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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

REPLY TO OPPOSITION TO 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 replies to respondents' opposition, ECF No. 18, to Berry's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b), ECF No. 13.

POINTS AND AUTHORITIES

Mr. Berry moves under Federal Rules of Civil Procedure 60(b) and 15(a) to reopen this case, set aside the judgment of dismissal without prejudice, and file an amended petition. ECF Nos. 13, 14. Berry had filed a timely, *pro se* petition before this court, ECF Nos. 1-1, 5, 9-29, which this court dismissed without prejudice for lack of exhaustion, ECF No. 10. During the time the court considered the petition,

the AEDPA statute of limitations deadline passed.[1] *See* ECF Nos. 1-1, 9-29; *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."). Rule 60(b) and 15(a) relief here would allow Mr. Berry to amend his timely-filed *pro se* petition to clearly identify, as an independent ground for relief, his standalone claim that federal Indian law renders his judgment of conviction and life sentence void.

This is his sole exhausted claim that he litigated before the Nevada Supreme Court, *see* ECF No. 9-29, which he discussed at length in the *pro se* petition he filed before this court, ECF No. 1-1, explained in great detail in his FRCP 60(b) motion, ECF No. 13, and also identified as his sole claim for relief in his new *pro se* petition, ECF No. 14-1 at 4. He also discussed the claim at length in the original *pro se* petition he filed in this case. *See* ECF No. 5. The claim raises a serious voidness challenge to his judgment and life sentence. *See* ECF No. 10 at 1 (". . . jurisdiction might have been with the federal courts, not the state courts, to handle the case"). If Mr. Berry's argument is correct, but he does not obtain relief on this claim due to the AEDPA statute of limitations, then he will serve a criminal sentence for the rest of his life upon a void judgment of conviction without this court examining the merits of the claim. Thus, application of the judgment of dismissal here may have dire, inequitable, unforeseen consequences, which this court may remedy by granting these motions.

As the Ninth Circuit has held, "[i]t is not unreasonable that plaintiffs may seek amendment after an adverse ruling, and in the normal course district courts should freely grant leave to amend when a viable case may be presented." *Lipton v.*

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[1] Mr. Berry does not waive any defenses or arguments he may have regarding the statute of limitations for this or any other petition for habeas corpus, though it is clear that over one year and ninety days elapsed from the date of the Nevada Supreme Court's order of affirmance, before the date this court dismissed his *pro se* federal petition. ECF Nos. 9-29, 1-1.

Pathogenesis Corp., 284 F.3d 1027, 1038–39 (9th Cir. 2002). That is exactly what Mr. Berry seeks here.

This reply addresses the respondents' arguments in their opposition to Mr. Berry's motion to Rule 60(b) relief. Respondents argue that Rule 60(b)(1) relief is not available or should not be granted here. They argue that "[t]here is no merit" to Mr. Berry's argument that he was affirmatively misled by the *pro se* form petition and imply that he actually wanted and chose to permanently waive this claim for complete relief. They also argue that this court did not have a basis to stay his unexhausted petition because he did not oppose the motion to dismiss.

I. Mr. Berry's purported strategic choice to abandon this claim is unfounded and does not preclude Rule 60(b) relief

Respondents repeatedly claim that Mr. Berry "chose" or "wished" to draft his *pro se* petition the way he did, and thus imply that he made a strategic, informed decision to forever waive his jurisdictional claim. For instance, they argue that Mr. Berry "presented the claims he wished to raise, namely ineffective assistance of counsel, rather than the jurisdictional issue he presented on direct appeal." ECF No. 18 at 1; *see also id.* at 4–7. Respondents also argue that the *pro se* form did not "prohibit[] or mislead [Mr. Berry] from presenting the jurisdictional claim raised in his direct appeal as an independent substantive allegation." *Id.* at 4. And respondents point out that "[t]he form petition instructs inmates to 'specify all grounds for relief available' to them and to 'state the facts supporting each ground.'" *Id.* at 5. Thus, the main theme of respondents' opposition is their proposition that Mr. Berry made an intelligent, strategic choice to permanently waive his jurisdictional claim and thus, suggest that this "choice" precludes Rule 60(b) relief.

