

1 Rene L. Valladares  
2 Federal Public Defender  
3 Nevada State Bar No. 11479  
4 \*S. Alex Spelman  
5 Assistant Federal Public Defender  
6 Nevada State Bar No. 14278  
7 411 E. Bonneville Ave., Ste. 250  
8 Las Vegas, Nevada 89101  
9 (702) 388-6577  
10 alex\_spelman@fd.org

\*Attorney for Petitioner Robert Logan Berry, Jr.

10 UNITED STATES DISTRICT COURT  
11 DISTRICT OF NEVADA

12 Robert Logan Berry, Jr.,  
13 Petitioner,  
14 v.  
15 Rene Baker, Warden, *et al.*,  
16 Respondents.<sup>1</sup>

Case No. 3:16-cv-00470-MMD-WGC  
**Response in opposition to motion  
to dismiss**  
**(ECF No. 28)**

18 Respondents' motion to dismiss argues this court can't consider Berry's  
19 federal-jurisdiction claim because the state court's rejection of the claim involved an  
20 error of state law. They also argue the claim is unexhausted because Berry used the  
21 word "against" in his state briefing but now uses the words "involved," "affected,"  
22 and "against." These arguments have no merit. Berry respectfully requests this  
23 court deny the motion.  
24  
25  
26

27 <sup>1</sup> This caption updates the name of the warden at the facility currently housing petitioner. See Fed. R. Civ. P. 25(d); Habeas Rule 2(b).

## POINTS AND AUTHORITIES

Contrary to Respondents' assertions, Berry's federal jurisdiction claim is cognizable in a federal habeas proceeding because it's a federal claim for relief. Also, the claim is exhausted because Berry squarely and fairly presented it to the Nevada Supreme Court.

### **I. Berry's federal-jurisdiction claim is cognizable in a federal habeas corpus proceeding.**

Respondents argue that this court cannot consider Berry's federal-jurisdiction claim because the state court's rejection of the claim involved, at most, an error of state law. This is wrong. Berry's claim is a federal claim for relief governed by federal law, regardless of how the Nevada Supreme Court decided to resolve the claim. It is cognizable on federal habeas review.

Federal law is the supreme law of the land, so when Congress enacts a statute in an area the federal constitution permits Congress to regulate, federal law governs and trumps state law.<sup>2</sup> Congress has the authority to regulate Indian country.<sup>3</sup> And Congress has done so, vesting jurisdiction over public offenses committed in Indian country exclusively with the federal government or Indian tribes.<sup>4</sup> Therefore, Berry's federal claim for relief is founded in 18 U.S.C. § 1152.

In relevant part here, Congress created an exception to § 1152's exclusive federal jurisdiction commonly referred to as "Public Law 280" jurisdiction. Public Law 280 is a federal statute that allows states to assume jurisdiction in Indian country if it complies with certain procedures. Whether a state has complied with the requirements of this *federal* statute, and has thus properly assumed jurisdiction

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<sup>2</sup> U.S. Const. art. IV (supremacy clause).

<sup>3</sup> U.S. Const. art. I § 8 (Indian Commerce Clause).

<sup>4</sup> See 18 U.S.C. § 1152; *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016), as revised (July 7, 2016).

1 in Indian country, remains a question of *federal* law. This is true even if the inquiry  
 2 requires the courts to look at state statutes and state historical documents to decide  
 3 what the state did (or purported to do).<sup>5</sup>

4 Therefore, whether federal jurisdiction was exclusive, rendering Berry's state  
 5 judgment of conviction void, is a question of federal law. His claim for relief under  
 6 18 U.S.C. § 1152 is a federal claim cognizable in a federal habeas proceeding.

7 The fact that the Nevada Supreme Court erroneously framed this issue as  
 8 one of state law does not change this result. To the contrary, the Nevada Supreme  
 9 Court's mishandling of this claim, and application of state-law principles contrary to  
 10 clearly established federal law, will result in *de novo* review of the claim by this  
 11 Court pursuant to 28 U.S.C. § 2254(d)(1).

## 12 **II. The claim is exhausted.**

13 Respondents also argue Berry did not fairly present this claim to the Nevada  
 14 Supreme Court. They claim that he presents a different argument in his petition  
 15 than the one he presented to the state court. Specifically, they argue that Berry  
 16 unexhausted his claim that the no-Indian exception to exclusive federal jurisdiction  
 17 did not apply when he used the words "involved," "affected," and "against" in the  
 18 federal petition while in state court he solely used the phrase "against Indians."  
 19 Although they admit the distinction is subtle, they argue that the language of the  
 20 federal petition is too different from the state briefing for the claim to be exhausted.  
 21 This is not so.

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26 <sup>5</sup> See, e.g., *Murphy v. Royal*, 875 F.3d 896, 936–37 (10th Cir. 2017), *cert.*  
 27 *granted* 138 S. Ct. 2026 (2018) (federal habeas court examining whether Oklahoma  
 ever assumed Public Law 280 jurisdiction, determining the state never did so).

1 To exhaust a federal claim in state court, a prisoner need only “give state  
2 courts a *fair* opportunity to act on [his] claims.”<sup>6</sup> As such, the United States  
3 Supreme Court has long held that a mere variation in legal theory concerning the  
4 same claim for relief does not render a claim unexhausted—rather, “[w]e simply  
5 hold that the substance of a federal habeas corpus claim must first be presented to  
6 the state courts.”<sup>7</sup> Indeed, the Ninth Circuit has stated that a claim in a federal  
7 petition is exhausted when it is “sufficiently related to,” and “intertwined with,” the  
8 one fairly presented to the state court.<sup>8</sup>

9 Put simply, exhaustion of a federal claim does not mean that the claim must  
10 be a verbatim copy of the way it was presented in state court. Instead, simply the  
11 *substance* of the claim must be presented to the state court, even if the petitioner  
12 alters the way it is presented in federal court. The petitioner simply needed to give  
13 the state court a *fair* opportunity to pass on the substance of the claim. Other  
14 circuits have been just as explicit about this. For example, the Seventh Circuit has  
15 explained, “a petitioner may reformulate [his] claims so long as the substance of the  
16 claim remains the same.”<sup>9</sup> Similarly, the Second Circuit stated, a petitioner fairly  
17 presents a federal claim when “the substance of the federal habeas corpus claim is  
18 clearly raised and ruled on in state court . . . although the federal principle may  
19 initially be attached to a different label than the one ultimately affixed in federal  
20 habeas proceedings.”<sup>10</sup> And as the Tenth Circuit has held, “we do not believe this  
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23 <sup>6</sup> *Sanders v. Ryder*, 342 F.3d 991, 998–99 (9th Cir. 2003) (emphasis and  
alteration in original) (quoting *O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999)).

24 <sup>7</sup> See *Picard v. Connor*, 404 U.S. 270, 276–78 (1971)).

25 <sup>8</sup> *Lounsbury v. Thompson*, 374 F.3d 785, 787-90 (9th Cir. 2004).

26 <sup>9</sup> *Sweeny v. Carter*, 361 F.3d 327, 333 (7th Cir. 2004).

27 <sup>10</sup> *Jackson v. Edwards*, 404 F.3d 612, 619 (2d Cir. 2005) (citing *Picard*, 404  
U.S. at 278).

1 label change . . . creates a fundamentally new argument which the state courts did  
2 not have an opportunity to consider.”<sup>11</sup>

3 Here, Berry gave the state court a fair opportunity to pass on the substance  
4 of the claim. He presented the same claim to the state court that he now presents to  
5 this court, namely his conviction is void as a matter of federal law because the state  
6 of Nevada did not have jurisdiction over this crime. The only difference in the  
7 federal petition is he elaborated on the standard governing the no-Indian exception  
8 to federal jurisdiction in Indian country. That standard has interchangeably utilized  
9 the terms “involved,” “affected,” and “against.” But this doesn’t change the claim, it  
10 just means Berry is elaborating on the law governing the claim.<sup>12</sup> Those governing  
11 cases controlled the resolution of the claim that was presented to state court.

12 Despite the subtle change in terms, the same substantive claim alleged in the  
13 federal petition was fairly presented to the state court. And the state court squarely  
14 addressed the same substantive claim. This claim is exhausted.

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24 <sup>11</sup> *Nichols v. Sullivan*, 867 F.2d 1250, 1253 (10th Cir. 1989).

25 <sup>12</sup> Note that this is much more than the habeas rules require Berry to do to  
26 properly plead a federal habeas corpus petition. All Berry needed to do was cite to  
27 18 U.S.C. § 1152 and set out the facts supporting the claim. *See Rules Governing  
Section 2254 Cases in the United States District Courts*, Rule 2(c). Just because  
Berry elaborated on the law governing this claim does not render it unexhausted.

**CONCLUSION**

Berry respectfully requests this Court deny respondents' motion to dismiss because his federal-jurisdiction claim is both cognizable and exhausted.

Dated August 8, 2019.

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 August 8, 2019, 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: Charles L. Finlayson.

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