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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),

**REPLY IN SUPPORT OF
MOTION TO DISMISS**

vs.

ISIDRO BACA, *et al.*,

Respondent(s).

Respondents submit this reply in support of their motion to dismiss Robert Logan Berry's (Berry) amended federal habeas petition. ECF No. 28. This reply is based upon the following points and authorities, together with all other pleadings, documents and exhibits on file.

POINTS AND AUTHORITIES

ARGUMENT

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

In the motion to dismiss, Respondents assert that Berry's jurisdictional claim is unexhausted because he did not fairly present the substance of the claim to the Nevada state courts. ECF No. 28 at 3. Berry seems to acknowledge that he is making a different legal argument in this court than he did in state court. ECF No. 32 at 5. He argues, however, that the claim is still exhausted because the crux of his claim in state court and this Court is that the Nevada state courts lacked jurisdiction, even if his theory for why that is true has changed. *Id.*

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1 Respondents respectfully disagree. Berry's claim in state court was that the state courts lacked
 2 jurisdiction because the gas station was the victim of his offense under the Nevada's robbery statute.
 3 ECF No. 9-25 at 14-15. Whether a person is a "victim" under a robbery statute is a different question
 4 from whether a robbery offense "involves" or "affects" a culture or tribe. *See Picard v. Connor*,
 5 404 U.S. 270, 278 (1971) ("[T]he substance of a federal habeas corpus claim must first be presented to
 6 the state courts."). Accordingly, Berry's allegation was not fairly presented to the Nevada Supreme
 7 Court and is unexhausted.

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

10 In the motion to dismiss, Respondents further assert that Berry's jurisdictional claim is not
 11 cognizable in a federal habeas action because it involves an issue of state law. ECF No. 28 at 4. Berry
 12 responds that this Court can consider his claim because federal law trumps state law, and Congress
 13 "vest[ed] jurisdiction over public offenses *exclusively* with the federal government or Indian tribes."
 14 ECF No. 32 at 2 (emphasis added).

15 Berry's argument lacks merit. Contrary to his assertion, the federal government cannot
 16 completely override state laws punishing criminal offenses because a state's authority to prosecute
 17 crimes is not derived from the federal government, but from its own inherent sovereignty. *Heath*
 18 *v. Alabama*, 474 U.S. 82, 89 (1985). Based on this principle, the United States Supreme Court has
 19 recognized that "[n]ot all crimes committed within Indian country are subject to federal or tribal
 20 jurisdiction . . . a non-Indian charged with committing crimes against other non-Indians in Indian
 21 country is subject to prosecution under *state* law." *United States v. Antelope*, 430 U.S. 641, 643 n.2
 22 (1977) (emphasis added).

23 The Nevada Supreme Court concluded that Nevada courts could prosecute Berry because, under
 24 Nevada law, the victim of his robbery was the gas station clerk. ECF No. 9-29 at 2-3. This Court
 25 cannot grant federal habeas relief on a claim that the Nevada Supreme Court misinterpreted Nevada
 26 law. *See Gasquet v. Lapeyre*, 242 U.S. 367, 369 (1917) ("[A]s our decisions show, there is nothing in
 27 the clauses of the 14th Amendment guarantying due process and equal protection which converts an
 28 issue respecting the jurisdiction of a state court under the Constitution and statutes of the state into

1 anything other than a question of state law, the decision of which by the state court of last resort is
2 binding upon this court.”); *Nuno Velasco v. Filson*, Case No. 3:13-cv-00431-MMD-VPC, 2017 WL
3 4011021, at *7 n.5 (D. Nev. Sept. 12, 2017) (“To the extent that [the petitioner] challenges the legal
4 conclusion that his actions bestowed jurisdiction on Nevada . . . he presents an issue of state law.
5 Clearly, it is not the province of a federal habeas court to reexamine state-court determinations on issues
6 of state law.”). Accordingly, Berry’s claim is not cognizable in a federal habeas action.

7 **CONCLUSION**

8 For the foregoing reasons, this Court should dismiss Berry’s amended petition.

9 RESPECTFULLY SUBMITTED this 16th day of August, 2019.

10 AARON D. FORD
11 Attorney General

12 By: /s/ Charles L. Finlayson
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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 16th day of August, 2019, I served a copy of the foregoing REPLY IN SUPPORT OF MOTION TO DISMISS, by U.S. District Court CM/ECF electronic filing to:

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