IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Sep 02 2021 10:40 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

RONALD EUGENE ALLEN, JR.,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: A-20-815539-W

Docket No: 83327

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
RONALD ALLEN #1185020,
PROPER PERSON
1200 PRISON RD.
LOVELOCK, NV 89419

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

A-20-815539-W **Ronald Allen, Plaintiff(s)**
vs.
William Gittere, Warden ESP, Defendant(s)

I N D E X

Case No. C-19-342255-1

Dept. No. 12

FILED
MAY 27 2020
CLERK OF COURT

1

IN THE EIGHT JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK.

RONALD ALLEN JR.
Petitioner,

v.

WILLIAM GITTERE WARDEN ETC

Respondent

A-20-815539-W
Dept. 29

PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

RECEIVED
MAY - 8 2020
CLERK OF THE COURT

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: ELY STATE PRISON NEVADA DEPTMENT OF CORRECTIONS

2. Name and location of court which entered the judgment of conviction under attack: EIGHT JUDICAL DISTRICT COURT CLARK COUNTY NEVADA

3. Date of judgment of conviction: FEBURARY 16, 2018

4. Case number: C-16-318255-1

5. (a) Length of sentence: TERM: 96 MONTHS, MAXIMUM TERM 240 MONTHS

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes ___ No ___

If "yes", list crime, case number and sentence being served at this time: INVASION OF HOME; BURGLILARY W/USE; D.V BATHERY W/S.B.H.; D.V BATHERY W/INTENT TO KILL C-16-318255-1 C16-317786-1 TERM LIFE W/ POSSIBILITY OF PAROLE 10 YRS

7. Nature of offense involved in conviction being challenged: BATHERY ON PROTECTED PERSON

8. What was your plea? (check one):
(a) Not guilty ___ (b) Guilty ___ (c) Nolo contendere ___

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details:

N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)
(a) Jury XX (b) Judge without a jury ___

11. Did you testify at the trial? Yes ___ No XX

12. Did you appeal form the judgment of conviction? Yes XX No ___

13. If you did appeal, answer the following:
(a) Name of Court: SUPREME COURT OF NEVADA
(b) Case number or citation: 75329 - COA
(c) Result: AFFIRMED

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(d) Date of result: APRIL 16 2019
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: NEVER RECEIVED - NOTICE OF AFFIRMANCE.

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?
Yes ____ No X

16. If your answer to No. 15 was "yes", give the following information:
(a)(1) Name of court: N/A
(2) Nature of proceeding: _____
(3) Grounds raised: N/A
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ____ No ____
(5) Result: N/A
(6) Date of result: _____
(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) As to any second petition, application or motion, give the same information:
(1) Name of court: _____
(2) Nature of proceeding: N/A
(3) Grounds raised: _____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ____ No ____
(5) Result: N/A
(6) Date of result: _____
(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: _____

(c) As to any third or subsequent additional applications or motions, give the same Information as above, list them on a separate sheet and attach.
(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?
(1) First petition, application or motion? Yes ____ No ____ N/A
Citation or date of decision: _____
(2) Second petition, application or motion? Yes ____ No ____
Citation or date of decision: _____
(3) Third or subsequent petitions, applications or motions? Yes ____ No ____
Citation or date of decision: _____
(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

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17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: N/A

(b) The proceedings in which these grounds were raised: N/A

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

18. If any of the grounds listed in No.'s 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) NONE OF THE GROUNDS HAVE BEEN PRESENTED TO ANY COURT.

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ____ No XX

If yes, state what court and case number: ____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: XIOMARA BONAVENTURE, ROBSON HAUSER TRIAL AND SENTENCE KEDRIC BASSETT; HOWARD BROOKS DIRECT APPEAL

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes XX No ____

If yes, specify where and when it is to be served, if you know: NO - JUST CURRENTLY SERVING A TERM OF 10 YRS. TO LIFE HABITUAL CRIMINAL C.C. 667-12(b)-1 PRIOR TO THIS HERE SENTENCE.

23. State concisely every ground on which you claim that you are being held unlawfully. summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

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GROUND (ONE) TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO PROSECUTORIAL MISCONDUCT WHEN IT IMPROPERLY DENIGRATED THE DEFENSE THEORY AND DEFENSE COUNSEL DURING REBUTTAL ARGUMENT, WHICH VIOLATED PETITIONER'S

SUPPORTING FACTS: 5TH, 6TH, AND 14TH AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION.

TRIAL COUNSEL SHOULD HAVE OBJECTED TO THE FOLLOWING STATEMENTS MADE BY THE PROSECUTOR, WHICH IMPLIED THAT HE HAD PERSONAL KNOWLEDGE OF OTHER BAD ACTS COMMITTED BY THE DEFENDANT.

FURTHER CLOSING ARGUMENTS PG. 41 LN. 17-24

"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, "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."

FURTHERMORE, DEFENSE WAS DISPARAGED BY THE PROSECUTOR'S SUGGESTION THAT THE ARGUMENT OF DEFENSE COUNSEL MUST BE BLATANTLY NEFARIOUS BECAUSE "DEFENSE COUNSEL, DOES THIS", "BLAME EVERYBODY" OTHER THAN THE DEFENDANT. "RIGHT"?

FURTHER CLOSING ARGUMENT PG. 46 LN. 5-9

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THAT COMMENT ~~SUGGESTION~~ SUGGESTED TO THE JURY THAT DEFENSE COUNSEL IS PRESENTING A THEORY OF DEFENSE, HAS FLAGRANTLY MANUFACTURED

AN UNTRUE FANTASY IN AN ATEMPT TO MISLEAD AND DECIEVE THE JURY.

