

1. RONALD ALLEN JR.

2. LOVE LOCK CORRECTION CENTER

3. 1200 PRISON ROAD

4. LOVE LOCK NV 89419

5. # 1185020

6. IN PROPER PERSON.

7.

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

10.

11. RONALD ALLEN JR.

12.

PETITIONER

13.

VS.

14.

NEVADA DEPT OF CORRECTIONS, ex. rel.

15.

WILLIAM GITTER, WARDEN

16.

RESPONDENT(S)

17.

18. COMES NOW, PETITIONER, RONALD ALLEN JR., in which notice is hereby
19. given to this Honorable Court, the Eighth Judicial District Court
20. of Nevada, Clark County, hereby Appeals to the Nevada Supreme Court
21. from the Judgment/Order, the Denial of Petition for Writ of Habeas
22. Corpus (Post-Conviction) Notice of Entry of Findings of Facts, Con-
23. clusions of Law and Order, entered in this Action on the 24th
24. day of August, 2021.

25.

26. Dated this 19th day of September, 2021

27.

28.

RECEIVED

SEP 27 2021

CLERK OF THE COURT

Electronically Filed
9/27/2021 2:22 PM
Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

Electronically Filed
Oct 06 2021 09:22 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE No: A-20-815539-W

Dept. 29

"NOTICE OF APPEAL"

Respectfully Submitted by:

X Ronald Allen Jr.
Petitioner / IN PRO SE

CERTIFICATE OF SERVICE

I, Ronald Allen Jr., hereby certify pursuant to ~~NC~~ 5(b) that on this 20th day of September, 2021, I did serve a true and correct copy of the foregoing "NOTICE OF Appeal" by given it to a prison official to deposit in the U.S. MAIL, sealed in a envelope, postage pre-paid, and addressed to the following;

1) Steven B. Wolfson
District Attorney
200 Lewis Avenue
Las Vegas NV, 89155-2212

Sign: Ronald Allen Jr
Petitioner

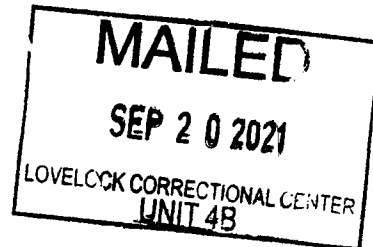
Ronald Allen Jr.
Love Lock Correction Center
1200 ~~Prison~~ Road
Love Lock NV 89419
1185020

Ronald Allen Jr. #1185020
Love Lock Correction Center
1200 Prison Road
Love Lock NV 89419
4-B-

To: Steven D. Grierson, Clerk of the Court
200 Lewis Ave, 3rd Floor
Las Vegas NV 89155-1160

ATTN: Deputy Clerk; Kristen Brown.

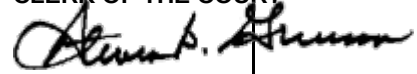
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6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**
9

10 RONALD ALLEN, JR.,

11 Plaintiff(s),

12 vs.

13 WILLIAM GITTERE, WARDEN ESP,

14 Defendant(s),
15

Case No: A-20-815539-W

Dept No: II

16
17 **CASE APPEAL STATEMENT**
18

19 1. Appellant(s): Ronald Allen Jr.

20 2. Judge: Carli Kierny

21 3. Appellant(s): Ronald Allen Jr.

22 Counsel:

23 Ronald Allen Jr. #1185020
24 1200 Prison Rd.
Lovelock, NV 89419

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

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89155-2212

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

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

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

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

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

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

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

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

13 11. Previous Appeal: Yes

14 Supreme Court Docket Number(s): 75329, 83327

15 12. Child Custody or Visitation: N/A

16 13. Possibility of Settlement: Unknown

17 Dated This 29 day of September 2021.

18 Steven D. Grierson, Clerk of the Court

19
20
21 /s/ Heather Ungermann

22 Heather Ungermann, Deputy Clerk
23 200 Lewis Ave
24 PO Box 551601
25 Las Vegas, Nevada 89155-1601
26 (702) 671-0512

27 cc: Ronald Allen Jr.
28

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY
CASE NO. A-20-815539-W

Ronald Allen, Plaintiff(s)
vs.
William Gittere, Warden ESP, Defendant(s)