First, this argument misses the point of these Rules 60(b) and 15(a)(2) motions and the governing standard therefor. The voluntariness of waiver is not a pre-requisite to reconsideration or leave to amend. Instead, Rules 60(b) and 15(a)(2)

motions are equitable and discretionary, and whether Mr. Berry has met the standard of relief here thus turns only on the standards set out for these Rules. Whether a movant made a voluntary act or omission in the past does not preclude Rules 60(b) or 15(a)(2) relief if the standards for relief are nonetheless met. Thus, regardless of whether Mr. Berry "chose" not to label his jurisdictional claim as an independent ground for relief, if this court finds that the circumstances surrounding that choice and the consequences of the dismissal now known to the court created an injustice, Rule 60(b) allows this court to set aside the judgment to fix the problem.

Second, the factual premise that Mr. Berry made a knowing and intelligent strategic choice to permanently abandon his jurisdictional claim is unfounded in the record and belied by the circumstances. If Mr. Berry is correct about his jurisdictional claim, in which he argues that the state court lacked jurisdiction to convict him as a matter of federal law, then the claim could result in complete relief from his judgment of conviction and life sentence. Mr. Berry already exhausted this claim before the Nevada Supreme Court, the claim was not procedurally defaulted, and Mr. Berry filed a timely federal petition—the claim was ripe for an adjudication on the merits before this court. No reasonable person would want to abandon such a cleanly presentable, strong claim for complete relief if he believed it was a permissible claim to raise, unless, perhaps, collateral consequences might result from raising the claim, which respondents do not suggest to be the case here. Instead, the totality of circumstances here show that Mr. Berry was simply misinformed about his ability to identify this claim as an independent ground for relief on the *pro se* form.[2]

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[2] Moreover, a reasonable, liberal construction of this *pro se* petition is that regardless of what Mr. Berry understood about his rights, the petition effectively *did* raise the exhausted jurisdictional claim within the discussion of ground 1 of the petition. *See* ECF No. 1-1 at 9–13. "A document filed *pro se* is to be liberally construed, . . . and a *pro se* complaint, however inartfully pleaded, must be held to less stringent

Yet respondents suggest that the text of the *pro se* form, and the way Mr. Berry filled it out, proves that he made a strategic, informed decision to abandon the claim. However, an examination of the form actually shows how and why someone like Mr. Berry would be affirmatively misled about whether he has the right to raise a claim based on a federal jurisdictional statute or based upon provisions of the Articles of the federal constitution, rather than upon a constitutional amendment. Mr. Berry's jurisdictional claim relies upon federal statutes governing criminal jurisdiction in Indian country, upon the Supremacy Clause of Article VI, Clause 2 of the federal constitution, and upon the Indian Commerce Clause of Article I, Section 8, Clause 3 of the federal constitution, not upon a federal constitutional amendment. *See* ECF No. 13 at 8–12. Yet it is no less a valid ground for federal habeas corpus relief. *See id.* at 12–13. That said, a *pro se* litigant filling out this form might be excused from believing that this Indian-country jurisdictional claim is not permissible as an independent ground for relief that he can list on that form; or, even if he thought he could list this claim as a "ground," he might be excused from not knowing how to do so properly so as to make clear that this is an independent ground for relief.

That is because this is a rare occasion in which the prompts on the required, boilerplate *pro se* form are misleading. Respondents argue that "[t]he form petition

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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"). This petition discusses the merits of this standalone jurisdictional issue for at least two handwritten pages. *See, e.g.*, ECF No. 1-1 at 11–12. Ground 1's fill-in-the-blank heading required him to identify a constitutional amendment as the basis for his grounds for relief, so he complied by identifying his "due process and equal protection" rights under the Sixth and Fourteenth Amendments. *See id.* at 9. Nonetheless, in the body of the discussion of "ground 1," Mr. Berry discussed additional grounds for relief, including ineffective assistance of counsel and the underlying Indian-country jurisdictional claim. A reasonable, liberal construction of this *pro se* petition aimed at achieving substantial justice would deem the two-page discussion of this jurisdictional claim as adequately raising it as an independent ground for relief.

instructs inmates to 'specify all grounds for relief available' to them and to 'state the facts supporting each ground.'" ECF No. 18 at 5. However, on the exact same page, the more specific portion of the form provides fill-in-the-blank prompts for the heading of each "ground" for relief that required Mr. Berry to identify a constitutional amendment as the basis for any "ground." *See generally* ECF No. 5 at 9–28. Specifically, the form required he filled 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 . . .". *Id.* at 9; *see also* https://www.nvd.uscourts.gov/Files/28.2254%20(Not%20Death).pdf.