THIS STATEMENT BY THE PROSECUTOR, TO THE JURY EMCOMPASSED TWO AREAS OF PROSECUTORIAL ~~MISCONDUCT~~ MISCONDUCT AND, AS SUCH DENIED THIS PETITIONER HIS FIGHT TO A FAIR TRIAL, DUE PROCESS, ~~CONFRONTAT~~ CONFRONTATION, AND AN IMPARTIAL JURY AS GUARANTEED BY STATE AND FEDERAL LAW AS WELL AS THE 5TH, 6TH, AND 14TH, AOMENDMENTS TO THE UNITED STATES CONSTITUTION.

IN THIS CASE THE PROSECUTION "BELITLED" AND RIDICULED "THE DEFENSE THEORY BY STATING THAT "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, "THAT IS WHAT HAPPENS. DEFENSE COUNSEL DOES THIS, "BLAME EVERY BODY. OTHER THAN THE DEFENDANT." RIGHT?"

FURTHER CLOSING ARGUMENT PG. 4 LN. 5-9

VOL. IV 720

THE PROSECUTOR'S COMMENTS WAS IMPROPER, FURTHERMORE, THE PROSECUTOR'S REBUTTAL STATEMENT ALSO IMPROPERLY DISPARAGED DEFENSE COUNSEL BY MAKING THEM OUT TO BE, IN ESSENCE, DISHONEST.

IMPROPER REMARK TAKEN IN CONTEXT UNFAIRLY PREJUDICED THE DEFENDANT. THE REMARK UNDERMINES THE FUNDAMENTAL FAIRNESS

OF THE TRIAL AND CONTRIBUTE TO A MIS-
CARRIAGE OF JUSTICE.
IN REGARDS TO THE JURY, THE REMARKS
INFLUENCED THE JURY TO STRAY FROM HIS
RESPONSIBILITY TO BE FAIR AND UNBIASED.
THE REMARKS SEPARATE THE DEFENDANTS
RIGHT TO BE TRIED SOLELY ON THE BASIS OF
THE EVIDENCE PRESENTED TO THE JURY AND
THE PROSECUTOR'S OPINION CARRIES WITH
IT THE IMPRIMATUR OF THE GOVERNMENT
AND MAY INDUCE THE JURY TO TRUST THE
GOVERNMENT JUDGMENT RATHER THAN HIS
OWN VIEW OF THE EVIDENCE.
WITH THIS REMARK, THE STATE VIOLATED
PETITIONER'S RIGHT TO A FAIR TRIAL AND
DUE PROCESS THAT ARE GUARANTEED UNDER
STATE AND FEDERAL LAW, AS WELL AS THE
5TH, 6TH, AND 14TH AMENDMENTS TO THE
UNITED STATES CONSTITUTION, AS WELL AS
ART. 1 SEC. 8(5) OF THE NEVADA
CONSTITUTION WAS VIOLATED BY THE
PROSECUTORIAL MISCONDUCT COMMITTED
DURING PETITIONER'S TRIAL, THEREBY
DENYING HIM A CONSTITUTIONALLY
GUARANTEED FAIR TRIAL. BASED ON THIS
ERROR, THE CONVICTION IN THIS CASE MUST
BE REVERSED AND REMANDED WITH THE
INSTRUCTIONS OF A NEW TRIAL.

GROUND (TWO) PROSECUTOR AND POLICE MISCONDUCT.
FAILURE TO ADEQUATELY INVESTIGATE CRIME CHARGED, IS A VIOLATION OF THIS PETITIONER'S 14TH, AMENDMENT CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF LAW.

SUPPORTING FACTS:

IN THIS CASE: THE POLICE RESPONDED AND ENCOUNTERED OFFICER "K" AT THE SCENCE, AFTER RESPONDING TO A CODE "ROO" TO A DOMESTIC DISTRUBANCE CALL. THE OFFICER SUFFERED AN INJURY TO HIS RIGHT LEG, AS HE ATTEMPTED TO GIVE CHASE AFTER A FLEEING DEFENDANT. PRELIM. PG. 19 LN. 17-20

AT SOME POINT DURING THIS FOOT-RACE-THE DEFENDANT MADE A SWIFT AND SUDDEN CHANGE OF DIRECTION, WHICH CAUSE THE OFFICER TO THAN RESPOND ACCORDINGLY AND TRY TO RE-TRAC HIS STEP TO THE SWIFT AND SUDDEN DIRECTION CHANGE AND IMMEDIATELY THE OFFICER GOES DOWN-HE HEARS A POP, AND HIS LEG GIVES OUT. PRELIM. PG. 19 LN. 12-20

AT NO TIME DID OFFICER "K" INDICATE OR VERBALLY COMMUNICATE THAT HE SUFFERED HIS CURRENT STATE DUE TO BEING PHYSICALLY ATTACKED, PUNCHED, KICKED AND/OR PUSHED BY THIS PETITIONER/DEFENDANT ON AUGUST 9TH, 2016 THAT CAUSE THIS INJURY. PRELIM. PG. 23 LN. 14-25

FURTHERMORE, ON AUGUST 9TH, 2016, NO POLICE REPORT WAS EVER TAKEN ON A CRIME OF BATTERY ON A PROTECTED PERSON. NO VOLUNTARY STATEMENT

WAS EVER MADE OR TAKEN BY OFFICER "K".
PRELIM. PG. 33 LN. 11-22
, THIS OFFICER "K" WAS NEVER UNDER THE
IMPRESSION THAT A CRIME WAS COMMITTED AGAINST
HIM BY THIS DEFENDANT, OTHER THEN THE DOMESTIC
BATTERY AGAINST SAID DELANCEY COLLINS THAT
OFFICER "K" TESTIFIED TO DURING PRELIM.
TAKING.