§
§
§
§
§
§

Location: **Department 2**
Judicial Officer: **Kierny, Carli**
Filed on: **05/27/2020**
Case Number History:
Cross-Reference Case **A815539**
Number:
Supreme Court No.: **83327**

CASE INFORMATION

Related Cases

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

Case Type: **Writ of Habeas Corpus**

Statistical Closures

08/18/2021 Motion to Dismiss by the Defendant(s)

Case Status: **08/18/2021 Dismissed**

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

		<i>Lead Attorneys</i>
Plaintiff	Allen, Ronald	Pro Se
Defendant	Nevada State of	Mishler, Karen <i>Retained</i> 702-671-2728(W)
	William Gittere, Warden ESP	Mishler, Karen <i>Retained</i> 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 <i>Petition for Writ of Habeas Corpus (Postconviction)</i>
01/04/2021	Case Reassigned to Department 2 <i>Judicial Reassignment to Judge Carli Kierny</i>
01/04/2021	 Order for Petition for Writ of Habeas Corpus <i>Order for Petition for Writ of Habeas Corpus</i>
02/04/2021	 Motion Filed By: Plaintiff Allen, Ronald <i>Motion</i>
02/22/2021	 Response <i>State's Response to Defendant's Petition for Writ of Habeas Corpus (Post Conviction)</i>

CASE SUMMARY

CASE NO. A-20-815539-W

07/15/2021	 Notice of Appeal <i>Notice of Appeal</i>
08/04/2021	 Case Appeal Statement Filed By: Plaintiff Allen, Ronald <i>Case Appeal Statement</i>
08/18/2021	 Findings of Fact, Conclusions of Law and Order <i>Findings of Fact, Conclusions of Law and Order</i>
08/24/2021	 Notice of Entry of Findings of Fact, Conclusions of Law Filed By: Defendant Nevada State of <i>Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>
09/27/2021	 Notice of Appeal <i>Notice of Appeal</i>
09/29/2021	 Case Appeal Statement Filed By: Plaintiff Allen, Ronald <i>Case Appeal Statement</i>

HEARINGS

02/23/2021	 Petition for Writ of Habeas Corpus (9:00 AM) (Judicial Officer: Kierny, Carli) Denied; Journal Entry Details: <i>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. ;</i>
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DISTRICT COURT CIVIL COVER SHEET

A-20-815539-W
Dept. 29

County, Nevada

Case No.

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

Ronald Allen, Jr.

Defendant(s) (name/address/phone):

William Gittere, Warden ESP

Attorney (name/address/phone):

Attorney (name/address/phone):

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property Landlord/Tenant ☐ Unlawful Detainer ☐ Other Landlord/Tenant Title to Property ☐ Judicial Foreclosure ☐ Other Title to Property Other Real Property ☐ Condemnation/Eminent Domain ☐ Other Real Property	Negligence ☐ Auto ☐ Premises Liability ☐ Other Negligence Malpractice ☐ Medical/Dental ☐ Legal ☐ Accounting ☐ Other Malpractice	Torts Other Torts ☐ Product Liability ☐ Intentional Misconduct ☐ Employment Tort ☐ Insurance Tort ☐ Other Tort
Probate Probate (select case type and estate value) ☐ Summary Administration ☐ General Administration ☐ Special Administration ☐ Set Aside ☐ Trust/Conservatorship ☐ Other Probate Estate Value ☐ Over \$200,000 ☐ Between \$100,000 and \$200,000 ☐ Under \$100,000 or Unknown ☐ Under \$2,500	Construction Defect & Contract Construction Defect ☐ Chapter 40 ☐ Other Construction Defect Contract Case ☐ Uniform Commercial Code ☐ Building and Construction ☐ Insurance Carrier ☐ Commercial Instrument ☐ Collection of Accounts ☐ Employment Contract ☐ Other Contract	Judicial Review/Appeal Judicial Review ☐ Foreclosure Mediation Case ☐ Petition to Seal Records ☐ Mental Competency Nevada State Agency Appeal ☐ Department of Motor Vehicle ☐ Worker's Compensation ☐ Other Nevada State Agency Appeal Other ☐ Appeal from Lower Court ☐ Other Judicial Review/Appeal
Civil Writ Civil Writ ☒ Writ of Habeas Corpus ☐ Writ of Mandamus ☐ Writ of Quo Warrant ☐ Writ of Prohibition ☐ Other Civil Writ		Other Civil Filing Other Civil Filing ☐ Compromise of Minor's Claim ☐ Foreign Judgment ☐ Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

