another federal habeas corpus petition alleging *only* his jurisdictional claim (and on this petition form, he simply squeezed in, awkwardly, the appropriate jurisdictional argument regardless of the fill-in-the-blank prompts). *See* Exhibit A. Thus, the way he drafted the instant petition was a mistake, inadvertent, and excusable neglect.

It is also worth noting that at the time Mr. Berry filed this *pro se* petition, the Ninth Circuit had already provided that district courts had the discretion to grant a stay of proceedings for fully unexhausted petitions, rather than dismissal. *See generally Mena v. Long*, 813 F.3d 907 (9th Cir. 2016).

**b. The dismissal is no longer equitable**

There are numerous equitable reasons for setting aside the judgment of dismissal. Chief among them is the fact that one year after the date of finality of the Nevada Supreme Court's decision has passed, which may needlessly and inequitably create AEDPA statute-of-limitations problems despite his best efforts, even though he filed his federal petition on time. Though Mr. Berry will still have an opportunity to raise arguments to combat the statute of limitations issue, it would be unjust to require him to do that here, where he has a meritorious claim justifying complete relief that can be adjudicated on the merits if this court grants this motion, and where he had filed his first petition on time and had so diligently and earnestly pursued his rights. Now that Mr. Berry has counsel who is able to clarify to the court that he means to pursue his jurisdictional claim, as he did in state court, it would be inequitable to continue to construe his original *pro se* federal petition as not raising this claim or, at least, to not provide the chance to amend. *See Rice v. Olson*, 324 U.S. 786, 792 (1945) ("A petition for habeas corpus ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice." (quoting *Holiday v. Johnston*, 313 U.S. 342, 350 (1941))).

Therefore, setting aside the judgment of dismissal pursuant to Federal Rule of Civil Procedure 60(b) and allowing Mr. Berry to amend his petition (now with counsel) will be an equitable outcome that furthers "the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits." *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986). On the other hand, allowing the judgment of dismissal to stand, requiring Mr. Berry to litigate this claim in an untimely petition, will produce an inequitable result in triggering statute-of-limitations issues he would not otherwise have needed to litigate had he been originally allowed to litigate the exhausted jurisdictional claim in the timely petition.

Given the facts that Mr. Berry has diligently pursued his rights from the start and timely filed the instant *pro se* petition in this court, that he can now clarify to the court that he intends to pursue this jurisdictional claim in his federal petition, and that the judgment against him and life sentence are likely void, prospective application of the prior dismissal (ECF Nos. 10, 11) is no longer equitable.

**c. Other reasons justifying relief**

Federal Rule of Civil Procedure 60(b)(6) also provides a basis for this court to provide relief from the judgment of dismissal. This subsection is available in "extraordinary circumstances," *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988), and there is no particular test or set of factors that limits what circumstances qualify:

> [FRCP 60(b)(6)] strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of . . . common law remedial tools. In simple English, the language of the 'other reason' clause . . . vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.

*Klapptrott v. United States*, 335 U.S. 601, 614–15 (1949).

In addition to all of the reasons discussed above, equity tips strongly in favor of setting aside the judgment of dismissal, as this is a rare, extraordinary

circumstance in which Mr. Berry is likely serving a life sentence upon a void judgment of conviction. It was well within the discretion of the court to grant a stay of proceedings here, rather than dismiss the case. *See generally Mena*, 813 F.3d 907. That option is still available under FRCP 60(b).

Mr. Berry simply seeks an adjudication on the merits of his exhausted jurisdictional claim. He asks the court to set aside the dismissal of his petition on procedural grounds, where he diligently exhausted his claim in state court on the merits, he filed his federal *pro se* petition on time, he discussed the jurisdictional-defect issue in his petition at length, and he presents a strong claim on the merits that his underlying judgment and life sentence are void. FRCP 60(b) allows this court to set aside the prior judgment "to prevent the judgment from becoming a vehicle of injustice." *MIF Realty L.P.*, 92 F.3d at 755. Granting this motion and granting the motion for leave to amend will allow Mr. Berry's counsel to clarify the grounds he seeks to pursue in federal court, will allow the case to proceed on the merits, and allow this court to ensure that Mr. Berry is not serving a lengthy sentence upon a void judgment, which is a claim of paramount importance for habeas corpus.

## VI. Conclusion

Mr. Berry respectfully moves this court to set aside its final judgment of dismissal (ECF Nos. 10, 11) and allow Mr. Berry to amend his petition in light of his appointment of counsel.

Dated this 4th day of January, 2018.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

*/s/ S. Alex Spelman*
S. ALEX SPELMAN
Assistant Federal Public Defender

**CERTIFICATE OF SERVICE**

I hereby certify that on January 4, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States District Court, District of Nevada by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system and include: Heather D. Procter.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

Robert Berry
#1105137
Lovelock Correctional Center
1200 Prison Road
Lovelock NV 89419

*/s/ Jessica Pillsbury*
An Employee of the
Federal Public Defender