GROUND THREE, PROSECUTOR'S MISCONDUCT BY KNOWINGLY PRESENTING FALSE AND PREJURED TESTIMONY. THE STATE IS IN VIOLATION OF THIS PETITIONER'S 6TH, 14TH, CONSTITUTION RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW.

SUPPORTING FACTS: IT IS ESTABLISHED THAT A CONVICTION OBTAINED BY THE KNOWINGLY USE OF USE PREJURED TESTIMONY IS FUNDAMENTALLY UNFAIR AND MUST BE SET ASIDE. IF THERE IS ANY REASONABLE LIKELIHOOD THAT THE FALSE TESTIMONY COULD HAVE AFFECTED THE JUDGEMENT OF THE JURY.

THE PETITIONER IN THIS CASE WAS DENIED DUE PROCESS WHEN HE WAS CONVICTED OF BATHERY ON A PROTECTED PERSON AT TRIAL, DURING WHICH THE OFFICER "K" WAS ASKED TO DESCRIBE THE INCIDENT.

TRIAL COUNSEL ASKED OFFICER K - THE DEFENDANT DIDN'T RUN STRAIGHT INTO YOU, AND HIT YOU IN THE FACE? TRIAL TRANSCRIPT DAY 3 PG 80 LN 4

THE OFFICER STATED "THAT HE WOULD SAY THAT, THAT THERE WAS A COLLISION, AND THAT THE DEFENDANT RAN HEAD ON INTO ME". TRIAL TRANSCRIPTS DAY 3 PG 80. LN 4-8 IS AN ACCURATELY DESCRIPTION ON WHAT TOOK PLACE

ON SEPTEMBER 22ND 2016 PRELIM. HEARING PG 23 LN. 19-23

OFFICER "K" TESTIFIED WHEN ASKED:

"BUT YOU WERE NEVER UNDER THE IMPRESSION HE WANTED TO INJURE YOU IN ANY WAY?
NO?
OR EVEN MAKE CONTACT WITH YOU?
NO? HE WANTED TO GO AFTER HER.
PRELIM HEARING; PG. 23 LN 19-23

FURTHERMORE, WHEN ASKED BY DEFENSE COUNSEL PRELIM. HEARING PG. 24 LN. 3-6
"AND THEN THERE HAPPENED TO BE SOME TYPE KIND OF A COLLISION, MAYBE?
NO." THERE WAS NOT. THERE WAS NOT A COLLISION.
HE HAD TO GET PASSED ME TO GET TO HER.
FURTHERMORE, IF PREJUDICED TESTIMONY WOULD HAVE NOT BEEN PRESENTED DURING TRIAL, THE OUTCOME WOULD HAVE BEEN DIFFERENT AND WOULD HAVE RESULTED RESULTED IN AN ACQUITAL OR ON A LESSER-INCLUDED OFFENSE OF RESISTING ARREST.

GROUND (FOUR) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO REQUEST A JURY INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF RESISTING AN ARREST. VIOLATING PETITIONERS 5TH, 6TH, 14TH AMENDMENT

SUPPORTING FACTS: CONSTITUTIONAL RIGHT TO FAIR TRIAL AND DUE PROCESS OF LAW.

DURING TRIAL PETITIONERS TRIAL COUNSEL FAIL TO OFFER JURY INSTRUCTIONS ON A LESSER-INCLUDED OFFENSE TO BATTERY ON A OFFICER WHICH IS RESISTING ARREST. THE EVIDENCE WAS SUFFICIENT TO SUPPORT SUCH AN INSTRUCTION IN THIS CASE.

IT IS ALSO FURTHER ~~ALLEGED~~ ALLEGED THAT TRIAL COURT DENIED PETITIONER'S DUE PROCESS OF LAW BY FAILING TO SUA SPONTE INSTRUCT THE JURY ON RESISTING ARREST INSTRUCTION.

THUS RESULTED IN THIS PETITIONERS DENIAL OF RIGHTS TO A FAIR TRIAL, ALSO IN VIOLATION OF DEFENDANT SIXTH, AND FOURTEENTH AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 5 day of the month of MAY, of the year 201 2020

Ronald Allen

Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Ronald Allen

Petitioner

Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I, RONALD ALLEN, hereby certify pursuant to N.R.C.P. 5(b), that on this 5 day of the month of MAY, of the year 2020 I mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** addressed to:

WILLIAM GITHERE
Respondent prison or jail official
4569 NORTH STATE ROUTE 490
ELY, NEVADA, 89301
Address

Attorney General
Heroes' Memorial Building
100 North Carson Street
Carson City, Nevada 89710-4717

CHAD N LEXIS ESQ
District Attorney of County of Conviction
301 EAST CLARK SUITE 100
LASVEGAS, NV, 8910
Address

Ronald Allen
Signature of Petitioner

AFFIRMATION PURSUANT TO NRS 239B.030

I, RONALD ALLEN, NDOC# 1185220,

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE ATTACHED DOCUMENT ENTITLED Petition of Writ of Habeas,

DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS 5 DAY OF MAY, 20 21.