May 27, 2020

PREPARED BY CLERK

Date

Signature of initiating party or representative

See other side for family-related case filings.

Heather S. Linn

CLERK OF THE COURT

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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1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

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

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

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

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

19 On June 1, 2020, Defendant filed the instant Motion for Appointment of Counsel and
20 Request for Evidentiary Hearing (hereinafter “Motion”). The State filed an Opposition on June
21 9, 2020. On June 23, 2020, the district court denied Petitioner’s Motion for Appointment of
22 Counsel and Request for Evidentiary hearing.

23 On May 27, 2020, Defendant filed the instant Post-Conviction Petition for Writ of
24 Habeas Corpus (“Petition”). The State filed a response on February 22, 2021. On February 23,
25 2021, this Court made the following Findings of Fact, Conclusions of Law and Order.

26 ///

27 ///

28 ///

1 **ANALYSIS**

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

4 A petitioner must raise all grounds for relief in a timely filed first post-conviction
5 Petition for Writ of Habeas Corpus. Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523
6 (2001). A petitioner must challenge the validity of their judgment or sentence within one year
7 from the entry of judgment of conviction or after the Supreme Court issues remittitur pursuant
8 to NRS 34.726(1). This one-year time limit is strictly applied and begins to run from the date
9 the judgment of conviction is filed or remittitur issues from a timely filed direct appeal.
10 Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001); Dickerson v. State, 114
11 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

12 The Nevada Supreme Court has explained that:

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

23 Id.

24 “Application of the statutory procedural default rules to post-conviction habeas
25 petitions is mandatory,” and “cannot be ignored [by the district court] when properly raised by
26 the State.” State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231 & 233, 112 P.3d
27 1070, 1074–75 (2005). For example, in Gonzales v. State, the Nevada Supreme Court rejected
28 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

1 no discretion regarding whether to apply the statutory procedural bars. Riker, 121 Nev. at 233,
2 112 P.3d at 1075.

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

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

9 Courts may consider the merits of procedurally barred petitions only when petitioners
10 establish good cause for the delay in filing and prejudice should the courts not consider the
11 merits. NRS 34.726(1)(a)-(b); NRS 34.810(3). Simply put, good cause is a "substantial reason;
12 one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506
13 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). To establish
14 good cause, a petitioner must demonstrate that "an impediment external to the defense
15 prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615,
16 621, 81 P.3d 521, 525-26 (2003). Good cause exists if a Petitioner can establish that the factual
17 or legal basis of a claim was not available to him or his counsel within the statutory time frame.
18 Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07. Once the factual or legal basis becomes
19 known to a petitioner, they must bring the additional claims within a reasonable amount of
20 time after the basis for the good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d at
21 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions). A claim that
22 is itself procedurally barred cannot constitute good cause. State v. District Court (Riker), 121
23 Nev. 225, 235, 112 P.3d 1070, 1077 (2005). See also Edwards v. Carpenter, 529 U.S. 446, 453
24 120 S. Ct. 1587, 1592 (2000).

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

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

3 **III. PETITIONER HAS FAILED TO SHOW PREJUDICE**

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

9 Claims other than challenges to the validity of a guilty plea and ineffective assistance
10 of trial and appellate counsel must be raised on direct appeal “or they will be *considered*
11 *waived in subsequent proceedings*.” Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059
12 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148,
13 979 P.2d 222 (1999)). “A court must dismiss a habeas petition if it presents claims that either
14 were or could have been presented in an earlier proceeding, unless the court finds both cause
15 for failing to present the claims earlier or for raising them again and actual prejudice to the
16 petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). Where a petitioner
17 does not show good cause for failure to raise claims of error upon direct appeal, the district
18 court is not obliged to consider their merits in post-conviction proceedings. Jones v. State, 91
19 Nev. 416, 536 P.2d 1025 (1975). Courts must dismiss a petition if a petitioner pled guilty and
20 the petitioner is not alleging “that the plea was involuntarily or unknowingly entered, or that
21 the plea was entered without effective assistance of counsel.” NRS 34.810(1)(a). Further,
22 substantive claims—even those disguised as ineffective assistance of counsel claims—are
23 beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29
24 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059.