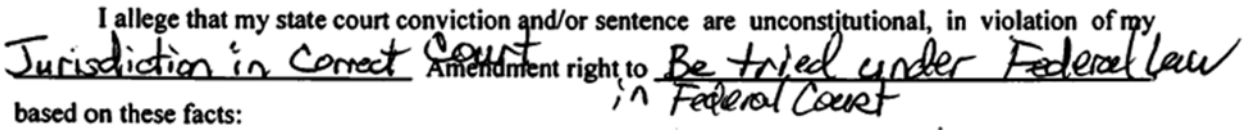
Further, this court's instructions for how to fill out this form tells *pro se* petitioners, "You need to identify which constitutional amendment was violated and which provision of that amendment," for each ground for relief. *See* Information and Instructions for Filing a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Nevada, at *6 (available at https://www.nvd.uscourts.gov/Files/28.2254%20Instructions.pdf). While these are useful instructions in the vast majority of cases, this rare case is an exception.

Thus, even taking into account the admonition warning petitioners to assert "all grounds for relief available" in the petition, any lay person would justifiably conclude, in reliance on this form, that the only "grounds" available to write on those blank lines are those based on a constitutional amendment. Or one might justifiably conclude that the only types of claims they can raise at all—anywhere on the form—are those based on constitutional amendments. Thus, the better interpretation of the circumstances, evidenced by this form, is that Mr. Berry was misinformed about which "grounds" he can raise and reasonably attempted to comply with the form's requirements, not that he strategically chose to abandon the jurisdictional claim.

Nonetheless, a great deal of Mr. Berry's petition discusses the merits of his standalone jurisdictional claim, as it serves as a foundation for his ineffective assistance of counsel claims. *See* ECF No. 1-1. This shows that Mr. Berry did not want to drop the issue. Rather, this shows only that he was just trying to obtain relief upon this issue through whatever type of ground he reasonably believed was permissible in in the federal habeas corpus petition (*i.e.* through an ineffective assistance of counsel claim). Indeed, those of Mr. Berry's ineffective assistance of counsel claims that rely in part on the underlying Indian-country jurisdictional claim would still require him to litigate both the merits of the underlying jurisdictional claim *and* the elements of for ineffective assistance of counsel. Thus, it does not appear he wished to drop the issue.

Next, the state argues that ground 1 is "a near verbatim copy of Berry's counseled supplemental state habeas petition," and that "[h]e could have done the same with the state jurisdictional issue presented on direct appeal, but chose not to." ECF No. 4. Respondents appear to rely on a misunderstanding of the procedural history of this case, which took a unique path to get here; Mr. Berry's state habeas corpus petition served as a vehicle to allow him to file a direct appeal: the state court allowed Mr. Berry to file a late notice of appeal to raise his standalone jurisdictional claim based on trial counsel's ineffectiveness regarding the filing of a notice of appeal. *See* ECF No. 9-1 (supplemental habeas petition); ECF No. 9-8 (order authorizing direct appeal); ECF No. 10 at 1–2 (this court's description of the procedural history). Thereafter, the only issue filed before the Nevada Supreme Court was Mr. Berry's jurisdictional claim—he has exhausted no other claims. Thus, to the extent that respondents are implying Mr. Berry made a reasoned, tactical decision to focus on other claims he has exhausted on appeal, they would be incorrect.

Finally, Mr. Berry's actions after this court's order of dismissal further show that he did not make a knowing and intelligent, strategic decision to permanently waive the standalone jurisdictional claim. After this court's dismissal of Mr. Berry's petition without prejudice, he filed another petition. This time, he decided to disregard the form's prompts and awkwardly squeezed-in his claim:



ECF No. 13-1 at 4. Obviously, when read as a complete sentence, this does not make much sense. So one might be excused for not trying this tactic in the first instance, or for not believing that this is allowed. But after this court dismissed Mr. Berry's first petition, he decided to forgo the prompts and simply assert the exhausted claim however he could. The fact that he wrote this in his subsequent *pro se* petition further confirms that he did not have some strategic reason to waive the claim.

