EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT

REGIONAL JUSTICE CENTER
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Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

August 19, 2021

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: RONALD ALLEN, JR. vs. WILLIAM GITTERE, WARDEN ESP
S.C. CASE: 83327
D.C. CASE: A-20-815539-W

Dear Ms. Brown:

Pursuant to your Order Directing Entry and Transmission of Written Order, dated August 9, 2021, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed August 18, 2021 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

Heather Ungermann, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RONALD ALLEN, aka,
Ronald Eugene Allen, Jr., #2846267

Defendant.

CASE NO: A-20-815539-W

DEPT NO: II

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: FEBRUARY 23, 2021
TIME OF HEARING: 9:00 AM

THIS CAUSE having come on for hearing before the Honorable CARLI KIERNY, District Judge, on the 23 day of Month, 20Y21, the Petitioner not being present, PROCEEDING IN PROPER PERSON, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On September 23, 2016, the State charged Ronald Allen (hereinafter "Defendant") by way of Information with one count of Battery on a Protected Person with Substantial Bodily Harm (Category B Felony – NRS 200.481).

Defendant's jury trial commenced on October 31, 2017. On November 3, 2017, the jury returned a verdict finding Defendant guilty. On February 6, 2018, the district court sentenced Defendant under the small habitual criminal statute to a minimum of ninety-six (96) months and a maximum of two hundred forty (240) months in the Nevada Department of Corrections (NDOC), consecutive to Case No. C16-317786-1. Defendant received three hundred eighty-seven (387) days credit for time served.

The Judgment of Conviction was filed on February 16, 2018. On March 8, 2018, Defendant filed a Notice of Appeal. He filed his Opening Brief on July 11, 2018. The State filed its Answering Brief on August 8, 2018. The Court of Appeals affirmed the Judgment of Conviction on April 16, 2019. Remittitur on May 13, 2019.

On May 22, 2020, Defendant filed a Motion for Withdrawal of Attorney of Record or in the Alternative, Request for Records/Court Case Documents. On June 23, 2020, the district court granted Petitioner's Motion for Withdrawal of Attorney of Record.

On June 1, 2020, Defendant filed the instant Motion for Appointment of Counsel and Request for Evidentiary Hearing (hereinafter "Motion"). The State filed an Opposition on June 9, 2020. On June 23, 2020, the district court denied Petitioner's Motion for Appointment of Counsel and Request for Evidentiary hearing.

On May 27, 2020, Defendant filed the instant Post-Conviction Petition for Writ of Habeas Corpus ("Petition"). The State filed a response on February 22, 2021. On February 23, 2021, this Court made the following Findings of Fact, Conclusions of Law and Order.

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ANALYSIS

I. THE INSTANT PETITION IS PROCEDURALLY TIME BARRED PURSUANT TO NRS 34.726

A petitioner must raise all grounds for relief in a timely filed first post-conviction Petition for Writ of Habeas Corpus. Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). A petitioner must challenge the validity of their judgment or sentence within one year from the entry of judgment of conviction or after the Supreme Court issues remittitur pursuant to NRS 34.726(1). This one-year time limit is strictly applied and begins to run from the date the judgment of conviction is filed or remittitur issues from a timely filed direct appeal. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

The Nevada Supreme Court has explained that:

> [C]onstruing NRS 34.726 to provide such an extended time period would result in an absurdity that the Legislature could not have intended. A judgment of conviction may be amended at any time to correct a clerical error or to correct an illegal sentence. Because the district court may amend the judgment many years, even decades, after the entry of the original judgment of conviction, restarting the one-year time period for all purposes every time an amendment occurs would frustrate the purpose and spirit of NRS 34.726. Specifically, it would undermine the doctrine of finality of judgments by allowing petitioners to file post-conviction habeas petitions in perpetuity.

Id.

"Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory," and "cannot be ignored [by the district court] when properly raised by the State." State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231 & 233, 112 P.3d 1070, 1074–75 (2005). For example, in Gonzales v. State, the Nevada Supreme Court rejected a habeas petition filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002). Absent a showing of good cause, district courts have a duty to consider whether claims raised in a petition are procedurally barred, and have

no discretion regarding whether to apply the statutory procedural bars. Riker, 121 Nev. at 233, 112 P.3d at 1075.