25 The United States Supreme Court has long recognized that “the right to counsel is the
26 right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686, 104
27 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
28 (1993). Claims of ineffective assistance of counsel are analyzed under the two-pronged test

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

8 "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559
9 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). "There are countless ways to provide effective
10 assistance in any given case. Even the best criminal defense attorneys would not defend a
11 particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. The question
12 is whether an attorney's representations amounted to incompetence under prevailing
13 professional norms, "not whether it deviated from best practices or most common custom."
14 Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). "Effective counsel does
15 not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of
16 competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State
17 Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S.
18 759, 771, 90 S. Ct. 1441, 1449 (1970)).

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

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

8 The Strickland analysis does not “mean that defense counsel, to protect himself against
9 allegations of inadequacy, must make every conceivable motion no matter how remote the
10 possibilities are of success.” Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551
11 F.2d at 1166 (9th Cir. 1977)). To be effective, the constitution “does not require that counsel
12 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
13 cannot create one and may disserve the interests of his client by attempting a useless charade.”
14 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984). “Counsel
15 cannot be deemed ineffective for failing to make futile objections, file futile motions, or for
16 failing to make futile arguments.” Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103
17 (2006). Counsel's strategy decision is a "tactical" decision and will be "virtually
18 unchallengeable absent extraordinary circumstances." Doleman v. State, 112 Nev, 843, 848,
19 921 P.2d 278, 281 (1996); see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180
20 (1990); Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. “Strategic choices made by counsel
21 after thoroughly investigating the plausible options are almost unchallengeable.” Dawson v.
22 State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853,
23 784 P.2d 951, 953 (1989). Trial counsel has the “immediate and ultimate responsibility of
24 deciding if and when to object, which witnesses, if any, to call, and what defenses to develop.”
25 Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

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

1 ineffective assistance of counsel asserted in a petition for post-conviction relief must be
2 supported with specific factual allegations, which if true, would entitle the petitioner to relief.
3 Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”
4 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
5 34.735(6) states in relevant part, “[Petitioner] must allege specific facts supporting the claims
6 in the petition[.] . . . Failure to allege specific facts rather than just conclusions *may cause your*
7 *petition to be dismissed.*” (emphasis added).

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

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

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

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

24 What's the state of mind of a man who is willing to disregard an officer's
25 commands, break free from the officer, and then charge through him in
26 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.

27 As I told you in voir dire, sometimes we're left with just one person,
28 convicted felon, drug addict, you name it -- it goes on and on.

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

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

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

7 Id. at 42.

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

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

16 When resolving claims of prosecutorial misconduct, this Court undertakes a two-step
17 analysis: determining whether the comments were improper; and deciding whether the
18 comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172,
19 1188. This Court views the statements in context and will not lightly overturn a jury's verdict
20 based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 865 (2014). Normally, the
21 defendant must show that an error was prejudicial in order to establish that it affected
22 substantial rights. Gallego v. State, 117 Nev. 348, 365 (2001).

23 "[A]s long as a prosecutor's remarks do not call attention to a defendant's failure to
24 testify, it is permissible to comment on the failure of the defense to counter or explain evidence
25 presented." Id., citing U.S. v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992). Further, the
26 State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018-
27 19 (1997). This includes commenting on a defendant's failure to substantiate his theory.
28 Colley v. State, 98 Nev. 14, 16 (1982); See also Bridges v. State, 116 Nev. 752, 762 (2000),

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

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

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

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

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

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

1 MR. LEXIS: Folks, defense counsel told you I'm going to come up here
2 and be angry and yelling and this, that, and the other. This case is as
3 straightforward as it gets, bottom line. What's the state of mind of a man
4 who is willing to disregard an officer's commands, break free from the
5 officer, and then charge through him in order to get to somebody else?
6 That's who you're dealing with. A man with zero regard for the law.

