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11 UNITED STATES DISTRICT COURT  
12 DISTRICT OF NEVADA

13 Robert Logan Berry, Jr.,

14 Petitioner,

15 v.

16 Isidro Baca, *et al.*,

17 Respondents.

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

**Amended Petition**

18 Robert Berry petitions this court for relief from his unlawful detention by  
19 respondents because the State of Nevada lacked jurisdiction over his alleged crimes.  
20 The events of this case took place in Indian country, was committed against  
21 Indians, and adversely affected Indians. Pursuant to federal law, the federal courts  
22 held exclusive jurisdiction over these alleged crimes, not the state, thus rendering  
23 his state-court judgment of conviction and sentence void. The Nevada Supreme  
24 Court unreasonably adjudicated this claim and wrongfully denied Mr. Berry relief.  
25 Therefore, Mr. Berry respectfully requests this court to enforce the federal law and  
26 grant this federal habeas corpus petition.  
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FACTUAL AND PROCEDURAL HISTORY<sup>1</sup>

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I. State-court proceedings

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.<sup>2</sup> The first amended information alleged that Berry “attempted to rob Fox Peak.”<sup>3</sup> “Fox Peak Station,” a gas station located in Indian country, is owned and operated by the Fallon Tribal Development Corporation, and thus by members of the Fallon Paiute-Shoshone Tribe.<sup>4</sup>

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.<sup>5</sup> The trial court rejected the argument.<sup>6</sup> 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.

On direct appeal, Mr. Berry argued “federal law establishes that the United States retains jurisdiction over [Mr. Berry’s] case. 18 U.S.C. Section 1152 provides

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<sup>1</sup> This petition and the single claim herein incorporate by reference the exhibits already filed before this court in earlier filings, ECF Nos. 8–9, 13–14. Further, Mr. Berry expects respondents will file any exhibits required by Local Rule LSR 3-3 and Rule 5 of the Rules Governing Section 2254 Cases that are not already filed in this court’s record in the present case.

<sup>2</sup> ECF No. 8-19; ECF 8-25.

<sup>3</sup> ECF No. 8-19 at 2.

<sup>4</sup> See ECF No. 9-29 at 3; ECF No. 23 at 2. See also ECF No. 9-25 at 11.

<sup>5</sup> ECF No. 8-24.

<sup>6</sup> *Id.* at 10.

1 for the punishment of crimes by non-Indians against Indians on Indian territory.”<sup>7</sup>  
2 Nonetheless, on October 19, 2015, the Nevada Supreme Court affirmed.<sup>8</sup>

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4 **II. Federal-court proceedings**

5 On August 8, 2016, well within a year of the date of finality of the direct appeal,  
6 Berry filed a timely *pro se* federal habeas corpus petition before this court.<sup>9</sup> He  
7 discussed the exhausted jurisdictional issue at great length in his petition, but also  
8 raised unexhausted claims related to his trial counsel’s performance.<sup>10</sup>

9 On September 26, 2017, this court noted that “[u]nder NRS § 41.430,  
10 jurisdiction might have been with the federal courts, not the state courts, to handle  
11 the case.”<sup>11</sup> But as the petition raised unexhausted claims, the court dismissed it.

12 Mr. Berry moved for relief from judgment and for leave to file an amended  
13 petition, in order to raise the below jurisdictional claim as his exhausted and  
14 independent ground for relief.<sup>12</sup>

15 This court granted the motions. This court explored the jurisdictional issue at  
16 length.<sup>13</sup> The court found that “[u]nder the original Public Law 280, the original state  
17 law, and the governor’s proclamation, Nevada did not have any jurisdiction over  
18 crimes committed by and against Indians in Indian country within Churchill  
19 County.”<sup>14</sup> Further, “[u]nder current law, 25 U.S.C. § 1321 and NRS § 41.430, Nevada

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21 <sup>7</sup> ECF No. 9-25 at 12–13.

22 <sup>8</sup> ECF No. 9-29.

23 <sup>9</sup> ECF No. 1-1.

24 <sup>10</sup> *See* ECF No. 10.

25 <sup>11</sup> *Id.*

26 <sup>12</sup> ECF Nos. 13, 14.