Here, Petitioner's Judgment of Conviction was filed on February 16, 2018, and Remittitur issued on May 13, 2019. The instant Petition was filed on May 27, 2020, two weeks past the one-year deadline. As such, absent a showing of good cause, the instant Petition is denied as procedurally time-barred.

II. PETITIONER HAS NOT SHOWN GOOD CAUSE TO OVERCOME PROCEDURAL BARS

Courts may consider the merits of procedurally barred petitions only when petitioners establish good cause for the delay in filing and prejudice should the courts not consider the merits. NRS 34.726(1)(a)-(b); NRS 34.810(3). Simply put, good cause is a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). To establish good cause, a petitioner must demonstrate that "an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). Good cause exists if a Petitioner can establish that the factual or legal basis of a claim was not available to him or his counsel within the statutory time frame. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07. Once the factual or legal basis becomes known to a petitioner, they must bring the additional claims within a reasonable amount of time after the basis for the good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions). A claim that is itself procedurally barred cannot constitute good cause. State v. District Court (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005). See also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Here, Petitioner has failed to establish or even address good cause. Petitioner does not argue that some external impediment justifies the filing of this Petition outside of the one-year time bar, or that he discovered new facts or evidence not available to him within the one-year time limit. In fact, every claim raised pertains to what occurred during trial. Petitioner has

offered no good cause for why he failed to file the instant Petition within the one-year time limit.

III. PETITIONER HAS FAILED TO SHOW PREJUDICE

To establish prejudice, petitioners must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

Claims other than challenges to the validity of a guilty plea and ineffective assistance of trial and appellate counsel must be raised on direct appeal "or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). Where a petitioner does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider their merits in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975). Courts must dismiss a petition if a petitioner pled guilty and the petitioner is not alleging "that the plea was involuntarily or unknowingly entered, or that the plea was entered without effective assistance of counsel." NRS 34.810(1)(a). Further, substantive claims—even those disguised as ineffective assistance of counsel claims—are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059.

The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Claims of ineffective assistance of counsel are analyzed under the two-pronged test

articulated in Strickland, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: 1) that counsel's performance was deficient, and 2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. Nevada adopted this standard in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S. Ct. 1473, 1485 (2010). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004). Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)). This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every

conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711. The role of a court in considering alleged ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Id. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

The Strickland analysis does not "mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984). "Counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments." Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman v. State, 112 Nev, 843, 848, 921 P.2d 278, 281 (1996); see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Claims of

ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] must allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions *may cause your petition to be dismissed*." (emphasis added).

Even if a petitioner can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Here Petitioner raises the following claims: (1) trial counsel was ineffective for failing to object to prosecutorial misconduct that occurred during rebuttal; (2) inadequate investigation by the State and law enforcement; (3) the State engaged in misconduct by presenting false and perjured testimony; (4) counsel was ineffective for failing to request a jury instruction on the lesser included offense of resisting arrest. All claims are denied.

A. Counsel was not ineffective for failing to object to the State's rebuttal.

Petitioner argues that counsel was ineffective for failing to object to two specific comments made by the State during rebuttal argument at trial. Petition, at Ground 1 Page 1. Specifically, Petitioner argues that the State engaged in prosecutorial misconduct when it "implied that he had personal knowledge of other bad acts" by stating:

> What's the state of mind of a man who is willing to disregard an officer's commands, break free from the officer, and then charge through him in order to get to somebody else? That's who you're dealing with. A man with zero regard for the law. The evidence in this case is overwhelming.
>
> As I told you in voir dire, sometimes we're left with just one person, convicted felon, drug addict, you name it -- it goes on and on.

Recorder's Transcript of Hearing: Jury Trial – Day 4, at 41 (November 3, 2017).

Petitioner further claims that the State engaged in prosecutorial misconduct by disparaging defense counsel when it argued:

> Folks, defense counsel comes up here and tells you what, when you have an overwhelming amount of evidence in this case and the defendant is absolutely boxed into a corner, this is what happens. Defense counsel does this, blames everybody other than the defendant. Right?

Id. at 42.

Petitioner believes counsel was ineffective because he did not object to either statement. Id. However, Petitioner's claim fails as both comments were proper arguments and deductions from the evidence and, therefore, not prosecutorial misconduct.

"Counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments." Ennis, 122 Nev. at 706, 137 P.3d at 1103. Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 848, 921 P.2d at 281; see also Howard, 106 Nev. at 722, 800 P.2d at 180; Strickland, 466 U.S. at 691, 104 S. Ct. at 2066.

When resolving claims of prosecutorial misconduct, this Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188. This Court views the statements in context and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 865 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365 (2001).

"[A]s long as a prosecutor's remarks do not call attention to a defendant's failure to testify, it is permissible to comment on the failure of the defense to counter or explain evidence presented." Id., citing U.S. v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992). Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018-19 (1997). This includes commenting on a defendant's failure to substantiate his theory. Colley v. State, 98 Nev. 14, 16 (1982); See also Bridges v. State, 116 Nev. 752, 762 (2000),

citing State v. Green, 81 Nev. 173, 176 (1965) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows.").

To determine whether misconduct was prejudicial, this Court examines whether the statements so infected the proceedings with unfairness as to result in a denial of due process and must consider such statements in context, as a criminal conviction is not to be lightly overturned. Thomas v. State, 120 Nev. 37, 47 (2004). When evidence of guilt is overwhelming, even a constitutional error can be insignificant. Haywood v. State, 107 Nev. 285, 288 (1991); State v. Carroll, 109 Nev. 975, 977 (1993).

With respect to the second step, this Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-89. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189 (quoting Darden v. Wainright, 477 U.S. 168, 181 (1986)). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. at 1189.

The Nevada Supreme Court has noted that "statements by a prosecutor, in argument, . . . made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker v. State, 109 Nev. 383, 392 (1993) (quoting, Collins v. State, 87 Nev. 436, 439 (1971)). Ultimately, the State is permitted to offer commentary on the evidence that is supported by the record. Rose v. State, 123 Nev. 194, 209 (2007).

Taking each of the State's argument in turn, counsel cannot be deemed ineffective for failing to object because neither comment constitutes prosecutorial misconduct and therefore any objection would have been futile.

First, the State's argument regarding Petitioner's state of mind was in no way a reference to prior bad acts. The argument was made at the first portion of the State's rebuttal wherein the State made the following argument:

> MR. LEXIS: Folks, defense counsel told you I'm going to come up here and be angry and yelling and this, that, and the other. This case is as straightforward as it gets, bottom line. What's the state of mind of a man who is willing to disregard an officer's commands, break free from the officer, and then charge through him in order to get to somebody else? That's who you're dealing with. A man with zero regard for the law.
>
> The evidence in this case is overwhelming. As I told you in voir dire, sometimes we're left with just one person, convicted felon, drug addict, you name it -- it goes on and on. That's what we're left with -- or somebody -- a home invasion where nobody is home and we have no idea who it is and we have to piece it together. Not this case.
>
> On the far end of the spectrum, you have somebody who the victim is an officer. And another officer responding to the first responding officer. And then a witness, a truly independent witness, take the stand. It was one of your questions that brought out she doesn't even know this man.

Recorder's Transcript of Hearing: Jury Trial – Day 4, at 41 (November 3, 2017).

The State's argument was revolving around Petitioner's state of mind at the time he committed the instant offense. The State made no reference to any prior crimes committed by Petitioner. Instead, put in context the State's comment of "sometimes we're left with just one person, convicted felon, drug addict, you name it" was a mention to the credibility of witnesses because immediately after that comment, the State said "not this case" because, according to the State's argument, the evidence of Petitioner's guilt in the instant case was overwhelming. Accordingly, this was not a reference to Petitioner's prior criminal history and counsel cannot be deemed ineffective for failing to object to the State's argument.

Next, the State's comment regarding defense counsel's argument did not constitute prosecutorial misconduct. Again, this comment was at the beginning of the State's rebuttal and did not belittle or ridicule the defense theory, but characterized it as being inconsistent with the overwhelming evidence. The State then discussed the overwhelming evidence that was presented and the jury instructions. Therefore, the State merely rebutted defense counsel's closing argument, on rebuttal. This is the purpose of a rebuttal argument. This was a proper response and counsel cannot be deemed ineffective for not objecting to it.

Moreover, even assuming arguendo that either of the State's comment were improper, Appellant cannot show prejudice. To determine whether misconduct was prejudicial, this

Court examines whether the statements so infected the proceedings with unfairness as to result in a denial of due process. Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). This Court must consider such statements in context, as a criminal conviction is not to be lightly overturned. Id. Additionally, the Nevada Supreme Court has held that "the level of misconduct necessary to reverse a conviction depends upon how strong and convincing the evidence of guilt is." Rowland, 118 Nev. at 38, 39 P.3d at 119. If the issue of guilt is not close and the State's case is strong, misconduct will not be considered prejudicial. Id. On appeal, Petitioner claimed that the State engaged in prosecutorial misconduct during its rebuttal argument. While the Nevada Court of Appeals did not consider the merits of Petitioner claim, the court nevertheless held that he had failed to show that any error prejudiced his substantial rights. As such, Petitioner cannot show now that any objection by counsel—if successful—would have changed the outcome at trial. Accordingly, Petitioner's claim is denied.

B. Petitioner cannot show that he was prejudiced by the State's investigation.

Petitioner argues that the prosecutor and police failed to adequately investigate his case which violated his right to due process. Petition, at Ground 2. Specifically, Petitioner argues that at no point did the Officer "K" state that he was physically attacked by Petitioner and that it was that attack that caused his injury. Id. Instead, Petitioner claims that Officer "K's" injury was the result of a sudden turn that caused his leg to give out. Id. As no police report was taken regarding the crime of Battery on a Protected Person, because Officer "K" did not provide a voluntary statement, and because Officer "K" was never under the impression that a crime was committed against him by Petitioner, Petitioner appears to indicate that the investigation in this case was inadequate. Id. at Ground 2. This claim is denied.

First, as this is not a claim of ineffective assistance of counsel, it should have been raised on direct appeal and is therefore waived. Claims other than challenges to the validity of a guilty plea and ineffective assistance of trial and appellate counsel must be raised on direct appeal "or they will be *considered waived in subsequent proceedings*." Franklin, 110 Nev. at 752, 877 P.2d at 1059 (emphasis added). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court

finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans, 117 Nev. at 646-47, 29 P.3d at 523. As Petitioner did not make this argument on direct appeal, and as Petitioner has not explained or even offered a reason as to why he did not, this claim is inappropriate for habeas proceedings and is denied.

Should this Court choose to consider the merits of Petitioner's argument, it nevertheless fails. To the extent Petitioner is claiming that the State's investigation into his guilt was inadequate, this claim is nothing but a bare and naked allegation suitable only for summary denial. Neither the State nor the Las Vegas Metropolitan Police Department are required to ensure that their investigation into a defendant's guilt appears sufficient to the defendant in question. Instead, the Las Vegas Metropolitan Police Department is required to make sure that they do not violate a defendant's constitutional rights against improper search and seizure or self-incrimination while investigating a crime. Similarly, prosecutors simply have a responsibility to prove a defendant's guilt beyond a reasonable doubt. This does not require ensuring that a defendant is satisfied with either law enforcement entities investigation. Indeed, such a standard defies logic as every defendant would likely prefer that the law enforcement agencies investigation be poor as it is more difficult to sustain a conviction with insufficient or inadmissible evidence. Moreover, Petitioner does not explain what additional investigating the police or prosecutors should have done and he has not established that this unidentified additional investigation would have reasonably changed the outcome at trial. Therefore, this claim is denied as a bare and naked allegation. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Finally, Petitioner's claim is belied by the record. Petitioner claims that Officer Karanikolas's injury occurred while he was chasing Petitioner and attempted to change direction. Petition at Ground 2. Petitioner relies on the preliminary hearing transcripts in support of this claim. Id. However, the trial testimony clearly belies Petitioner's version of events. At trial, Officer Karanikolas testified that he responded to a call of a male harassing a female. Recorder's Transcript of Hearing: Jury Trial – Day 3, at 51 (November 2, 2017). When Officer Karanikolas arrived, he made contact with Petitioner who was sitting in a brown Pontiac. Id. Officer Karanikolas told Petitioner to remain in the vehicle and returned to the

patrol car to run Petitioner's name. Id. at 53. Petitioner then jumped out of the Pontiac, approached the patrol car, and Officer Karanikolas directed Appellant to the front of the patrol car to pat him down for potential weapons. Id. at 53-56. Petitioner then fled towards the passenger side of the patrol car and Officer Karanikolas ran up the driver side of the patrol car called for help on the radio. Id. at 56-57. When both Officer Karanikolas and Petitioner both reached the back of the patrol car, Petitioner pushed Officer Karanikolas, causing him to step back. Id. at 58-59. When he did so, his leg popped ad he dropped his knee to the ground. Id. at 62. Officer Karanikolas was unable to stand back up. Id. at 62-63. Officer Karanikolas was taken to University Medical Center ("UMC") by ambulance, where it was discovered that he had a partial tear in his right Achilles requiring surgery. Id. at 3 AA 66-67. Accordingly, the trial testimony is clear that Petitioner in fact used physical force against Officer Karanikolas which cause him substantial injury and his claim is denied as it is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

C. The State did not present false or perjured testimony.

Petitioner argues that Officer Karanikolas offered false testimony at trial because it was not consistent with his testimony during the preliminary hearing. Petition at Ground 3. Based on this, Petitioner believes that the prosecutors violated his right to due process. Id. Petitioner's claim is denied.

First, as this is not a claim of ineffective assistance of counsel, it should have been raised on direct appeal and is therefore waived. Franklin, 110 Nev. at 752, 877 P.2d at 1059 (emphasis added). As Petitioner did not make this argument on direct appeal, and as Petitioner has not explained or even offered a reason as to why he did not, this claim is inappropriate for habeas proceedings that is denied. Evans, 117 Nev. at 646-47, 29 P.3d at 523.

Should this Court consider the merits of Petitioner's claim, it still fails. True, Petitioner noted an inconsistency between Officer Karanikolas' preliminary hearing and trial testimony. However, during cross examination, Petitioner's trial counsel asked Officer Karanikolas if he would define what happened as a collision and properly noted this inconsistency at trial:

///

Q So you said that you were standing next to the car when you were face-to-face with Mr. Allen; right? A Correct.
Q And he was trying to get through the gap between you and the car?
A Yes.
Q Okay. And that's when he kind of went through that gap, maybe pushing you out of the way?
A I would -- I would not say -- the way you describe it as in kind of he stepped to the side, I would not say that, no.
Q Okay. Let me ask you this way: You would not call this a collision?
A Well, so define a collision. And let me define a collision. When I think collision, I think of two cars head-on, going like this –
Q Right. A -- with significant damage.
Q Okay.
A Okay. I would probably say an impact would probably be a better statement, which is not as -- not like heads going through windows, so –
Q Uh-huh. You would then say this was not a head-on collision? A Not in the accident sense.
Q Right. You would agree with me on that one?
A I'm -- I'm not –
Q I know we're talking past each other.
A We are. Because I'm not really trying -- I'm not understanding, and I don't think I'm articulating well about how I see it.
Q We are all in court. We're all nervous. I understand. You would not describe it as, you know, head-on collision. He didn't run straight into you, hit you in the face?
A I would -- I would say that.
Q You would say it was a collision?
A Yeah. I would say he ran head-on into me. Yes, I would say that.
Q Let me see here. Officer, you do remember testifying at that preliminary hearing; is that right?
A Correct.
Q And the date of that was September 22nd, 2016; does that sound right?
A I can't recall.
Q It's been a while.
A It has been a while.
Q More than a year. You would recognize your testimony if I showed you a transcript of it; right?
A Go ahead.
[…]
Q Officer, do you remember testifying at preliminary hearing that you would say that there was no collusion -- or collision? Excuse me.

A I don't. To be honest with you, at the time of the preliminary hearing, I was still in recovery mode. I mean, just to come to court took me like four hours, two hours just to get ready.
Q I recall.
A And I was on medication. So I would be -- I would -- it was definitely a hard day.
Q I understand that. But your testimony is you don't recall testifying to that at preliminary hearing?
A That's correct.
Q All right.
MR. HAUSER: Your Honor, may I approach the witness with preliminary hearing transcript that I will first share with opposing counsel.
THE COURT: Yes.
MR. HAUSER: May I approach, Your Honor?
THE COURT: Yes.
BY MR. HAUSER: Q Let me show you from the front of this so we get some clarification. Officer, go ahead and read over this. Do you recognize the caption here?
A I'm sorry. In what manner?
Q Do you recognize that it says this is the reporter's transcript of preliminary hearing for this case?
A Okay. Yes.
Q All right. And do you recognize that your name is on here as a listed witness?
A Yes.
Q All right. You recall testifying at this preliminary hearing?
A I do.
Q All right. I'm going to direct your attention to page 24.
A Uh-huh.
Q Lines 3 through 6. Go ahead and refresh -- just read over that, and then look -- look at me when you're done.
A Okay.
Q All right.
MR. HAUSER: May I retrieve, Your Honor.
THE WITNESS: Well, can I -- I'm sorry. I'm sorry.
BY MR. HAUSER: Q Page 24, lines 3 through 6. A Okay.
Q So, Officer, do you recall the preliminary hearing that you testified there was no collision?
A I just read it.
Q And based on refreshing your recollection, is your memory refreshed as to your testimony at that time?
A No. I just -- I just read it.

Q You would agree with me that the transcript says you did testify there was no collision at the preliminary hearing? All right. That's fair enough.

Recorder's Transcript of Hearing: Jury Trial – Day 3, at 78-85 (November 2, 2017).

As this inconsistency was noted, and as the jury still concluded that Petitioner was guilty, Petitioner has failed to establish that his conviction is based on inaccurate testimony and his claim must fail as it is belied by the record. For these same reasons, any claim or prejudice fails. This inconsistency was noted for the record and therefore Petitioner cannot show a reasonable probability that the outcome at trial would have changed.

D. Counsel was not ineffective for failing to request a jury instruction.

Petitioner argues that trial counsel should have asked that the jury be instructed on the lesser included offense of resisting arrest. Petition at Ground 4. Petitioner further argues that the trial court erred because it did not *sua sponte* offer the instruction. Id. Petitioner's claim is denied.

First, Petitioner fails to point this court to a specific statute that covers his believed lesser included offense of resisting arrest. Therefore, this is simply a bare and naked claim suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Next, any claim of prejudice must fail as Petitioner cannot show that there is a reasonable probability that the outcome at trial would have been different. Petitioner was charged with Battery on a Protected Person pursuant to NRS 200.481. Pursuant to NRS 200.481, it is a category B felony for a person to commit a battery upon an officer who is performing their duties when the battery results in substantial bodily harm and the person knew or should have known that the victim was an officer. Here, there was overwhelming evidence that Petitioner pushed Officer Karanikolas and caused significant injury. As such, any jury instruction on "resisting arrest" would have been irrelevant and Petitioner's claim is denied.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this _____ day of August, 2021.

Dated this 18th day of August, 2021

DISTRICT JUDGE

5EA DE0 09E7 C46B
Carli Kierny
District Court Judge

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____ For
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #13730

August 19, 2021

UNITED STATES OF AMERICA
DISTRICT COURT
OF THE
EIGHTH
JUDICIAL
DISTRICT
COUNTY OF CLARK
STATE OF NEVADA

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ELECTRONIC SEAL (NRS 1.190(3))

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Ronald Allen, Plaintiff(s) vs. William Gittere, Warden ESP, Defendant(s)	CASE NO: A-20-815539-W DEPT. NO. Department 2

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case. The filer has been notified to serve all parties by traditional means.