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8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF NEVADA  
10

11 ROBERT LOGAN BERRY, JR.,  
12 Petitioner,  
13 vs.  
14 ISIDRO BACA, *et al.*,  
15 Respondents.

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

**MOTION TO DISMISS**

16 Respondents, by and through counsel, Adam Paul Laxalt, Attorney General of the State of  
17 Nevada, move to dismiss Robert Logan Berry, Jr. (Berry) federal habeas petition because the claims are  
18 unexhausted. This motion is based upon the following points and authorities, together with all other  
19 pleadings, documents and exhibits on file herein.

20 **POINTS AND AUTHORITIES**

21 **STATEMENT OF THE CASE<sup>1</sup>**

22 On June 27, 2013, the State charged Berry in the Tenth Judicial District Court, Churchill  
23 County, Nevada, by information with Count 1, attempt to commit robbery; Count 2, burglary; and  
24 Count 3, habitual criminal with three prior felonies. Exhibit 11.<sup>2</sup> He was charged by first-amended  
25

26 <sup>1</sup> Respondents deny each and every factual allegation alleged by the petitioner in the petition not  
27 otherwise expressly found to be true by a Nevada court of competent jurisdiction.

28 <sup>2</sup> Respondents' index of exhibits is filed concurrently with this motion to dismiss.

1 information with Count 1, attempt to commit robbery; and Count 2, habitual criminal with three prior  
2 felonies. Exhibit 19. Berry plead no contest. Exhibits 21, 22. On September 17, 2013, the court  
3 adjudicated Berry a habitual criminal and sentenced him to 10 years to life. Exhibit 24. The court filed  
4 the judgment of conviction the same day. Exhibit 25.

5 Berry did not file a direct appeal.

6 Berry filed a motion to withdraw his guilty plea on February 12, 2014. Exhibit 27. The court  
7 denied Berry's motion. Exhibit 33.

8 On March 3, 2014, before the court ruled on the motion to withdraw his guilty plea, Berry filed  
9 a proper person state habeas petition. Exhibit 32.

10 Berry filed a counseled supplemental petition on April 14, 2014. Exhibit 36. The court  
11 dismissed the petition in part and set the matter for an evidentiary hearing. Exhibit 39. The court held  
12 an evidentiary hearing held on July 17, 2014. Exhibit 42. On August 4, 2014, the court found trial  
13 counsel was ineffective for failing to advise Berry of his right to appeal and that Berry was entitled to a  
14 direct appeal with the assistance of appointed appellate counsel. Exhibit 43.

15 Berry appealed the court's order, and the State filed a cross-appeal. Exhibits 44, 47.

16 On September 12, 2014, the Nevada Supreme Court found the State could not appeal from the  
17 order but could instead pursue the issue through a motion to dismiss the appeal. Exhibit 51. The court  
18 therefore struck the State's notice of appeal. *Id.*

19 The State filed a motion to dismiss. Exhibit 53. The State argued:

- 20 1. The Tenth Judicial District Court's order does not contain specific  
21 findings of fact and conclusions of law holding [defense counsel]  
Drakulich as ineffective.
- 22 2. Defense counsel was not ineffective.
- 23 3. This Court should dismiss this appeal because the lower court, at all  
24 times, maintained jurisdiction to hear this case.

25 *Id.* On March 11, 2015, the Nevada Supreme Court denied the motion to dismiss, finding the state  
26 district court did not err in denying the appeal-deprivation claim and therefore reinforced Berry's  
27 appellate rights. Exhibit 59. The court therefore reinstated briefing on Berry's appellate issues. *Id.*

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1 In Berry's opening brief on direct appeal, he alleged: "I. Does the State of Nevada or the  
2 federal government have jurisdiction to prosecute this case?" Exhibit 60. On October 19, 2015, the  
3 Nevada Supreme Court affirmed the denial. Exhibit 64. Remittitur issued on November 13, 2015.  
4 Exhibit 68.

5 On August 4, 2016, Berry mailed or handed to a correctional officer for the purpose of mailing  
6 his federal habeas petition. ECF No. 5.

7 This Court denied Berry's request for appointment of counsel. ECF No. 4.

8 Respondents move to dismiss the claims are unexhausted.

9 **ARGUMENT<sup>3</sup>**

10 A federal court may not grant a federal habeas corpus unless the petitioner has exhausted all  
11 available state court remedies. 28 U.S.C. § 2254(b)(1). The exhaustion requirement is a matter of  
12 comity designed to afford state courts the first opportunity to remedy a constitutional violation. *Greene*  
13 *v. Lambert*, 288 F.3d 1081, 1088 (9th Cir. 2002). To satisfy exhaustion, each claim must have been  
14 previously presented to the Nevada appellate courts with references to a specific federal constitutional  
15 guarantee, as well as a statement of facts that entitle the petitioner to relief. *Koerner v. Grigas*,  
16 328 F.3d 1039, 1046 (9th Cir. 2002); *see Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (if a  
17 federal claim has not been fairly presented to the state's highest court, there is a failure to exhaust).  
18 The petitioner must characterize the claim raised in state proceedings "*specifically* as federal claims."  
19 *Lyons v. Crawford*, 232 F.3d 666, 670 (2000), *as modified by* 247 F.3d 904 (9th Cir. 2001). Mere  
20 similarities of claims are insufficient to establish exhaustion. *Vang v. Nevada*, 329 F.3d 1069,  
21 1075 (9th Cir. 2003).

22 Exhaustion requires presentation of more than just the facts; the substance of the federal claim  
23 must be provided. *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam), and "full factual  
24 development" is also required by *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992). "Fair presentation  
25 requires that a state's highest court has a 'fair opportunity to consider [an appellant's constitutional  
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27 <sup>3</sup> Respondents argue some of the petitioner's claims are unexhausted. Respondents do not waive the  
28 exhaustion requirement with respect to *any* of the raised claims. 28 U.S.C. § 2254(b)(3).

1 claim] and to correct that asserted constitutional defect.” *Lounsbury v. Thompson*, 374 F.3d 785, 787-  
2 88 (9th Cir. 2004) (citations omitted). Specifically, the state court brief must describe both the  
3 operative facts and the federal legal theory on which the petitioner’s claims are based so that the state  
4 court can have a fair opportunity to apply controlling legal principles to the facts. *Castillo*  
5 *v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005); *see also Gray v. Netherland*, 518 U.S. 152, 162  
6 (1996). Exhaustion is not met if the court must go beyond the pleadings presented to satisfy fair  
7 presentation. *Baldwin v. Reese*, 541 U.S. 27 (2004). Exhaustion applies equally to each claim of  
8 ineffective assistance of counsel. *Custer v. Hill*, 378 F.3d 968, 974 (9th Cir. 2004).

9 A federal court should not entertain a petition for a writ of habeas corpus unless the petitioner  
10 has exhausted available and adequate state court remedies with respect to each of the claims contained  
11 in the petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A “mixed” petition containing both  
12 exhausted and unexhausted claims must be dismissed, with the court permitting the petitioner the  
13 choice of returning to state court to exhaust his claims, or amending and resubmitting the habeas  
14 petition so as to present only exhausted claims to the district court. *Id.* at 520-21. This Court also has  
15 the discretion to grant a petitioner a stay provided the petitioner can meet certain requirements. *Rhines*  
16 *v. Weber*, 544 U.S. 269, 277 (2005); *King v. Ryan*, 564 F.3d 1133, 1143 (9th Cir. 2009).

17 In this case, Berry failed to fully exhaust any of his grounds.

18 **I. Ground 1 Is Unexhausted.**

19 In Ground 1, Berry claims: “Petitioner’s counsel was constitutionally ineffective for failure to  
20 make any reasonable investigations before any hearings or meetings, proceedings.” ECF No. 5 at 9.  
21 He alleges counsel presented a possible jurisdictional issue (the robbery occurred on Indian Territory)  
22 for the first time at sentencing. *Id.* at 9-11. Counsel failed to appeal the jurisdictional issue or to file a  
23 direct appeal (*id.* at 12); failed to investigate the jurisdictional issue prior to sentencing; failed to  
24 investigate Berry’s mental stability based upon the numerous medications he was taking at the time of  
25 the crime; failed to inform Berry that he was not eligible for probation; that the court canvass contained  
26 conflicting information as to the possible sentences; failed to object to the sentence received (*id.*); failed  
27 to file a discovery motion seeking *Brady* information (*id.* at 13); coerced Berry into pleading guilty;  
28 and that he received a life sentence contrary to the plea agreement (*id.*).

1 First, the only claim Berry presented in his opening brief was that the State lacked jurisdiction  
2 to prosecute the case. Exhibit 60 at 9.<sup>4</sup> Berry did not present an ineffective assistance of counsel claim  
3 in his opening brief, and did not allege that counsel was ineffective regarding the jurisdictional issue.  
4 *See Kelly v. Small*, 315 F.3d 1063, 1068 fn. 2 (9th Cir. 2003) (petitioner must set forth ineffective  
5 assistance of counsel claim as an independent constitutional claim to provide state court “full and fair  
6 opportunity” to act on it, rather than hoping the court would infer a Sixth Amendment claim), *overruled*  
7 *on other grounds by Robbins v. Carey*, 481 F.3d 1143 (9th Cir. 2007). Berry did not exhaust Ground 1  
8 in his opening brief, which was treated as his direct appeal. *See also Corbin v. State*, 892 P.2d 580  
9 (Nev. 1995) (the Nevada Supreme Court has consistently held that it will not entertain claims of  
10 ineffective assistance of counsel on direct appeal).

11 Second, in the motion to dismiss appeal, the State argued counsel was not ineffective for failing  
12 to file a direct appeal. Exhibit 53 at 10-13. While the State did later address the jurisdictional issue,  
13 the issue was again addressed as a substantive claim under state law, not as an ineffective assistance of  
14 counsel claim. *Id.* at 14-16.

15 In his opposition to the motion to dismiss, Berry argued his guilty plea was not knowingly and  
16 intelligently entered because he was not aware of the jurisdictional issue. Exhibit 58 at 8-10. He also  
17 argued counsel failed to inform Berry of his right to appeal, specifically regarding the jurisdictional  
18 issue. *Id.* at 10-13.

19 The only claim presented in Ground 1 which this Court might consider exhausted in the motion  
20 to dismiss briefing is the claim that counsel failed to appeal the jurisdictional issue. ECF No. 5 at 9-12.

21 Nevertheless, Berry’s claim that counsel failed to appeal the jurisdictional issue is moot as the  
22 state district court already found counsel was ineffective for failing to perfect an appeal on the  
23 jurisdictional issue, and Berry in fact pursued a delayed direct appeal on the underlying substantive  
24 jurisdictional issue in the Nevada Supreme Court. *See Exhibits 43, 60.* Berry already received the  
25 relief sought.

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27 <sup>4</sup> Respondents reference the actual page number rather than the e-filed page numbers through the  
28 CM/ECF system.

1 A federal court lacks jurisdiction to decide a case if it is moot because constitutional authority  
2 extends only to actual cases or controversies. *Sample v. Johnson*, 771 F.2d 1335, 1338 (9th Cir. 1985);  
3 *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983). A case is moot when the issues are no  
4 longer live or the parties lack a legally cognizable interest in the outcome and when a court's decision  
5 will no longer have an impact on the petitioner. *Sample*, 771 F.2d at 1338-39. A court may still review  
6 a case where the injury is "capable of repetition yet evading review" as to the complainant. *Id.* at 1339  
7 (citation omitted). The "capable of repetition doctrine" may only be applied in exceptional situations  
8 where the petitioner can show a "demonstrated probability" that he will be subject to the same injury  
9 again. *Id.* The burden is on the plaintiff to show the likelihood of recurrence. *Id.* at 1342.

10 This Court should dismiss Ground 1 as moot.

11 The remaining claims in Ground 1 are unexhausted. Berry presented no claims to the Nevada  
12 Supreme Court that counsel failed to investigate the jurisdictional issue prior to sentencing, and no  
13 reference was made to Berry's mental stability or medications; probation eligibility; the canvass; the  
14 sentence received; possible motions; or coercion of the guilty plea.<sup>5</sup> ECF No. 5 at 12-13. These claims  
15 are unexhausted.

16 Finally, Berry's claim that counsel failed to file a *Brady* motion or discovery motion is  
17 conclusory as Berry fails to provide any specific factual support for the claim. ECF No. 5 at 13; Rule  
18 2(c), Rules Governing Section 2254 Cases; *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) (mere  
19 conclusion of violation of federal rights without specifics fails to state a basis for federal habeas relief).

20 Ground 1 should be dismissed.

21 **II. Ground 2 Is Unexhausted.**

22 In Ground 2, Berry claims: "Attorney failed to object to anything during this petitioner's  
23 proceedings." ECF No. 5 at 14. He alleges counsel failed to object to any evidence, the sentence, the  
24 sentence structure, the testimony, or anything during the state proceedings. He further alleges  
25 cumulative error. *Id.* at 14-15.

26 First, Berry did not present any such claim in his opening brief. *Supra*; Exhibit 60. Berry did  
27 not exhaust Ground 2 in his opening brief, which was treated as his direct appeal.

28 <sup>5</sup> Regarding the sufficiency of the guilty plea, see Ground 3, *infra*.

1 Second, the claim that counsel was ineffective for failing to object was not presented in the  
2 State's motion to dismiss or Berry's opposition to the motion. *Supra*; Exhibits 53, 58. Berry failed to  
3 exhaust any portion of Ground 2.

4 Finally, Ground 2 is conclusory as Berry fails to present any specific factual support for his  
5 claims. Rule 2(c); *Jones*, 66 F.3d at 205.

6 Ground 2 should be dismissed.

7 **III. Ground 3 Is Unexhausted.**

8 In Ground 3, Berry claims: "Failure to have any defense at all." ECF 5 at 18. He alleges  
9 counsel failed to develop a defense. He alleges counsel failed to investigate or object to anything  
10 (including Berry's mental stability at the time of the crime, eligibility for probation, court canvass, and  
11 sentence received); failed to raise the jurisdictional issue until sentencing (*id.* at 18-19); failed to advise  
12 Berry of his right to appeal (*id.* at 20-21, 23); failed to advise Berry of his right to appeal the sentence  
13 received (*id.* at 23); that the plea was not freely, knowingly or voluntarily entered because he did not  
14 receive the bargained-for sentence (*id.* at 21-22); and the jurisdictional issue (*id.* at 20, 22-23).

15 First, to the extent Berry presents an independent claim that counsel was ineffective for failing  
16 to appeal the jurisdictional issue that claim is duplicative of Ground 1 and should be dismissed. *Supra.*

17 To the extent Berry presents an independent claim that counsel failed to object to anything, or  
18 failed to conduct any investigation (including Berry's mental stability at the time of the crime) or other  
19 investigation (including failure to inform Berry he was not eligible for probation; the canvass contained  
20 conflicting information, and counsel failed to object to the sentence received); the claim is duplicative  
21 of Ground 2 and should be dismissed. *Supra.*

22 Second, Berry did not present any of his Ground 3 claims in his opening brief. *Supra*; Exhibit  
23 60. Berry did not exhaust Ground 3 in his opening brief, which was treated as his direct appeal.

24 Third, in the opposition to the State's motion to dismiss, Berry argued his guilty plea was not  
25 knowingly and intelligently entered because he was not aware of the jurisdictional issue. Exhibit 58 at  
26 8-10. He also argued counsel failed to inform Berry of his right to appeal, specifically regarding the  
27 jurisdictional issue. *Id.* at 10-13.