7 The evidence in this case is overwhelming. As I told you in voir dire,
8 sometimes we're left with just one person, convicted felon, drug addict, you
9 name it -- it goes on and on. That's what we're left with -- or somebody --
10 a home invasion where nobody is home and we have no idea who it is and
11 we have to piece it together. Not this case.

12 On the far end of the spectrum, you have somebody who the victim is
13 an officer. And another officer responding to the first responding officer.
14 And then a witness, a truly independent witness, take the stand. It was one
15 of your questions that brought out she doesn't even know this man.

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

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

25 Next, the State's comment regarding defense counsel's argument did not constitute
26 prosecutorial misconduct. Again, this comment was at the beginning of the State's rebuttal and
27 did not belittle or ridicule the defense theory, but characterized it as being inconsistent with
28 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

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

13 **B. Petitioner cannot show that he was prejudiced by the State’s investigation.**

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

23 First, as this is not a claim of ineffective assistance of counsel, it should have been
24 raised on direct appeal and is therefore waived. Claims other than challenges to the validity of
25 a guilty plea and ineffective assistance of trial and appellate counsel must be raised on direct
26 appeal “or they will be *considered waived in subsequent proceedings*.” Franklin, 110 Nev. at
27 752, 877 P.2d at 1059 (emphasis added). “A court must dismiss a habeas petition if it presents
28 claims that either were or could have been presented in an earlier proceeding, unless the court

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

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

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

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

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

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

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

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

28 ///

1 Q So you said that you were standing next to the car when you were
2 face-to-face with Mr. Allen; right? A Correct.
3 Q And he was trying to get through the gap between you and the car?
4 A Yes.
5 Q Okay. And that's when he kind of went through that gap, maybe
6 pushing you out of the way?
7 A I would -- I would not say -- the way you describe it as in kind of he
8 stepped to the side, I would not say that, no.
9 Q Okay. Let me ask you this way: You would not call this a collision?
10 A Well, so define a collision. And let me define a collision. When I think
11 collision, I think of two cars head-on, going like this --
12 Q Right. A -- with significant damage.
13 Q Okay.
14 A Okay. I would probably say an impact would probably be a better
15 statement, which is not as -- not like heads going through windows,
16 so --
17 Q Uh-huh. You would then say this was not a head-on collision? A Not
18 in the accident sense.
19 Q Right. You would agree with me on that one?
20 A I'm -- I'm not --
21 Q I know we're talking past each other.
22 A We are. Because I'm not really trying -- I'm not understanding, and I
23 don't think I'm articulating well about how I see it.
24 Q We are all in court. We're all nervous. I understand. You would not
25 describe it as, you know, head-on collision. He didn't run straight into
26 you, hit you in the face?
27 A I would -- I would say that.
28 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.

1 A I don't. To be honest with you, at the time of the preliminary hearing,
2 I was still in recovery mode. I mean, just to come to court took me
like four hours, two hours just to get ready.

3 Q I recall.

4 A And I was on medication. So I would be -- I would -- it was definitely
a hard day.

5 Q I understand that. But your testimony is you don't recall testifying to
that at preliminary hearing?

6 A That's correct.

7 Q All right.

8 MR. HAUSER: Your Honor, may I approach the witness with preliminary
hearing transcript that I will first share with opposing counsel.

9 THE COURT: Yes.

10 MR. HAUSER: May I approach, Your Honor?

11 THE COURT: Yes.

12 BY MR. HAUSER: Q Let me show you from the front of this so we get
13 some clarification. Officer, go ahead and read over this. Do you recognize
the caption here?

14 A I'm sorry. In what manner?

15 Q Do you recognize that it says this is the reporter's transcript of
preliminary hearing for this case?

16 A Okay. Yes.

17 Q All right. And do you recognize that your name is on here as a listed
witness?

18 A Yes.

19 Q All right. You recall testifying at this preliminary hearing?

20 A I do.

21 Q All right. I'm going to direct your attention to page 24.

22 A Uh-huh.

23 Q Lines 3 through 6. Go ahead and refresh -- just read over that, and then
look -- look at me when you're done.

24 A Okay.

25 Q All right.

26 MR. HAUSER: May I retrieve, Your Honor.

27 THE WITNESS: Well, can I -- I'm sorry. I'm sorry.

28 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.

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

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

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

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

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

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

18 Next, any claim of prejudice must fail as Petitioner cannot show that there is a
19 reasonable probability that the outcome at trial would have been different. Petitioner was
20 charged with Battery on a Protected Person pursuant to NRS 200.481. Pursuant to NRS
21 200.481, it is a category B felony for a person to commit a battery upon an officer who is
22 performing their duties when the battery results in substantial bodily harm and the person knew
23 or should have known that the victim was an officer. Here, there was overwhelming evidence
24 that Petitioner pushed Officer Karanikolas and caused significant injury. As such, any jury
25 instruction on "resisting arrest" would have been irrelevant and Petitioner's claim is denied.

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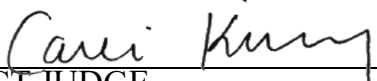
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ORDER

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

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

5EA DE0 09E7 C46B
Carli Kierny
District Court Judge

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

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
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6 Ronald Allen, Plaintiff(s)

CASE NO: A-20-815539-W

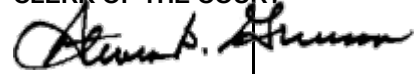
7 vs.

DEPT. NO. Department 2

8 William Gittere, Warden ESP,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5 RONALD ALLEN,

6 Petitioner,

7 vs.

8 WILLIAM GITTERE, WARDEN ESP; ET,AL.,

9 Respondent,

Case No: A-20-815539-W

Dept No: II

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

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

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 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.

15 STEVEN D. GRIERSON, CLERK OF THE COURT

16 /s/ Amanda Hampton

17 Amanda Hampton, Deputy Clerk

18
19 **CERTIFICATE OF E-SERVICE / MAILING**

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

22 ☒ By e-mail:

23 Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

24 ☒ The United States mail addressed as follows:

25 Ronald Allen # 1185020
1200 Prison Rd.
26 Lovelock, NV 89419

27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk

Heather S. Linn

CLERK OF THE COURT

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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1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

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

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

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

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

19 On June 1, 2020, Defendant filed the instant Motion for Appointment of Counsel and
20 Request for Evidentiary Hearing (hereinafter “Motion”). The State filed an Opposition on June
21 9, 2020. On June 23, 2020, the district court denied Petitioner’s Motion for Appointment of
22 Counsel and Request for Evidentiary hearing.

23 On May 27, 2020, Defendant filed the instant Post-Conviction Petition for Writ of
24 Habeas Corpus (“Petition”). The State filed a response on February 22, 2021. On February 23,
25 2021, this Court made the following Findings of Fact, Conclusions of Law and Order.

26 ///

27 ///

28 ///

1 **ANALYSIS**

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

4 A petitioner must raise all grounds for relief in a timely filed first post-conviction
5 Petition for Writ of Habeas Corpus. Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523
6 (2001). A petitioner must challenge the validity of their judgment or sentence within one year
7 from the entry of judgment of conviction or after the Supreme Court issues remittitur pursuant
8 to NRS 34.726(1). This one-year time limit is strictly applied and begins to run from the date
9 the judgment of conviction is filed or remittitur issues from a timely filed direct appeal.
10 Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001); Dickerson v. State, 114
11 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

12 The Nevada Supreme Court has explained that:

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

23 Id.

24 “Application of the statutory procedural default rules to post-conviction habeas
25 petitions is mandatory,” and “cannot be ignored [by the district court] when properly raised by
26 the State.” State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231 & 233, 112 P.3d
27 1070, 1074–75 (2005). For example, in Gonzales v. State, the Nevada Supreme Court rejected
28 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

1 no discretion regarding whether to apply the statutory procedural bars. Riker, 121 Nev. at 233,
2 112 P.3d at 1075.