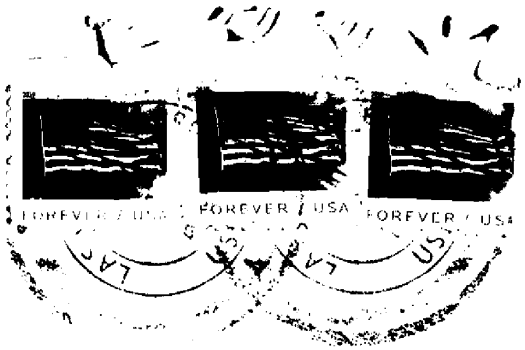
SIGNATURE: Ronald Allen

INMATE PRINTED NAME: RONALD ALLEN

INMATE NDOC # 1185220

INMATE ADDRESS: ELY STATE PRISON
P. O. BOX 1989
ELY, NV 89301

DONALD ALLEN 1165220
P.O. BOX 1989 ESP
ELY, NEVADA, 89301



STEVEN D. GRIERSON
CLERK OF THE COURT
200 LEWIS AVENUE 3RD FLOOR
LAS VEGAS, NV, 89155-1160

PPOW

DISTRICT COURT
CLARK COUNTY, NEVADA

Ronald Allen,

Petitioner,

vs.

William Gittere, Warden ESP,

Respondent,

Case No: A-20-815539-W
Department 29

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on May 27, 2020. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

Tuesday, February 23, 2021 at 9:00 a.m.

Calendar on the _____ day of _____, 20____, at the hour of _____ o'clock for further proceedings.

Dated this 4th day of January, 2021

District Court Judge

8FA CFB CA4D 7C07
David M Jones
District Court Judge

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.

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 1/5/2021

Ronald Allen

ESP
P.O. Box 1989
Ely, NV, 89301

RONALD ALLEN #1185020
E.S.P - P.O. BOX 1989
ELY, NV. 89301

Electronically Filed
02/04/2021
CLERK OF THE COURT

27

DISTRICT COURT
CLARK COUNTY, NEVADA

NAME, RONALD ALLEN
Plaintiff(s),

-vs-

NAME, WILLIAM GITTERE
WARDEN ESP.
Defendant(s).

CASE NO.
A-20-815539-W
DEPT. 29

COMES NOW, RONALD ALLEN, in PRO PER and herein above respectfully Moves this Honorable Court for a ORDER PETITIONER'S PRESENCE AT THE POST-CONVICTION EVIDENTIARY HEARING SCHEDULED FOR THE CALENDAR ON

The above is made and based on the following Memorandum of Points and Authorities.

RECEIVED
JAN 25 2021
CLERK OF THE COURT

MEMORANDUM OF POINTS AND AUTHORITIES

TUESDAY, FEBRUARY 23, 2021 AT 9:00 A.M.

WHEREFORE, PETITIONER RESPECTFULLY REQUESTS THAT PETITIONER'S PRESENCE AT HEARING BE ORDERED.. AND THE SHERIFF OF KERN COUNTY ARRANGE THE TRANSPORTING OF THE PETITIONER TO THE HEARING.

RESPECTFULLY SUBMITTED THIS WEDNESDAY DAY OF JANUARY 20, 2021

RONALD ALLEN
PETITIONER, PRO SE

Dated this WEDS day of JAN. 20TH, 2021

By: RONALD ALLEN
PRO SE

CERTIFICATE OF SERVICE BY MAIL

Pursuant to NRCP Rule 5 (b), I hereby certify that I am the Petitioner/Defendant named herein and that on this WEDS day of JAN. 20, 20 21, I mailed a true and correct copy of this foregoing MOTION TO TRANSPORT PRISONER to the following:

STEVEN D. GRIERSON
CLERK OF COURT
200 LEWIS ST. 3RD FLOOR
LAS VEGAS, NV, 89155-1160

BY: RONALD ALLEN
PRO SE

AFFIRMATION

Pursuant to NRS 239b.030

The undersigned does hereby affirm that the preceding document, MOTION FOR TRANSPORT PRISONER

(Title of Document)

Filed in case number: A-20-815539-W

☒ Document does not contain the social security number of any person

Or

☐ Document contains the social security number of a person as required by:

☐ A Specific state or federal law, to wit

N/A

Or

☐ For the administration of a public program

Or

☐ For an application for a federal or state grant

Or

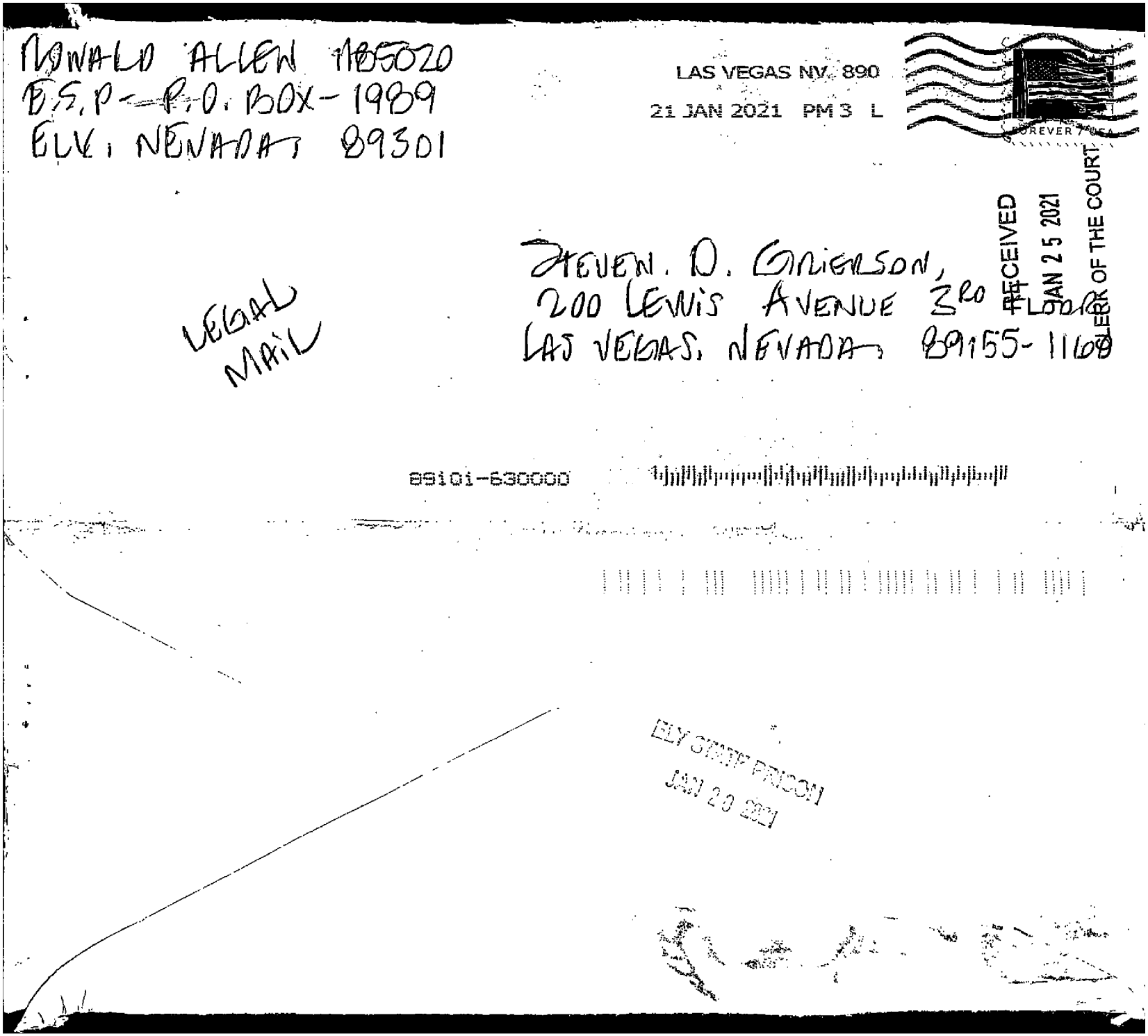
☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230, and NRS 125b.055)

DATE: 01-20-2021

Ronald Allen
(Signature)

RONALD ALLEN
(Print Name)

(Attorney for)


RONALD ALLEN 1185020
E.S.P. - P.O. BOX - 1989
ELY, NEVADA, 89301
LAS VEGAS NV 890
21 JAN 2021 PM 3 L
FOREVER / USA
LEGAL MAIL
STEVEN D. GRIERSON,
200 LEWIS AVENUE 3RD FLOOR
LAS VEGAS, NEVADA, 89155-1160
RECEIVED
JAN 25 2021
CLERK OF THE COURT
89101-630000
ELY STATE PRISON
JAN 20 2021

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #13730
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

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

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

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

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through KAREN MISHLER, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in State's Response to Defendant's Petition for Writ Of Habeas Corpus (Post-Conviction).

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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's response follows.

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ARGUMENT

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 must be 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 fail.

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 must fail.

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 fails.

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 that therefor must be 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 must be denied as it is nothing more than 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 fails 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 fails.

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 therefor must be 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 fails.

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 fails.

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CONCLUSION

For the foregoing reasons, the State respectfully requests this Court DENY Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this 22nd day of February, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565

BY /s/ KAREN MISHLER
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #13730

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 22nd day of February, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

RONALD ALLEN, BAC #1185020
ELY STATE PRISON
P.O. BOX 1989
ELY, NV, 89301

BY /s/ J. MOSLEY
Secretary for the District Attorney's Office

R. ALLEN
P.O. BOX 1989
ELY, NEVADA, 89301
NOA

FILED
JUL 15 2021
CLERK OF COURT

IN THE COURT OF APPEALS
FOR THE STATE OF NEVADA

I.D 1105020

NAME, RONALD ALLEN JR*
Plaintiff(s),

-vs-

NAME, WILLIAM GITTERE, WARDEN ESP
Defendant(s).

CASE NO.
A-20-815539-W

COMES NOW, RONALD ALLEN JR, in PRO PER and herein above resp lly
Moves this Honorable Court for a NOTICE OF APPEAL.

The above is made and based on the following Memorandum of Points and Authorities.

RECEIVED
JUL 15 2021
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

A-20-815539-W
NOAS
Notice of Appeal
4962848

RECEIVED
APPEALS
AUG - 4 2021
CLERK OF THE COURT

NOTICE OF APPEAL ON DECISION FROM DISTRICT COURT OF STATE OF NEVADA WRIT OF HABEAS CORPUS PETITION.

THIS MOTION IS MADE AND BASED UPON THE ACCOMPANYING MEMORANDUM OF POINTS AND AUTHORITIES

Dated this 12th day of JULY, 2021

By: RONALD ALLEN JR
PRO-SE

CERTIFICATE OF SERVICE BY MAIL

Pursuant to NRCP Rule 5 (b), I hereby certify that I am the Petitioner/Defendant named herein and that on this 12TH day of JULY, 20 21, I mailed a true and correct copy of this foregoing NOTICE OF APPEAL to the following:

COURT OF APPEALS NEVADA
201 S. CARSON ST.
CARSON CITY, NV, 89701

BY: RONALD ALLEN JR
PRO-SE

AFFIRMATION

Pursuant to NRS 239b.030

The undersigned does hereby affirm that the preceding document, NOTICE OF APPEAL

(Title of Document)

Filed in case number: A-20-815539-W

☑ Document does not contain the social security number of any person

Or

☐ Document contains the social security number of a person as required by:

☐ A Specific state or federal law, to wit

_____

Or

☐ For the administration of a public program

Or

☐ For an application for a federal or state grant

Or

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230, and NRS 125b.055)

DATE: JULY 12TH, 2021

Ronald Allen
(Signature)

RONALD ALLEN JR
(Print Name)

PRO-SE
(Attorney for)

R. Allen
P.O. Box 1989
Ely, Nevada 89301
MOSA

IN THE COURT of APPEALS FOR
THE STATE of NEVADA

NAME, RONALD ALLEN, JR. ID 1185020
Plaintiff(s),

-vs-

NAME, WILLIAM GITTERE, WARDEN ESP
Defendant(s).

