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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

ROBERT LOGAN BERRY, JR.,

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

Petitioner(s),

**MOTION TO DISMISS**

vs.

ISIDRO BACA, *et al.*,

Respondent(s).

Respondents move to dismiss petitioner Robert Berry Jr.'s (Berry) amended petition for writ of habeas corpus because the claim raised therein is unexhausted and/or not cognizable in a federal habeas action. ECF No. 25. This motion is based on the following points and authorities, together with all other pleadings, papers and exhibits on file.

**POINTS AND AUTHORITIES**

**STATEMENT OF THE CASE**

Berry was accused of entering a gas station and threatening to kill an employee unless he turned over money from the cash register on June 24, 2013. ECF No. 8-11. On June 27, 2013, the State charged Berry in the Tenth Judicial District Court, Churchill County Nevada, by information with Count 1, attempt to commit robbery; Count 2, burglary; and Count 3, habitual criminal. *Id.* A first-amended information charged him with Count 1, attempt to commit robbery; and Count 2, habitual criminal. ECF No. 8-19. Under the terms of a negotiated guilty plea agreement, Berry pleaded guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to the charges alleged in the first-amended information ECF No. 8-22; ECF No. 8-21.

1 On the day of sentencing, Berry argued for the first time that the state court did not have  
2 jurisdiction over his offense because the gas station in question was owned by a Native American tribe.  
3 ECF No. 8-24 at 4-5. The court rejected the argument. *Id.* at 10. The court adjudicated Berry a  
4 habitual criminal and sentenced him to 10 years to life imprisonment. *Id.* at 24. The court entered the  
5 judgment of conviction on September 17, 2013. ECF No. 8-25.

6 Berry did not file a direct appeal, but moved to withdraw his guilty plea on the ground that his  
7 attorney had led him to believe that he would receive a lesser sentence. ECF No. 8-27 at 4. The state  
8 district court denied the motion. ECF No. 8-33.

9 Before the state district court ruled on the motion to withdraw his guilty plea, Berry filed a  
10 pro se post-conviction petition for a writ of habeas corpus in the state district court. ECF No. 8-32.  
11 He filed a counseled supplemental petition thereafter. ECF 9-1. After an evidentiary hearing, the state  
12 district court found that trial counsel was ineffective for failing to advise Berry of his right to appeal and  
13 Berry was entitled to a direct appeal with the assistance of counsel. ECF No. 9-8.

14 In Berry's opening brief on direct appeal, he raised one ground: "Does the State of Nevada or  
15 the federal government have jurisdiction to prosecute this case?" ECF No. 9-25 at 3. On October 19,  
16 2015, the Nevada Supreme Court rejected Berry's argument that the state trial court lacked jurisdiction  
17 and affirmed his judgment of conviction. ECF No. 9-29. Remittitur issued on November 13, 2015.  
18 ECF No. 9-33.

19 Berry initiated this federal habeas action on or about August 4, 2016. ECF No. 5. This Court  
20 denied Berry's motion for the appointment of counsel. ECF No. 4. Respondents moved to dismiss  
21 Berry's petition, ECF No. 7, and this Court granted the motion, ECF No. 10.

22 Several months later, the Federal Public Defender filed a notice of appearance, ECF No. 12,  
23 along with a motion for relief from the judgment, ECF No. 13, and a motion for leave to file an  
24 amended petition, ECF No. 14. Respondents opposed Berry's motions. ECF No. 17, ECF No. 18.

25 On September 27, 2018, this Court granted Berry's motions. ECF No. 23 at 6. This Court noted  
26 that Berry's jurisdictional challenge "should be developed further." *Id.* at 4. Berry filed an amended  
27 federal habeas petition on November 15, 2018. ECF No. 25. On May 3, 2019, this Court directed  
28 Respondents to answer or respond to Berry's amended petition. ECF No. 27.

Respondents now move to dismiss Berry's amended petition because his jurisdictional challenge is unexhausted and/or not cognizable in a federal habeas proceeding under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).

## ARGUMENT

### **I. Berry's Claim That the Nevada State Court Lacked Jurisdiction Because His Offense "Involved" Or "Affected" On Indians Is Not Exhausted.**

In his amended petition, Berry argues that Nevada courts lacked jurisdiction over his offense because it "affected" and "involved" Indians. ECF No. 25 at 7-8. This claim should be dismissed because Berry did not exhaust it in state court.

A federal court may not grant a federal habeas corpus unless the petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1). Generally speaking, exhaustion is satisfied by fairly presenting the claim in state court. To establish fair presentation, a petitioner must describe both the operative facts and the federal legal theory on which the petitioner's claims are based so that the state court can have a fair opportunity to apply controlling legal principles to the facts. *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005); *see also Gray v. Netherland*, 518 U.S. 152, 162 (1996).

Berry did not fairly present this claim to the Nevada Supreme Court. In his opening brief on direct appeal, Berry argued that the federal court, not the state court, had jurisdiction over the crime for three reasons: (1) the offense took place in "Indian territory," (2) the offense was committed *by* a non-Indian, and (3) the offense was committed *against* an Indian because the gas station was owned by tribe members. ECF No. 9-25 at 15-16.<sup>1</sup> Berry's claim in this proceeding is different: he argues that the federal court had jurisdiction if his offense "affected" or "involved" Indians in any way, apparently regardless of whether the Tribe was the victim of Berry's offense under Nevada's robbery statute. ECF No. 25 at 8 ("Thus, if the crime 'involves' or 'affects' Indians . . . federal jurisdiction remains exclusive.").

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<sup>1</sup>In its May 9, 2019 order, this Court framed the jurisdictional question similarly, pressing the parties to address whether the Fallon Paiute-Shoshone Indian Tribe or the Fallon Tribal Development Corporation were "victims" of Berry's offense and/or constituted "persons" under Nevada's robbery statute. ECF No. 23 at 6.

1 The difference between how Berry framed his claim in the Nevada Supreme Court and how it is  
 2 framed in this proceeding may seem subtle, but it is important, because it means the Nevada Supreme  
 3 Court was never fairly asked to consider the legal theory he now presents. Although he presented many  
 4 of the same facts to the Nevada Supreme Court, that Court was never asked to consider whether the  
 5 crime “involved” or “affected” Indians such that it deprived the state trial court of jurisdiction—it was  
 6 asked only to consider whether the Tribe was the victim of Berry’s offense because it owned the gas  
 7 station in question. Because Berry’s claim is different from that raised on direct appeal, it should be  
 8 dismissed as unexhausted.

9 **II. Berry’s Claim That the Nevada State Court Lacked Jurisdiction is Not Cognizable in a**  
 10 **Federal Habeas Action.**

11 Berry argues that Nevada courts lacked jurisdiction over his offense and therefore he is entitled  
 12 to federal habeas relief. Under AEDPA, a petition for a writ of habeas corpus is only available if a  
 13 person is being held in custody in violation of the Constitution or laws or treaties of the United States.  
 14 28 U.S.C. § 2254(a). Accordingly, “federal habeas corpus relief does not lie for errors of state law.”  
 15 *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (internal quotation marks omitted); *Murdoch v. Castro*,  
 16 365 F.3d 699, 703 fn. 1 (9th Cir. 2004).

17 Berry’s claim that the state trial court lacked jurisdiction involves determining whether the  
 18 Nevada Supreme Court erred in applying state law. Accordingly, his claim is not cognizable on federal  
 19 habeas review. *See Gasquet v. Lapeyre*, 242 U.S. 367, 369 (1917) (“[A]s our decisions show, there is  
 20 nothing in the clauses of the 14th Amendment guarantying due process and equal protection which  
 21 converts an issue respecting the jurisdiction of a state court under the Constitution and statutes of the  
 22 state into anything other than a question of state law, the decision of which by the state court of last  
 23 resort is binding upon this court.”); *Wright v. Angelone*, 151 F.3d 151, 158 (4th Cir. 1998) (rejecting a  
 24 petitioner’s claim that he was convicted by a Virginia court that did not have proper jurisdiction because  
 25 “when pared down to its core, [the claim] rests solely upon an interpretation of Virginia’s case law and  
 26 statutes” and therefore “is simply not cognizable on federal habeas review”); *Wills v. Egeler*, 532 F.2d  
 27 1058, 1059 (6th Cir. 1976) (“Determination of whether a state court is vested with jurisdiction under  
 28 state law is a function of the state courts, not the federal judiciary.”); *Nuno Velasco v. Filson*, 2017 WL

1 4011021, at \*7 n.5 (D. Nev. Sept. 12, 2017) (“To the extent that [the petitioner] challenges the legal  
2 conclusion that his actions bestowed jurisdiction on Nevada . . . he presents an issue of state law.  
3 Clearly, it is not the province of a federal habeas court to reexamine state-court determinations on issues  
4 of state law.”).