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

7 **II. PETITIONER HAS NOT SHOWN GOOD CAUSE TO OVERCOME** 8 **PROCEDURAL BARS**

9 Courts may consider the merits of procedurally barred petitions only when petitioners
10 establish good cause for the delay in filing and prejudice should the courts not consider the
11 merits. NRS 34.726(1)(a)-(b); NRS 34.810(3). Simply put, good cause is a "substantial reason;
12 one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506
13 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). To establish
14 good cause, a petitioner must demonstrate that "an impediment external to the defense
15 prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615,
16 621, 81 P.3d 521, 525-26 (2003). Good cause exists if a Petitioner can establish that the factual
17 or legal basis of a claim was not available to him or his counsel within the statutory time frame.
18 Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07. Once the factual or legal basis becomes
19 known to a petitioner, they must bring the additional claims within a reasonable amount of
20 time after the basis for the good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d at
21 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions). A claim that
22 is itself procedurally barred cannot constitute good cause. State v. District Court (Riker), 121
23 Nev. 225, 235, 112 P.3d 1070, 1077 (2005). See also Edwards v. Carpenter, 529 U.S. 446, 453
24 120 S. Ct. 1587, 1592 (2000).

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

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

3 **III. PETITIONER HAS FAILED TO SHOW PREJUDICE**

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

9 Claims other than challenges to the validity of a guilty plea and ineffective assistance
10 of trial and appellate counsel must be raised on direct appeal “or they will be *considered*
11 *waived in subsequent proceedings*.” Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059
12 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148,
13 979 P.2d 222 (1999)). “A court must dismiss a habeas petition if it presents claims that either
14 were or could have been presented in an earlier proceeding, unless the court finds both cause
15 for failing to present the claims earlier or for raising them again and actual prejudice to the
16 petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). Where a petitioner
17 does not show good cause for failure to raise claims of error upon direct appeal, the district
18 court is not obliged to consider their merits in post-conviction proceedings. Jones v. State, 91
19 Nev. 416, 536 P.2d 1025 (1975). Courts must dismiss a petition if a petitioner pled guilty and
20 the petitioner is not alleging “that the plea was involuntarily or unknowingly entered, or that
21 the plea was entered without effective assistance of counsel.” NRS 34.810(1)(a). Further,
22 substantive claims—even those disguised as ineffective assistance of counsel claims—are
23 beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29
24 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059.

25 The United States Supreme Court has long recognized that “the right to counsel is the
26 right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686, 104
27 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
28 (1993). Claims of ineffective assistance of counsel are analyzed under the two-pronged test

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

8 "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559
9 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). "There are countless ways to provide effective
10 assistance in any given case. Even the best criminal defense attorneys would not defend a
11 particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. The question
12 is whether an attorney's representations amounted to incompetence under prevailing
13 professional norms, "not whether it deviated from best practices or most common custom."
14 Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). "Effective counsel does
15 not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of
16 competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State
17 Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S.
18 759, 771, 90 S. Ct. 1441, 1449 (1970)).

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

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

8 The Strickland analysis does not “mean that defense counsel, to protect himself against
9 allegations of inadequacy, must make every conceivable motion no matter how remote the
10 possibilities are of success.” Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551
11 F.2d at 1166 (9th Cir. 1977)). To be effective, the constitution “does not require that counsel
12 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
13 cannot create one and may disserve the interests of his client by attempting a useless charade.”
14 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984). “Counsel
15 cannot be deemed ineffective for failing to make futile objections, file futile motions, or for
16 failing to make futile arguments.” Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103
17 (2006). Counsel's strategy decision is a "tactical" decision and will be "virtually
18 unchallengeable absent extraordinary circumstances." Doleman v. State, 112 Nev, 843, 848,
19 921 P.2d 278, 281 (1996); see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180
20 (1990); Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. “Strategic choices made by counsel
21 after thoroughly investigating the plausible options are almost unchallengeable.” Dawson v.
22 State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853,
23 784 P.2d 951, 953 (1989). Trial counsel has the “immediate and ultimate responsibility of
24 deciding if and when to object, which witnesses, if any, to call, and what defenses to develop.”
25 Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

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

1 ineffective assistance of counsel asserted in a petition for post-conviction relief must be
2 supported with specific factual allegations, which if true, would entitle the petitioner to relief.
3 Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”
4 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
5 34.735(6) states in relevant part, “[Petitioner] must allege specific facts supporting the claims
6 in the petition[.] . . . Failure to allege specific facts rather than just conclusions *may cause your*
7 *petition to be dismissed.*” (emphasis added).