Although this *pro se* boilerplate form is acceptable and helpful for the vast majority of cases, here, in this unusual case with this uncommon jurisdictional claim, the boilerplate form served only to mislead Mr. Berry about what he can list as a "ground" for relief.[3] Fed. R. Civ. P. 60(b)(1). "The determination of whether neglect is excusable 'is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission.' *Lemoge v. United States*, 587 F.3d 1188, 1192 (9th Cir. 2009) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 395 (1993)); ECF No. 18 at 3. Here, the totality of the unique circumstances of this

[3] Indeed, this is always a risk with boilerplate forms in complex legal matters. While boilerplate forms are always drafted in a way to capture the needs of 99% of cases, there is always a risk that a particularly unique case will fall outside of the boilerplate language. When such a unique case appears for a *pro se* litigant, he might be excused from trying to nonetheless strictly follow what the boilerplate form tells him to do. This is such a unique and excusable case that Rule 60(b) relief is available.

case show Mr. Berry was affirmatively misinformed by the *pro se* petition form about the permissibility of raising a jurisdictional claim in federal habeas corpus and therefore, among the other reasons discussed, Rule 60(b) relief is available for this court to fix the issues presented here.

II. Mr. Berry's non-opposition to the motion to dismiss does not prevent relief

Next, respondents point out that Berry, a *pro se* petitioner, did not oppose their motion to dismiss. ECF NO. 18 at 3. They argue that this means that the court could not have granted a stay of the fully exhausted petition, and imply that Rule 60(b) relief is unavailable or unwarranted now for this reason.

"The failure of an opposing party to file points and authorities in response to any motion, except a motion under Fed. R. Civ. P. 56 or a motion for attorney's fees, constitutes a consent to the granting of the motion." LR 7-2(d). The Ninth Circuit has held that this is simply a discretionary local rule, and a court may employ it only after weighing five factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases [on] their merits; and (5) the availability of less drastic sanctions." *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)).

The court noted that it construed Mr. Berry's non-response to the motion to dismiss "as consent to the Court granting the motion." ECF No. 10. However, the court did not explicitly address the mandatory LR 7-2(d) factors before dismissing the petition and instead, the discussion section of this court's order exclusively focused on the non-exhaustion of the identified claims in the petition. *See id.*

Next, LR 7-2(d) is simply a discretionary power and does not limit this court's ability to grant relief here. A prior non-opposition to a motion does not bar this court

from granting Rule 60(b) relief where new information convinces the court that setting aside the judgment is otherwise equitable and warranted.[4]

Further, notwithstanding Mr. Berry's non-response to the motion to dismiss, one of the factors to consider before a dismissal is the availability of less drastic sanctions. *Ghazali*, 46 F.3d at 53. One of those less-drastic alternatives was a stay and abeyance per *Mena v. Long*, which the Ninth Circuit decided before this court rendered its decision on the motion to dismiss in this case. *See* 813 F.3d 907, 912 (9th Cir. 2016) (decided February 17, 2016); ECF No. 10 (order of dismissal entered September 26, 2017). *Mena* held that a district court has the discretion to stay and hold in abeyance fully unexhausted petitions under the circumstances set forth in *Rhines v. Weber*, 544 U.S. 269 (2005). 813 F.3d at 912. This was the exact situation respondents argued was before this court when it moved to dismiss; respondents argued that "Berry failed to fully exhaust any of his grounds." ECF No. 7 at 4.

While a court is not required to consider whether to grant a stay *sua sponte*, *Robbins v. Carey*, 481 F.3d 1143 (9th Cir. 2007), respondents were nonetheless obligated under the Nevada Rules of Professional Conduct to notify the court of this directly on point, adverse authority which provided this court with an option to deny respondents' motion.[5] Respondents' motion to dismiss does not acknowledge *Mena* or its holding. ECF No. 7. Although they note that "this Court also has the discretion to

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[4] Note that the motions to dismiss permitted for federal habeas practice in this district are substantively analogous to Rule 56 motions for summary judgment in that they are typically dispositive motions that require the court to look at evidence outside of the pleadings to determine if they should be granted. Therefore, failure to oppose a motion to dismiss in a federal habeas corpus case, like Rule 56 motions in other civil cases, may not constitute consent to granting the motion per LR 7-2(d).