5 As this Court recognized in its September 27, 2018 order, the state trial court could have  
6 exercised jurisdiction over Berry’s offense in two ways. ECF No. 23 at 4. The first way was through  
7 statutory authority. *Id.* at 2. In 1953, Congress passed a law giving states the power to assume  
8 jurisdiction over crimes committed in Indian Country. ECF No. 13-3 at 3-4. Consistent with that  
9 authority, the State of Nevada enacted Nev. Rev. Stat. 41.430. ECF No. 13-4 at 2. Under the terms of  
10 that statute, Nevada assumed general criminal jurisdiction over “public offenses committed by or  
11 against Indians in the areas of Indian country in Nevada,” with some statutorily-defined exceptions. *Id.*

12 The second way was through the State of Nevada’s inherent authority to regulate criminal  
13 offenses that occur within its borders. *See Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001). “Not all  
14 crimes committed within Indian country are subject to federal or tribal jurisdiction . . . a non-Indian  
15 charged with committing crimes against other non-Indians in Indian country is subject to prosecution  
16 under *state law*.” *United States v. Antelope*, 430 U.S. 641, 643 n.2 (1977) (emphasis added); *see also*  
17 *United States v. Langford*, 641 F.3d 1195, 1197 (10th Cir. 2011).

18 On direct appeal, the Nevada Supreme Court considered both theories of jurisdiction and  
19 rejected Berry’s claim that the Churchill County court lacked jurisdiction over his offense.

20 First, the Nevada Supreme Court concluded that jurisdiction was proper because neither Berry  
21 nor the clerk were Indians. ECF No. 9-29 at 2-3. The Nevada Supreme Court expressly rejected the  
22 notion that the “tribal members, as owners of [the gas station] were victims of the attempted robbery.”  
23 *Id.* at 3. Determining whether the Nevada Supreme Court’s decision was correct involves interpreting  
24 Nevada’s robbery statute, *see* Nev. Rev. Stat. 200.380(1), and analyzing Nevada case law regarding  
25 robbery. These are issues of purely state law, which cannot be challenged on federal habeas review.

26 Second, the Nevada Supreme Court held that even assuming the tribe was a victim, jurisdiction  
27 was proper because Nev. Rev. Stat. 41.430(1) gave Nevada courts general criminal jurisdiction over  
28 offenses occurring in “Indian country,” and although there were statutory exceptions, Berry failed to

1 demonstrate that any of them applied. ECF No. 9-29 at 3. Although this Court has suggested  
2 otherwise, it made that determination after mostly looking to *state* law, including analyzing whether  
3 the original version of Nev. Rev. Stat. 41.430 assumed jurisdiction over the relevant portion of  
4 Churchill County and whether Nevada's Governor excluded Churchill County from Nevada's general  
5 rule. ECF No. 23 at 3. Whether the Nevada Supreme Court correctly concluded that Nev. Rev. Stat.  
6 41.430 afforded the trial court with jurisdiction is thus an issue of state law, which cannot be challenged  
7 on federal habeas review.

8 Because Berry's claim is not cognizable on federal habeas review under AEDPA, this court  
9 should dismiss his petition.

### 10 CONCLUSION

11 For the foregoing reasons, this Court should dismiss Berry's amended petition.

12 RESPECTFULLY SUBMITTED this 14th day of June, 2019.

13 AARON D. FORD  
14 Attorney General

15 By: /s/ Charles L. Finlayson  
16 CHARLES L. FINLAYSON (Bar No. 13685)  
17 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 14th day of June, 2019, I served a copy of the foregoing MOTION TO DISMISS, by U.S. District Court CM/ECF electronic filing to:

S. Alex Spelman  
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Las Vegas, Nevada 89101

/s/ Laurie Sparman