CASE NO.
A-20-818539-W

COMES NOW, Ronald Allen, Jr, in PRO PER and herein above respectfully
Moves this Honorable Court for an ORDER of STAY AND ABEYANCE.

The above is made and based on the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

(1) On February 16, 2018 the Judgment of Conviction in C-16-318255-1 was filed in the Eighth Judicial District Court, Clark County, Nevada.

(2) The Plaintiff filed an appeal to the Nevada Court of Appeals. The appeal was DENIED. Remittitur was filed on May 16, 2019. The Plaintiff thus had until May 16, 2020 to file a Post-Conviction Petition for Writ of Habeas Corpus.

(3) Clark County Clerk of the Court STEVEN D. GRIERSON received the Plaintiffs Petition on May 8, 2020 (see copy attached - EXHIBIT A). The Petition was not filed, however, until May 27, 2020.

(4) On February 23, 2021, the Eighth Judicial District Court denied Plaintiff's Petition on the ground that the Petition was untimely (NRS 34.726(1)); and, that Plaintiff failed to put forth an argument establishing good cause as to the untimely petition.

(5) On June 22, 2021 the Order Denying Petition was mailed to the Plaintiff at Ely State Prison, in Ely. (see copy attached - EXHIBIT B).

/

(6) On July 2, 2021, Plaintiff wrote to Clerk of Court Steven Grierson to inquire what caused the three-week delay in filing the petition. See Huebner v. State, 107 Nev. 328, 810 P.2d 1209, 107 Nev. Adv. Rep. 49, 1991 Nev. LEXIS 52 (Nev.) app. dismissed 107 Nev. 1123, 838 P.2d 945, 1991 Nev. LEXIS 898 (Nev. 1991).

(7) Plaintiff is Appealing Denial of Writ to Nevada Court of Appeals, pursuant to Section 4 of Article 6 of Nevada Constitution; and, Nev. Rev. Statutes § 34.575(1), and § 34.830. Lemmond v State, 114 Nev 219.

(8) Ronald Allen, Jr., ID#1185020 Respectfully Prays this Honorable Court will STAY consideration of the District Courts Denial of the Petition until Plaintiff receives response from Clerk of Court.

WHEREFORE, based on the above Motion, Plaintiff urges this Court to Stay for ninety (90) days it's consideration of Plaintiff's appeal, pursuant to NRAP Rule 8(B)(i) and 8(B)(ii)

Dated this 12TH day of July, 2021

By: RONALD E. ALLEN

CERTIFICATE OF SERVICE BY MAIL

Pursuant to NRCP Rule 5 (b), I hereby certify that I am the Petitioner/Defendant named herein and that on this 12 day of JULY, 20 21, I mailed a true and correct copy of this foregoing MOTION FOR STAY & ABEYANCE to the following:

NEVADA COURT OF APPEALS
201 S CARSON ST.
CARSON CITY, NV, 89701

BY: RONALD E. ALLEN

AFFIRMATION

Pursuant to NRS 239b.030

The undersigned does hereby affirm that the preceding document, Motion of Stay and Abeyance.

(Title of Document)

Filed in case number: A-20-815539-W.

☑ Document does not contain the social security number of any person

Or

☐ Document contains the social security number of a person as required by:

☐ A Specific state or federal law, to wit

_____

Or

☐ For the administration of a public program

Or

☐ For an application for a federal or state grant

Or

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230, and NRS 125b.055)

DATE: July 12th, 2021

Ronald Allen Jr
(Signature)

Ronald Allen
(Print Name)

Pro-se
(Attorney for)

EXHIBIT A

Case No. C-19-342255-1

Dept. No. 29

FILED
MAY 27 2020
CLERK OF COURT

IN THE EIGHT JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK.

RONALD ALLEN JR.
Petitioner,

v.

WILLIAM GITTERE WARDEN ESP
Respondent.

A-20-815539-W
Dept. 29

PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

RECEIVED
JUL 15 2021
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK OF THE COURT

RECEIVED
MAY - 8 2020
CLERK OF THE COURT

1

EXHIBIT B 1 OF 2

CLERK OF THE COURT
201 S. CARSON ST. SUITE 201
CARSON CITY, NV, 89701

DATE: 5.11.2021

RE: CASE NO. A-20-815539-W
REQUEST FOR DOCKET SHEET.

DEAR CLERK,

I AM RESPECTFULLY REQUESTING A COPY OF THE DOCKET SHEET IN THE ABOVE CASE NUMBER. ENCLOSED IS A CASE SUMMARY DATED: 2/23/2021 HEARING FOR A WRIT OF HABEAS CORPUS.

I HAVE NOT HEARD ANYTHING BACK FROM THE COURTS OF WHAT HAPPENED AT MY COURT HEARING 2/23/21 —

I PLEASE ASK THAT YOU WAIVE ANY FEE ASSOCIATED WITH THIS REQUEST DUE TO MY INDIGENCE AND INABILITY TO PAY —

I APPRECIATE YOUR ASSISTANCE IN THIS MATTER.