27 <sup>13</sup> ECF No. 23.

<sup>14</sup> *Id.* at 4.

1 does not have jurisdiction over any part of Indian country unless the relevant tribe  
2 has consented.”<sup>15</sup> The court observed that current federal law provides only one  
3 process by which a state may attempt to obtain the relevant tribe’s consent to the  
4 state’s exercise of jurisdiction over crimes by or against Indians in Indian country:  
5 via a special election called by the United States Secretary of the Interior.<sup>16</sup>  
6 Therefore, absent favorable results of such an election, the state does not have Public  
7 Law 280 jurisdiction over such crimes in Indian country—rather, “either the federal  
8 courts or the tribal courts have jurisdiction.”<sup>17</sup> And the court found that the land in  
9 question “seems to be part of Indian country for the purposes of the jurisdictional  
10 statutes.”<sup>18</sup>

11 In granting relief under Rule 60(b) and granting leave to amend, this court  
12 posed the central question of this case in its order: whether this crime was by or  
13 against Indians for the purposes of the federal jurisdictional statute.<sup>19</sup>

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21 <sup>15</sup> *Id.*

22 <sup>16</sup> *See id.* at 2; 25 U.S.C. §§ 1321(a)(1), 1326.

23 <sup>17</sup> ECF No. 23 at 3 (citing 18 U.S.C. § 1152). The court also observed that  
24 regardless, “[t]he land at issue probably never could have been subject to Public  
25 Law 280 jurisdiction” due to the Fallon Paiute Shoshone Indian Tribes Water  
26 Rights Settlement Act of 1990, and because thereafter, the Secretary of Interior  
27 took the land into trust. *Id.* at 4 n.7. This is correct.

<sup>18</sup> *Id.* at 5; *see also* ECF No. 9-25 at 11.

<sup>19</sup> *Id.* at 6.

## GROUND FOR RELIEF

**Ground 1: Mr. Berry's judgment of conviction is void as a matter of federal law because the state of Nevada did not have jurisdiction over this crime.**

**Statement of exhaustion:** Mr. Berry exhausted this claim on direct appeal.

**Statement of the claim:**

This case is about which sovereign had the power to charge and convict Mr. Berry for a crime in Indian country. The United States has exclusive jurisdiction over public offenses committed in Indian country except as federal law otherwise provides.<sup>20</sup> The alleged crime occurred in Indian country.<sup>21</sup> Federal law provides no applicable exception to federal jurisdiction for the circumstances of this crime. Therefore, the state of Nevada lacked jurisdiction to prosecute and convict Mr. Berry for it. Lacking the necessary jurisdiction, Mr. Berry's judgment of conviction is void per federal law, and habeas relief is warranted.<sup>22</sup>

From the inception of Mr. Berry's prosecution, it has been and remains undisputed that this offense took place in Indian country. Specifically, on appeal before the Nevada Supreme Court, the state expressly conceded so: "June 24, 2013 at approximate 0251 Berry entered the Fox Peak gas station, on the Paiute-Shoshone Tribe of the Fallon Reservation within Churchill County."<sup>23</sup> This comports with public Census Bureau information with regard to the land in question, which deems the area within a "Fallon Paiute-Shoshone (Colony) [Off-Reservation Trust Land]."<sup>24</sup>

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<sup>20</sup> 18 U.S.C. § 1152.

<sup>21</sup> See Note 3, *supra*; ECF No. 9-25 at 11.

<sup>22</sup> 28 U.S.C. § 2254(a) ("... in violation of the Constitution or *laws* or treaties of the United States . . ." (emphasis added)).

<sup>23</sup> ECF No. 9-26 at 13. The doctrine of judicial estoppel binds the state to these concessions. See *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990); *Brown v. Farwell*, 525 F.3d 787, 789 n.1 (9th Cir. 2008).

<sup>24</sup> See ECF No. 23 at 2 n.2 (this court noting public Census information regarding the land in question). Mr. Berry requests this court take judicial notice,

1 And Mr. Berry provided this undisputed information to the Nevada Supreme Court:  
2 “The real property associated with the Fox Peak Station is legally deeded to the  
3 United States of America Trust, which holds the property for the benefit of several  
4 Native American tribes. Hence, it is considered Indian territory . . . .”<sup>25</sup> The location  
5 of this offense, and the fact that this location constitutes Indian country, is not in  
6 dispute.