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1 This Court might consider exhausted is Berry's claim that his guilty plea was not knowingly or  
2 voluntarily entered because he was unaware of the jurisdictional issue. However, it is not clear if this  
3 claim is even presented in the Ground 3. *See* Exhibit 58.

4 To the extent Berry alleges counsel failed to inform Berry of his right to appeal the  
5 jurisdictional issue, the claim is moot. *See supra* Ground 1.

6 Ground 3 is unexhausted. Berry made no claim in the Nevada Supreme Court that counsel  
7 failed to develop a defense; the sentence received; the right to appeal the sentence received; or that the  
8 plea was not knowingly and intelligently entered based upon the sentence received.

9 Ground 3 is unexhausted.

10 **IV. If This Court Were To Consider Any Unexhausted Claim, This Court Must Apply The**  
11 **Clearly Applicable State Procedural Bars And Dismiss The Claim.**

12 In a circumstance where the state court is not given an opportunity to apply its procedural bar(s), a  
13 federal court is bound to bar the claim where, as in this case, application of the bar(s) is clear. *Coleman*  
14 *v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *Teague v. Lane*, 489 U.S. 288, 297-99 (1989). In a  
15 circumstance where a federal court considers an unexhausted claim, the state court has not had the  
16 opportunity to apply its procedural bar(s).

17 The clearly applicable state procedural bars are those found in Nev. Rev. Stat. 34.726, Nev. Rev.  
18 Stat. 34.800, and Nev. Rev. Stat. 34.810. Because these default rules have exceptions that substantially  
19 mirror the exceptions to the federal doctrine of procedural default, this Court has historically declined  
20 to apply anticipatory default in the absence of a concession from the petitioner that his claim does not  
21 fit the exceptions to procedural default in state court. *See Spencer v. Palmer*, No. 3:10-cv-00485-  
22 HDM-RAM, 2010 WL 3703750 at \*2 n.5 (D. Nev., Sept. 10, 2010); *Guillen-Rico v. United States*,  
23 No. 3:08-cv-00467-ECR-VPC, 2009 WL 929009 at \*2 (D. Nev., April 2, 2009). As a result, even if an  
24 otherwise unexhausted claim falls within the scope of Nevada's default rules, it is enough that a  
25 petitioner has an opportunity to meet an exception to the default rules. *Guillen-Rico*, No. 3:08-cv-  
26 00467-ECR-VPC, 2009 WL 929009 at \*2.

27 The exhaustion requirement is based in comity and is intended to give state courts the first  
28 opportunity to resolve federal constitutional claims that arise from state criminal proceedings. *Greene*,



1 288 F.3d at 1088. To apply an anticipatory default to Berry's otherwise unexhausted claims, and then  
2 allow Berry to bypass the procedural default so that he can present his otherwise unexhausted claims to  
3 the federal courts when Nevada law recognizes the same exception to its procedural defaults would  
4 completely undermine the purpose of the exhaustion requirement. This Court should find Berry's  
5 claims to be unexhausted.

6 **CONCLUSION**

7 This Court should dismiss Berry's Berry federal habeas petition as he failed to exhaust all of the  
8 claims in his petition.

9 Dated: December 1, 2016.

10 ADAM PAUL LAXALT  
11 Attorney General

12 By: /s/ Heather D. Procter  
13 HEATHER D. PROCTER (Bar. No. 8621)  
14 Senior Deputy Attorney General  
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**CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General and that on this 25th day of October, 2016, I served a copy of the foregoing MOTION TO DISMISS, by U.S. Mail, postage prepaid, addressed to:

Robert Logan Berry, Jr. #1105137  
Northern Nevada Correctional Center  
P.O. Box 7000  
Carson City, NV 89702

/s/ Laurie Sparman  
Laurie Sparman, an employee of the office  
of the Nevada Attorney General

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