[5] *See* Nev. R. Prof. Cond. 3.3 ("Candor Toward the Tribunal"). This Rule requires Nevada lawyers to "disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." *Id.* Further, this duty continues "to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." *Id.*

grant a petitioner a stay provided the petitioner can meet certain requirements," they cite only *Rhines* and *King v. Ryan*, 564 F.3d 1133, 1145 (9th Cir. 2009) in support of this statement. Each of these cases address the power to grant a stay only in the case of mixed petitions (petitions containing both exhausted and unexhausted stays), and had not yet extended the principle to fully unexhausted petitions. And respondents' note about the power to grant a stay directly followed their statement that the court "must" dismiss mixed petitions. ECF No. 7 at 4. In context, without citing *Mena*, one might conclude from reading respondents' motion to dismiss that a stay is available only in the case of mixed petitions.

Had respondents explicitly disclosed *Mena v. Long*, Mr. Berry would have been notified that a stay is a possibility in his case even if his petition is fully unexhausted. Further, as the Ninth Circuit has held, courts "must, at a minimum, [offer a petitioner] leave to amend the petition to delete any unexhausted claims and to proceed on the exhausted claims." *Henderson v. Johnson*, 710 F.3d 872, 873 (9th Cir. 2013). The Ninth Circuit has further observed "the important precedent requiring district courts first to grant leave to amend and, if requested, to consider a petitioner's eligibility for a stay under [*Rhines*] (stay of entire petition), or under [*Kelly*] (stay of exhausted claims only)." *Id.* at 874. Since *Henderson*—in *Mena v. Long*—the Ninth Circuit has extended the power to grant a stay to fully unexhausted petitions. The implication from *Mena*, therefore, is that this court could have provided Mr. Berry the option to stay his petition rather than dismissing it without prejudice.

If this court granted this option to Mr. Berry, rather than dismissing his petition without prejudice, the inequities created by the AEDPA statute of limitations would not be present here and this Rule 60(b) motion would have been entirely unnecessary. *See Kelly v. Small*, 315 F.3d 1063, 1070 (9th Cir. 2003), *overruled on other grounds by Robbins v. Carey*, 481 F.3d 1143 (9th Cir. 2007) (observing that

"[t]he exercise of discretion to stay the federal proceeding is particularly appropriate when an outright dismissal will render it unlikely or impossible for the petitioner to return to federal court within the one-year limitation period imposed by [AEDPA]," and "we join the 'growing consensus' in recognizing the clear appropriateness of a stay when valid claims would otherwise be forfeited.") (quoting *Duncan v. Walker*, 533 U.S. 167, 182–83 (2001) (Stevens, J., concurring in part and in the judgment) ("[T]here is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies.")). A stay would have provided a less drastic alternative to the court than a dismissal without prejudice.

Further, the court's policy favoring adjudications on the merits would have weighed against employment of LR 7-2(d) as a sole basis for granting the motion to dismiss. *See Ghazali*, 46 F.3d at 53. Accordingly, Mr. Berry's non-response to the motion to dismiss would not have been grounds alone to dismiss the petition, and is no obstacle to this court's ability to grant Rule 60(b) relief now—the only requirement for the court to set aside the judgment now are the requirements for Rule 60(b) relief.

III. Relief under Rule 60(b)(5) is warranted

Respondents argue that to obtain relief under Rule 60(b)(5), there must be a significant change in factual circumstances or the law. ECF No. 18 at 5. This case presents a fact-specific, nuanced set of changed circumstances. The mere expiration of the statute-of-limitations, as respondents suggest, does not capture the entire picture of the change in circumstances here.

At the time that this court ruled on the original *pro se* petition, it dismissed the petition without prejudice so that Mr. Berry could return to state court to exhaust the claims that he listed as independent grounds for relief. *See* ECF No. 10. Further, as argued extensively here and in Mr. Berry's motions, Mr. Berry was reasonably

misinformed about his ability to raise his standalone jurisdictional claim before this court. Therefore, at the time, neither this court nor Mr. Berry would have believed that this court's judgment of dismissal would cause a statute-of-limitations problem for Mr. Berry's standalone jurisdictional claim. Nonetheless, during this time, the statute of limitations passed.