7 Further, the facts of the arrest also show this was Indian country, as Officer  
8 Richard Babcock of the Fallon Paiute Shoshone Tribal Police is the officer who filed  
9 the original criminal complaint against Mr. Berry in this case.<sup>26</sup> Logically, agents of  
10 the Fallon Paiute Shoshone Tribal Police would not have filed the complaint in this  
11 case if the alleged crime did not occur in its territory or on its property.

12 Accordingly, federal jurisdiction was exclusive here unless an exception to  
13 federal jurisdiction, provided by federal law, applied.<sup>27</sup> No exception applied.

14 Federal law provides for an exception to exclusive federal jurisdiction  
15 commonly known as “Public Law 280” jurisdiction.<sup>28</sup> But “Public Law 280”  
16 jurisdiction, under 25 U.S.C §§ 1321, 1326 and NRS § 41.430 does not apply. Nevada  
17 did not exercise such jurisdiction anywhere in the state at the time of this offense.  
18 And specifically with regard to the county and tribal territory in which this crime  
19 occurred, Nevada never assumed jurisdiction. Under Congress’s original Public Law  
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23 as it appears to already have done, of this Census information pursuant to Federal  
24 Rule of Evidence 201(a)(b). *See also* NRS 47.130 (same).

25 <sup>25</sup> ECF No. 9-25 at 11.

26 <sup>26</sup> ECF No. 8-3.

27 <sup>27</sup> 18 U.S.C. § 1152.

28 <sup>28</sup> *See* 25 U.S.C. §§ 1321, 1326.

1 280 statute,<sup>29</sup> the original state law,<sup>30</sup> and the governor’s proclamation required by  
2 the original state law,<sup>31</sup> Churchill County was excluded from Public Law 280  
3 jurisdiction.<sup>32</sup> And in any event, this land was likely never subject to Public Law 280  
4 jurisdiction in the first place.<sup>33</sup>

5 From that point forward, there was only one means by which a state could  
6 assume Public Law 280 jurisdiction over tribal territory: the tribe needed to give its  
7 consent, through a special election called by the United States Secretary of Interior,  
8 *before* the state could assume jurisdiction over crimes committed by and against  
9 Indians in the tribe’s Indian country.<sup>34</sup> The Fallon Paiute-Shoshone Tribe has never  
10 given its consent through such a public, special election. Thus, the state did not have  
11 Public Law 280 jurisdiction over this location at the time of the instant offense.

12 Therefore, the only way the State of Nevada could prosecute a crime in Indian  
13 country, such as the alleged crime here, is if the crime did not involve Indians.  
14 However, this crime did involve Indians, affected Indians, and was against Indians;  
15 the no-Indian exception to federal jurisdiction does not apply.

16 Despite the plain text of 18 U.S.C. § 1152, the United States Supreme Court  
17 has recognized an exception, holding crimes in Indian country “involving *only* non-  
18 Indians” may be prosecuted in the state courts.<sup>35</sup> Decades earlier, the court  
19 described this limited exception to exclusive federal jurisdiction as thus: states, by  
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21 <sup>29</sup> ECF No. 13-3 (available at [https://www.gpo.gov/fdsys/pkg/STATUTE-](https://www.gpo.gov/fdsys/pkg/STATUTE-67/pdf/STATUTE-67-Pg588.pdf)  
22 [67/pdf/STATUTE-67-Pg588.pdf](https://www.gpo.gov/fdsys/pkg/STATUTE-67/pdf/STATUTE-67-Pg588.pdf)).

23 <sup>30</sup> ECF No. 13-4.

24 <sup>31</sup> ECF No. 13-5.

25 <sup>32</sup> *See* NRS § 41.430;

26 <sup>33</sup> ECF No. 23 at 4 n.7.

27 <sup>34</sup> 25 U.S.C. §§ 1321(a)(1), 1326.

<sup>35</sup> *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990), *superseded by statute on other grounds as stated in United States v. Lara*, 541 U.S. 193 (2004).