RECEIVED
MAY 17 2021
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

RESPECTFULLY,
[redacted]
RONALD ALLEN
P.O. BOX-1989
ELY, NEVADA. 89301

EXHIBIT B 2 of 2

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-20-815539-W

Ronald Allen, Plaintiff(s)	§	Location:	**Department 2**
vs.	§	Judicial Officer:	**Kierny, Carli**
William Gittere, Warden ESP, Defendant(s)	§	Filed on:	**05/27/2020**
	§	Case Number History:	
	§	Cross-Reference Case Number:	**A815539**

CASE INFORMATION

Related Cases
C-16-318255-1 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**

Case Status: **05/27/2020 Open**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	A-20-815539-W
Court	Department 2
Date Assigned	01/04/2021
Judicial Officer	Kierny, Carli

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**Allen, Ronald**	**Pro Se**
Defendant	**Nevada State of**	**Mishler, Karen** *Retained* 702-671-2728(W)
	William Gittere, Warden ESP	**Mishler, Karen** *Retained* 702-671-2728(W)

DATE — EVENTS & ORDERS OF THE COURT — INDEX

EVENTS

05/27/2020 Inmate Filed - Petition for Writ of Habeas Corpus
Party: Plaintiff Allen, Ronald
Post Conviction

01/04/2021 Case Reassigned to Department 2
Judicial Reassignment to Judge Carli Kierny

01/04/2021 Order for Petition for Writ of Habeas Corpus
Order for Petition for Writ of Habeas Corpus

02/04/2021 Motion
Filed By: Plaintiff Allen, Ronald

RECEIVED JUL 15 2021 CLERK OF SUPREME COURT DEPUTY CLERK

02/22/202 Response
State's Response to Defendant's Petition for Writ of Habeas Corpus (Post Conviction)

Printed on 06/22/2021 at 1:54 PM

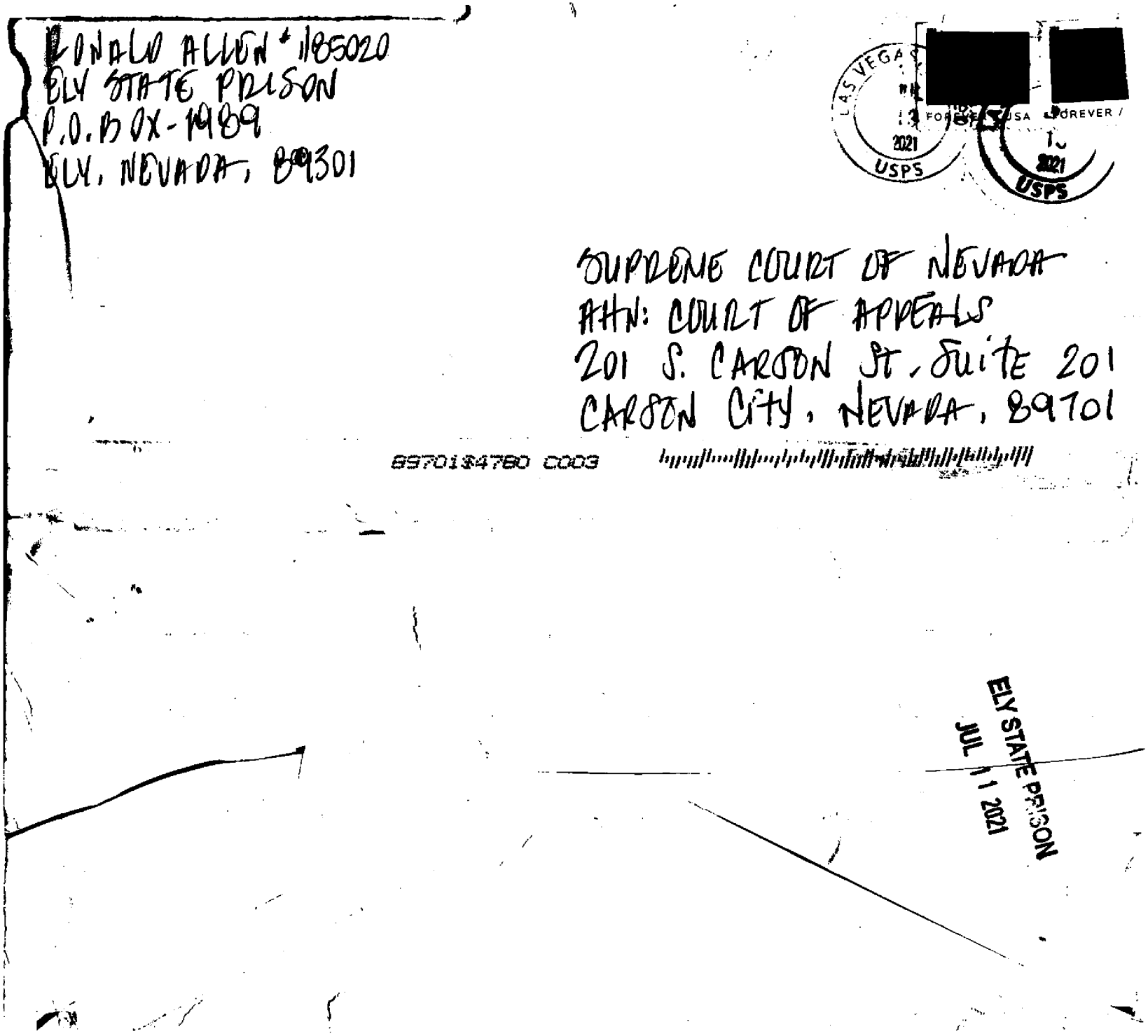
HEARINGS

02/23/2021 **Petition for Writ of Habeas Corpus** (9:00 AM) (Judicial Officer: Kierny, Carli)