It was only after, when Mr. Berry filed a new petition and the court appointed counsel, that someone representing Mr. Berry could evaluate this unique case, could recognize the problem with the *pro se* form as applied to him, and discovered that his omission in his *pro se* form constituted excusable neglect. As in *Dozier v. Neven, et al.*, No. 2:08-cv-00489-KJD-GWF (D. Nev. Feb. 26, 2018), the Federal Public Defender was appointed to represent the petitioner in a subsequent federal habeas petition. During counsel's review of the record, counsel discovered the basis for the instant Rule 60(b) motion. *Id.* at 4. The court itself was not obligated to investigate and determine whether the statute of limitations had passed or would pass soon, but subsequently-appointed counsel was able to make that determination, discovered the extraordinary circumstances surrounding Mr. Berry's original *pro se* petition, and could identify the harsh results of the dismissal without prejudice. Thus, after the statute of limitations passed and the extenuating circumstances were discovered, it became apparent that prospective application of the judgment of dismissal without prejudice is inequitable and Rule 60(b)(5) relief is appropriate.

IV. Rule 60(b)(6)

Respondents argue that the catch-all provision of Rule 60(b) is available only in extraordinary circumstances, that extraordinary circumstances typically exist only when "an extreme and unexpected hardship" would result without relief, and that relief under this ground is ordinarily available only when the moving party is not at fault and did not cause the extraordinary circumstances. ECF No. 18 at 6.

To the extent that Mr. Berry needs to meet the "typical" or "ordinary" standard for Rule 60(b) relief suggested by respondents, he does so. When someone's compliance and faith in a court-provided, boilerplate form results in the waiver of a claim for complete relief from a life sentence, where the court-provided *pro se* form affirmatively misled him into believing his claim was unavailable as a ground for relief, this qualifies as an "extreme or unexpected hardship." That the circumstances caused such an injustice was not apparent until the Federal Public Defender was appointed in his subsequent federal habeas corpus petition. *Cf. Dozier v. Neven, et al.*, No. 2:08-cv-00489-KJD-GWF, at *4 (D. Nev. Feb. 26, 2018).

Such a situation would not be the petitioner's fault because the misinformation came from the court-provided, mandatory form, and the court is a figure of legal authority. A lay person must be allowed to have faith in the correctness and accuracy of a required boilerplate form provided by the court itself, and equity demands he is not penalized for following its requirements. Indeed, failure to comply with the explicit prompts of a court-provided form is ill-advised in the usual case.

Such an unusual situation causing such a harsh, unexpected result is exactly what Rule 60(b)(6) exists to remedy.[6]

V. This motion is not a successive petition

Respondents do not argue that this is a successive motion, but they do mention, in passing, the rule that in habeas petitions, Rule 60(b) motions cannot be "the equivalent of a successive petition." *See* ECF No. 18 at 3 (citing *Harvest v. Castro*,

[6] Lastly, respondents argue that "Berry fails to demonstrate this Court abused its discretion in dismissing the petition in this matter without a stay." ECF No. 18 at 7. This court does not need to find that it abused its discretion in its prior order of dismissal in order to grant Rule 60(b) relief here—all that is required for Rule 60(b) relief is that the movant meets the standards of Rule 60(b).

531 F.3d 737, 745 (9th Cir. 2008). Because respondents make no argument regarding this issue, it is waived.

In any event, this motion is not the equivalent of a successive petition. *See Harvest*, 531 F.3d at 745. This court dismissed the first, *pro se* petition without prejudice for lack of exhaustion. ECF No. 10. Therefore, even a subsequently filed habeas corpus petition would not be considered "second or successive." *See generally Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) ("To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review."). So even if this motion were the functional equivalent of a habeas corpus petition, it would not be second or successive. This is no bar to Rule 60(b) relief here.

VI. Conclusion

This is an unusual case involving an unusual jurisdictional claim for relief. The circumstances surrounding Mr. Berry's drafting of his *pro se* petition are extraordinary and justifiable, and a harsh inequity has arisen since the court's dismissal without prejudice due to the statute of limitations. The extraordinary circumstances now known to the court allow it to grant Rule 60(b) relief to fix the situation. This will allow Mr. Berry to amend the petition to clarify his grounds for relief and thus will allow his exhausted jurisdictional claim to proceed to an adjudication on the merits. Given the length of his sentence and strength of his claim for complete relief, the equities lean heavily in favor of granting this motion to proceed to the merits.

Therefore, Mr. Berry respectfully requests that this court grant his Rule 60(b) motion, ECF No. 13, and his motion for leave to file an amended petition, ECF No. 14. Further he requests this court order that this case is reopened, that the order and judgment of dismissal are set aside, ECF Nos. 10, 11, and grant leave to Mr. Berry to

file an amended petition, including the jurisdictional claim, within 120 days of the date of entry of this order.

Dated this 6th day of March, 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 March 6, 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