1 virtue of their statehood, have jurisdiction over “crimes between whites and whites  
2 which do not affect Indians.”<sup>36</sup> Thus, if the crime “involves” or “affects” Indians, this  
3 exception to 18 U.S.C. § 1152 does not apply; federal jurisdiction remains exclusive.

4 The record is replete with evidence—and allegations by the state—that this  
5 alleged crime involved Indians, affected Indians, and was against Indians, because  
6 the owners of the Indian-country store were Indian. As Mr. Berry explained to the  
7 Nevada Supreme Court, the Fallon Tribal Development Corporation (FTDC) owned  
8 Fox Peak Station, and this is a corporation that the Fallon Paiute-Shoshone Tribe  
9 established and operated.<sup>37</sup> Further, the State’s first amended information alleged  
10 Mr. Berry attempted to take money from an Indian-owned store in Indian country,  
11 alleging Mr. Berry “attempted to rob Fox Peak.”<sup>38</sup> Likewise, the Nevada Supreme  
12 Court found the owners of Fox Peak Station were tribal members.<sup>39</sup> Finally, a tribal  
13 police officer responded and filed the original criminal complaint in this matter.<sup>40</sup>

14 As Mr. Berry argued in the state court, “the money that would have been  
15 stolen, had the commission of the alleged criminal act been successful, belonged to  
16 the Fox Peak Station. Therefore, Fox Peak Station, ak.a. the Fallon Paiute-  
17 Shoshone Tribe, would have bore the financial loss had the commission of this  
18 alleged offense been successful.”<sup>41</sup> This alleged crime—an attempted robbery meant  
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22 <sup>36</sup> *People of State of N.Y. ex rel. Ray v. Martin*, 326 U.S. 496, 500 (1946).

23 <sup>37</sup> ECF No. 9-25 at 11; ECF No. 23 at 2; *see also Fox Peak Station – Fernley*,  
Fallon Tribal Dev. Corp., <http://www.ftdc.us/business-ops/fox-peak-fallon>.

24 <sup>38</sup> ECF No. 8-19.

25 <sup>39</sup> ECF No. 9-29 at 3; *see also* ECF No. 8-1 at 11 (declaration of probable  
26 cause arrest and detention). The FTDC is wholly owned by the tribe itself.

27 <sup>40</sup> ECF No. 8-3.

<sup>41</sup> ECF No. 9-25 at 14.



1 to steal money from an Indian-owned store—“affected,”<sup>42</sup> “involved,”<sup>43</sup> and was  
2 against Indians. The non-Indian exception to 18 U.S.C. § 1152 does not apply;  
3 federal jurisdiction was exclusive.

4 The state of Nevada did not have jurisdiction over this crime. Mr. Berry’s  
5 judgment of conviction and sentence are thus void as a matter of federal law. Federal  
6 habeas relief, pursuant to 28 U.S.C. § 2254, is warranted.

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8 **PRAYER FOR RELIEF**

9 Accordingly, Client Name respectfully requests that this Court:

10 1. Issue a writ of habeas corpus to have Client Name brought before the  
11 Court so that she may be discharged from his unconstitutional confinement;

12 2. Conduct an evidentiary hearing at which proof may be offered  
13 concerning the allegations in this amended petition and any defenses that may be  
14 raised by respondents; and

15 3. Grant such other and further relief as, in the interests of justice, may be  
16 appropriate.

17 Dated November 15, 2018.

18 Respectfully submitted,

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20 Rene L. Valladares  
21 Federal Public Defender

22 /s/S. Alex Spelman  
23 S. Alex Spelman  
24 Assistant Federal Public Defender

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27 <sup>42</sup> *Martin*, 326 U.S. at 500.

<sup>43</sup> *See Duro*, 495 U.S. at 680.

**DECLARATION UNDER PENALTY OF PERJURY**

I declare under penalty of perjury under the laws of the United States of America and the State of Nevada that the facts alleged in this petition are true and correct to the best of counsel's knowledge, information, and belief.

Dated November 15, 2018.

Respectfully submitted,

Rene L. Valladares  
Federal Public Defender

/s/ S. Alex Spelman  
S. Alex Spelman  
Assistant Federal Public Defender

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 15, 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/ Arielle Blanck  
An Employee of the  
Federal Public Defender