Denied;

Journal Entry Details:

Having considered Petitioner Allen s Writ of Habeas Corpus, COURT ORDERED, Petition is DENIED as the petition is untimely. NRS 34.726(1) states unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. Further, the NV Supreme Court has held the one-year time bar is strictly construed and enforced. Gonzales v. State, 118 Nev. 590. Petitioner must establish good cause to overcome the procedural bar of NRS 34.726 (1). The underlying case from which Mr. Allen files his writ is C-16-318255-1. The Judgment of Conviction in that matter was filed on February 16, 2018 following a guilty verdict rendered by the jury. Thus, under NRS 34.726(1), Mr. Moore had until February 16, 2019 to file his petition unless there was a direct appeal. Mr. Moore did file an appeal to the NV Court of Appeals raising the same arguments herein, which was denied and the remittitur was filed on May 16, 2019. Thus, Mr. Allen had until May 16, 2020 to file this petition. He did not do so until May 27, 2020. Petitioner has failed to put forth an argument establishing good cause as to his untimely petition; thus, the petition lacks good cause and must be dismissed. Additionally, petitioner failed to make a showing of ineffective assistance of counsel under the two prong test in Strickland, which was adopted by the Nevada Supreme Court in Warden v. Lyons. The two prong test provides: A defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Here, petitioner failed to articulate why or how his former counsel s representation fell below an objective standard of reasonableness or that but for his former counsel s errors, there is a reasonable probability that the result of the proceedings would have been different. Petitioner fails to articulate what amount of credit for time served he was not credited with. Thus, he has failed to make the required showings. ;


RONALD ALLEN #1185020
ELY STATE PRISON
P.O. BOX-1989
ELY, NEVADA, 89301
LAS VEGAS NV
2021
USPS
FOREVER USA
2021
USPS
SUPREME COURT OF NEVADA
ATTN: COURT OF APPEALS
201 S. CARSON ST. SUITE 201
CARSON CITY, NEVADA, 89701
89701$4780 C003
ELY STATE PRISON
JUL 1 1 2021

ASTA

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

RONALD ALLEN, JR.,

Plaintiff(s),

vs.

WILLIAM GITTERE, WARDEN ESP,

Defendant(s),

Case No: A-20-815539-W

Dept No: II

CASE APPEAL STATEMENT

1. Appellant(s): Ronald Allen Jr.

2. Judge: Carli Kierny

3. Appellant(s): Ronald Allen Jr.

Counsel:

Ronald Allen Jr. #1185020
P.O. Box 1989
Ely, NV 89301

4. Respondent (s): William Gittere, Warden ESP

Counsel:

Steven B. Wolfson, District Attorney
200 Lewis Ave.
Las Vegas, NV 89155-2212

5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
***Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: No
Date Application(s) filed: N/A

9. Date Commenced in District Court: May 27, 2020

10. Brief Description of the Nature of the Action: Civil Writ

Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

11. Previous Appeal: No

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 4 day of August 2021.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Ronald Allen Jr.

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #13730
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

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:

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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

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.

Electronically Filed
8/24/2021 3:32 PM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

RONALD ALLEN,

Petitioner,

vs.

WILLIAM GITTERE, WARDEN ESP; ET,AL.,

Respondent,

Case No: A-20-815539-W

Dept No: II

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on August 18, 2021, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on August 24, 2021.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 24 day of August 2021, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Ronald Allen # 1185020
1200 Prison Rd.
Lovelock, NV 89419

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #13730
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

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:

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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

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.

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**February 23, 2021**

A-20-815539-W Ronald Allen, Plaintiff(s)
vs.
William Gittere, Warden ESP, Defendant(s)

February 23, 2021 **9:00 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Kierny, Carli **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Kristen Brown

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Having considered Petitioner Allen s Writ of Habeas Corpus, COURT ORDERED, Petition is DENIED as the petition is untimely. NRS 34.726(1) states unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. Further, the NV Supreme Court has held the one-year time bar is strictly construed and enforced. Gonzales v. State, 118 Nev. 590. Petitioner must establish good cause to overcome the procedural bar of NRS 34.726(1).

The underlying case from which Mr. Allen files his writ is C-16-318255-1. The Judgment of Conviction in that matter was filed on February 16, 2018 following a guilty verdict rendered by the jury. Thus, under NRS 34.726(1), Mr. Moore had until February 16, 2019 to file his petition unless there was a direct appeal. Mr. Moore did file an appeal to the NV Court of Appeals raising the same arguments herein, which was denied and the remittitur was filed on May 16, 2019. Thus, Mr. Allen had until May 16, 2020 to file this petition. He did not do so until May 27, 2020. Petitioner has failed to put forth an argument establishing good cause as to his untimely petition; thus, the petition lacks good cause and must be dismissed.

Additionally, petitioner failed to make a showing of ineffective assistance of counsel under the two prong test in Strickland, which was adopted by the Nevada Supreme Court in Warden v. Lyons. The two prong test provides: A defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Here, petitioner failed to articulate why or how his former counsel s representation fell below an objective standard of reasonableness or that but for his former counsel s errors, there is a reasonable probability that the result of the proceedings would have been different. Petitioner fails to articulate what amount of credit for time served he was not credited with. Thus, he has failed to make the required showings.

Certification of Copy and Transmittal of Record

State of Nevada
County of Clark } **SS:**

Pursuant to the Supreme Court order dated August 25, 2021, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 99.

RONALD ALLEN, JR.,

Plaintiff(s),

vs.

WILLIAM GITTERE, WARDEN ESP,

Defendant(s),

Case No: A-20-815539-W

Dept. No: II

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 2 day of September 2021.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk