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9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 ROBERT LOGAN BERRY, JR.,

12 Petitioner,

13 vs.

14 ISIDRO BACA, *et al.*,

15 Respondents.

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

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

16 Respondents oppose Robert Logan Berry, Jr. (Berry) motion for relief form judgment pursuant
17 to Federal Rule of Civil Procedure (Rule) 60(b). ECF No. 13. This opposition is based upon the
18 following points and authorities, together with all other pleadings, documents and exhibits on file
19 herein.

20 **POINTS AND AUTHORITIES**

21 **INTRODUCTION**

22 This Court dismissed Berry’s proper person federal habeas petition as it contained only
23 unexhausted ineffective assistance of counsel claims. Berry fails to demonstrate this Court should
24 reconsider its order dismissing the petition. Berry’s statute of limitations has expired in this case, but
25 that fact does not warrant relief in this matter. Liberal construction of Berry’s proper person federal
26 petition demonstrates he presented the claims he wished to raise, namely ineffective assistance of
27 counsel, rather than the jurisdictional issue presented on direct appeal. Berry is not entitled to relief
28 from the judgment.

STATEMENT OF THE CASE¹

On August 4, 2016, Berry mailed or handed to a correctional officer for the purpose of mailing his federal habeas petition. ECF No. 5. Respondents moved to dismiss the petition. ECF No. 7. Berry did not respond.

On September 26, 2017, this Court granted the motion to dismiss without prejudice as Berry failed to exhaust his remedies. ECF No. 10. Judgment entered the same day. ECF No. 11.

On January 4, 2018, Berry filed his motion for relief from judgment pursuant to Rule 60(b) (ECF No. 13) and motion for leave to file an amended petition (ECF No. 14). Respondents now oppose the Rule 60(b) motion.

ARGUMENT

Berry argues he is entitled to relief pursuant to Rule 60(b)(1), (5), and (6). ECF No. 13 at 13–18. He presented a claim based upon the state court’s lack of jurisdiction on direct appeal, and that he discussed the jurisdictional issue at great length in his proper person federal petition. *Id.* at 2. Berry argues his proper person petition was “inartfully drafted and disorganized” based upon confusion regarding the form petition. *Id.* at 4. The statute of limitations expired while this Court considered the motion to dismiss, but he promptly filing a new proper person federal petition raising only the jurisdictional issue. *Id.* at 3 (citing *Berry v. Baker*, Case No. 3:17-cv-0659-HDM-VPC, ECF No. 1-1). Berry argues he is entitled to Rule 60(b) relief based upon equitable concerns that his new petition in Case No. 3:17-cv-0659 is untimely; the liberal construction requirement for *pro se* pleadings; the case law providing for a stay of fully unexhausted petitions; and Berry’s good faith attempt to litigate his exhausted jurisdictional claim. *Id.*

Motions to reconsider are generally left to the discretion of the trial court. *See Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001). A district court has discretion not to consider claims and issues not raised until a motion for reconsideration. *Hopkins v. Andaya*, 958 F.2d 881, 889 (9th Cir. 1992). There is no abuse of discretion to refuse to consider new arguments in a Rule 60(b) motion even though
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¹ Respondents deny each and every factual allegation alleged by the petitioner in the petition not otherwise expressly found to be true by a Nevada court of competent jurisdiction.

1 “dire consequences” might result. *Schanen v. United States Dept. of Justice*, 762 F.2d 805, 807–08 (9th
2 Cir. 1985).

3 Moreover, motions for reconsideration are not justified on the basis of new evidence which
4 could have been discovered prior to the court’s ruling. *Jones v. Aero/Chem Corp.*, 921 F.2d 875,
5 878–79 (9th Cir. 1990); *see E.E.O.C. v. Foothills Title*, 956 F.2d 277 (10th Cir. 1992). A “habeas
6 petitioner may move for relief from the denial of habeas under Rule 60(b) so long as the motion is not
7 the equivalent of a successive petition.” *Harvest v. Castro*, 531 F.3d 737, 745 (9th Cir. 2008) (citing
8 *Gonzalez v. Crosby*, 545 U.S. 524, 535–36 (2005)). These rules avoid the sandbagging effect of one
9 party waiting to see if a decision is favorable and then, if it is not, raising new arguments.

10 Berry did not oppose Respondents’ motion to dismiss. All of his arguments are presented for
11 the first time in his motion for reconsideration. This Court should deny the motion.

12 **I. Berry Is Not Entitled To Relief Under Rule 60(b)(1).**

13 Rule 60(b)(1) provides relief from a final judgment or order for “mistake, inadvertence,
14 surprise, or excusable neglect.” Whether neglect is excusable is an equitable determination which takes
15 “account of all relevant circumstances surrounding the party’s omission.” *Lemoge v. United States*,
16 587 F.3d 1188, 1192 (9th Cir. 2009). “Prejudice requires greater harm than simply that relief would
17 delay resolution of the case.” *Id.* at 1196.

18 Berry argues the way he drafted his federal petition was a mistake, inadvertent, and excusable
19 neglect. ECF No. 13 at 15, 16. He argues he exhausted a state jurisdictional issue on direct appeal. In
20 his federal petition, he presented the jurisdictional issue within his ineffective assistance of counsel
21 claims. *Id.* at 13–16.

22 First, Berry argues he was forced to couch his jurisdictional argument in terms of a violation of
23 a constitutional amendment based upon the form petition he used. *Id.* at 14. He argues the vast
24 majority of Ground 1 addresses the jurisdictional claim, and in Ground 3, Berry discussed many ways
25 the jurisdictional issue affected his other rights, including entry of his plea. *Id.*

26 There is no merit to Berry’s argument that he only presented his ineffective assistance claims in
27 order to conform to the form petition. In completing the top of Ground 1, there is no reference to
28 ineffective assistance; rather, Berry alleged due process and equal protection allegations. ECF No. 5

1 at 9. The first full sentence of Ground 1 clearly demonstrates that Berry fully intended to present an
2 ineffective assistance of counsel claim, not a substantive claim addressing the state court's jurisdiction.
3 The second full paragraph sets forth numerous cases addressing the effective assistance of counsel case
4 law, including *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* It is clear Berry intended to present
5 an ineffective assistance of counsel claim, not an independent state jurisdictional issue.

6 Further, Ground 1 is a near verbatim copy of Berry's counseled supplemental state habeas
7 petition. *Compare* ECF No. 5; ECF No. 9-1 at 7-9. While Berry added some additional allegations in
8 his federal petition as to trial counsel, the jurisdictional issues are the same.

9 Berry fails to demonstrate he inartfully presented his jurisdictional issue as an ineffective
10 assistance of counsel claim. To the contrary, Berry presented almost verbatim the claim that counsel as
11 ineffective in regard to the jurisdictional issue in his supplemental state habeas petition. He could have
12 done the same with the state jurisdictional issue presented on direct appeal, but chose not to.

13 As to Ground 3, Berry did fill in the blanks at the top of the claim with reference to "due
14 process and effective assistance of counsel." ECF No. 5 at 18. However, Berry again referenced
15 counsel's alleged errors throughout the claim. *Id.* at 18-27. Again, he repeatedly cited *Strickland* and
16 other trial counsel case. *Id.* While he referenced jurisdiction, it was in the context that counsel failed to
17 raise the issue until sentencing and failed to appeal the issue. *Id.* at 20. He also raised a jurisdictional
18 issue regarding the validity of his guilty plea, but again based upon counsel's failure to present the issue
19 on appeal. *Id.* at 22-23.

20 Whether Berry exhausted his jurisdictional issue on direct appeal, which Respondents do not
21 concede, is irrelevant to whether Berry presented substantive issue in his federal petition. Berry fails to
22 demonstrate the form petition "affirmatively mislead him." ECF No. 13 at 15. Berry presented
23 ineffective assistance of counsel claims. He was not prohibited or mislead from presenting the
24 jurisdictional claim raised in his direct appeal as an independent substantive allegation. Instead, Berry
25 chose to pursue only claims against trial counsel. Berry knew the existence of the jurisdictional issue
26 from his direct appeal, but chose not to pursue that claim in his federal petition.

27 A pro se habeas petition is "given the benefit of liberal construction," *Porter v. Ollison*, 620
28 F.3d 952, 958 (9th Cir. 2010). It is well established that "[p]ro se litigants must follow the same rules

1 of procedure that govern other litigants.” *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987), *overruled*
2 *on other grounds by Lacey v. Maricopa Cty.*, 693 F.3d 896 (9th Cir. 2012) (*en banc*); *see e.g. Ghazali*
3 *v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (failure to follow a court’s rules is a proper basis for dismissal
4 under Fed. R. Civ. Pro. 41(b)).

5 The form petition instructs inmates to “specify all the grounds for relief available” to them and
6 to “state the facts supporting each ground.” *See Mayle v. Felix*, 545 U.S. 644, 649 (2005). Here, Berry
7 did present grounds for relief and the facts supporting each ground. In doing so, Berry chose to
8 concentrate on his ineffective assistance of counsel claims. He could have presented his jurisdictional
9 claim as a separate ground, but chose not to. It was Berry’s choice, not some confusion as to the form
10 petition, which resulted in the claims presented in his federal petition.

11 Berry presents nothing more than supposition that he had no strategic reason for waiving the
12 jurisdictional issue raised on direct appeal. ECF No. 13 at 15. However, he could have presented the
13 issue in his federal petition, just as his copied Ground 1 from his counseled supplemental petition. That
14 Berry chose to focus on his trial counsel claims rather than the jurisdictional issue presented on direct
15 appeal does not demonstrate a basis for Rule 60(b) relief under the liberal construction rule. Rather,
16 even “a liberal interpretation . . . may not supply . . . [a] claim that [was] not initially pled.” *Ivey v. Bd.*
17 *of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

18 Finally, Berry argues this Court had discretion to grant a stay of a fully unexhausted petition
19 rather than dismissal. ECF No. 13 at 16. Berry provided no basis for this Court to consider a stay
20 rather than dismissal as he did not oppose the motion to dismiss or reference a stay in his petition.
21 Berry fails to demonstrate this Court abused its discretion in dismissing the petition without providing
22 Berry an opportunity to seek stay.

23 **II. Berry Is Not Entitled To Relief Under Rule 60(b)(5).**

24 Rule 60(b)(5) provides relief from a final judgment or order where “the judgment has been
25 satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated;
26 or applying it prospectively is no longer equitable.” To obtain relief, a petitioner must demonstrate a
27 significant change in factual circumstances or the law. *Harvest v. Castro*, 520 F.3d 1055, 1064–65,
28 *amended and superseded on reh.*, 531 F.3d 737, 749 (9th Cir. 2008).

1 Berry argues the statute of limitations has expired, which creates an issue for his new petition in
2 Case No. 3:17-cv-0659. ECF No. 13 at 16. He argues it would be unjust to force Berry to adjudicate
3 statute of limitations issues. Finally, Berry was diligent in pursuing his claims on the jurisdictional
4 issue. *Id.*

5 As noted above, Berry chose which claims to present in his proper person petition. That Berry
6 chose not to include a substantive claim presented in the Nevada Supreme Court on direct appeal does
7 not create an equitable basis for granting Rule 60(b) relief. He could have pursued the jurisdictional
8 claim in federal court. Berry was not diligent. Whether Berry has exhausted the jurisdictional claim,
9 an issue Respondents do not concede, is irrelevant to the question of what claims Berry diligently
10 pursued in his federal petition.

11 Berry fails to demonstrate a significant change in the factual circumstances. That he must
12 litigate the statute of limitations in his new case is not a basis for equitable relief; it is the result of his
13 own actions in choosing which claims to present in his federal petition in this action. There is no
14 equitable basis for this Court to grant relief pursuant to Rule 60(b)(5).

15 **III. Berry Is Not Entitled To Relief Under Rule 60(b)(6).**

16 Rule 60(b)(6) provides relief from a final judgment or order for “any other reason that justifies
17 relief.” The plain language of Rule 60(b)(6), known as the Rule’s “catch-all provision,” provides for
18 relief from a final order for “any justifiable reason.” Rule 60(b)(6); *Budget Blinds, Inc. v. White*, 536
19 F.3d 244, 251 (3d Cir. 2008). However, courts have added a requirement to the rule, namely that a
20 party seeking Rule 60(b)(6) relief must demonstrate the existence of “extraordinary circumstances.”
21 *Gonzalez v. Crosby*, 545 U.S. 524, 535–36 (2005); *Lal v. California*, 610 F.3d 518, 524 (9th Cir. 2010);
22 *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir. 2008) (petitioner must demonstrate both an injury and
23 circumstances beyond his control prevented him from proceeding with this claim); *Budget Blinds, Inc.*,
24 536 F.3d at 251.

25 Extraordinary circumstances typically exist when “an extreme and unexpected hardship” would
26 result if the relief sought is not granted. *Budget Blinds, Inc.*, 536 F.3d at 255. In addition, a court
27 ordinarily will only grant relief if the moving party is not at fault and did not cause the extraordinary
28 circumstances to come into being. *Id.*; *Gonzalez*, 545 U.S. at 535–36. Rule 60(b)(6) is to be used

1 “sparingly as an equitable remedy to prevent manifest injustice.” *Lal*, 610 F.3d at 524 (citation
2 omitted); *see United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993).

3 Berry argues he can demonstrate extraordinary circumstances because he is serving a life
4 sentence based upon a void judgment of conviction due to state court jurisdictional issues, and it was
5 within this Court’s discretion to grant a stay rather than to dismiss the case. ECF No. 13 at 17–18.

6 Berry fails to demonstrate extraordinary circumstances. The length of his sentence does not
7 address his choice to present only trial counsel claims rather than the substantive jurisdictional issue.
8 He was not precluded from raising the jurisdictional issue in his federal petition. He is not precluded
9 from seeking such a claim now, but must do so in his new federal action. He fails to demonstrate an
10 extreme hardship in this action.

11 Respondents do not concede or otherwise address Berry’s claim that his judgment is void.
12 Berry’s arguments in the motion are based upon a merits determination of a substantive jurisdictional
13 claim that does not exist in the federal petition. ECF No. 13 at 4–12; *see* ECF No. 5. Such argument is
14 not appropriate in a Rule 60(b) motion – it is raised for the first time in the Rule 60(b) motion; it does
15 not demonstrate extraordinary circumstances sufficient for relief pursuant to Rule 60(b)(6); and it is not
16 dispositive of the issue of the validity of his judgment of conviction.

17 Finally, Berry fails to demonstrate this Court abused its discretion in dismissing the petition in
18 this matter without a stay.

19 Berry fails to demonstrate extraordinary circumstance warranting relief under Rule 60(b)(6).

20 **CONCLUSION**

21 This Court should deny Berry’s motion for relief from judgment pursuant to Rule 60(b).

22 RESPECTFULLY SUBMITTED this 13th day of February, 2018.

23 ADAM PAUL LAXALT
24 Attorney General

25 By: /s/ Heather D. Procter
26 HEATHER D. PROCTER (Bar. No. 8621)
27 Senior Deputy Attorney General
28

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 13th day of February, 2018, I served a copy of the foregoing, **OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(B)** by U.S. District Court CM/ECF electronic filing to:

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