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

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

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

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

24 What's the state of mind of a man who is willing to disregard an officer's
25 commands, break free from the officer, and then charge through him in
26 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.

27 As I told you in voir dire, sometimes we're left with just one person,
28 convicted felon, drug addict, you name it -- it goes on and on.

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

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

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

7 Id. at 42.

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

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

16 When resolving claims of prosecutorial misconduct, this Court undertakes a two-step
17 analysis: determining whether the comments were improper; and deciding whether the
18 comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172,
19 1188. This Court views the statements in context and will not lightly overturn a jury's verdict
20 based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 865 (2014). Normally, the
21 defendant must show that an error was prejudicial in order to establish that it affected
22 substantial rights. Gallego v. State, 117 Nev. 348, 365 (2001).

23 "[A]s long as a prosecutor's remarks do not call attention to a defendant's failure to
24 testify, it is permissible to comment on the failure of the defense to counter or explain evidence
25 presented." Id., citing U.S. v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992). Further, the
26 State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018-
27 19 (1997). This includes commenting on a defendant's failure to substantiate his theory.
28 Colley v. State, 98 Nev. 14, 16 (1982); See also Bridges v. State, 116 Nev. 752, 762 (2000),

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

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

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

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

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

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

1 MR. LEXIS: Folks, defense counsel told you I'm going to come up here
2 and be angry and yelling and this, that, and the other. This case is as
3 straightforward as it gets, bottom line. What's the state of mind of a man
4 who is willing to disregard an officer's commands, break free from the
5 officer, and then charge through him in order to get to somebody else?
6 That's who you're dealing with. A man with zero regard for the law.

7 The evidence in this case is overwhelming. As I told you in voir dire,
8 sometimes we're left with just one person, convicted felon, drug addict, you
9 name it -- it goes on and on. That's what we're left with -- or somebody --
10 a home invasion where nobody is home and we have no idea who it is and
11 we have to piece it together. Not this case.

12 On the far end of the spectrum, you have somebody who the victim is
13 an officer. And another officer responding to the first responding officer.
14 And then a witness, a truly independent witness, take the stand. It was one
15 of your questions that brought out she doesn't even know this man.

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

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

25 Next, the State's comment regarding defense counsel's argument did not constitute
26 prosecutorial misconduct. Again, this comment was at the beginning of the State's rebuttal and
27 did not belittle or ridicule the defense theory, but characterized it as being inconsistent with
28 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

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

13 **B. Petitioner cannot show that he was prejudiced by the State’s investigation.**

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

23 First, as this is not a claim of ineffective assistance of counsel, it should have been
24 raised on direct appeal and is therefore waived. Claims other than challenges to the validity of
25 a guilty plea and ineffective assistance of trial and appellate counsel must be raised on direct
26 appeal “or they will be *considered waived in subsequent proceedings*.” Franklin, 110 Nev. at
27 752, 877 P.2d at 1059 (emphasis added). “A court must dismiss a habeas petition if it presents
28 claims that either were or could have been presented in an earlier proceeding, unless the court

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

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

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

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

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

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

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

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

28 ///

1 Q So you said that you were standing next to the car when you were
2 face-to-face with Mr. Allen; right? A Correct.
3 Q And he was trying to get through the gap between you and the car?
4 A Yes.
5 Q Okay. And that's when he kind of went through that gap, maybe
6 pushing you out of the way?
7 A I would -- I would not say -- the way you describe it as in kind of he
8 stepped to the side, I would not say that, no.
9 Q Okay. Let me ask you this way: You would not call this a collision?
10 A Well, so define a collision. And let me define a collision. When I think
11 collision, I think of two cars head-on, going like this --
12 Q Right. A -- with significant damage.
13 Q Okay.
14 A Okay. I would probably say an impact would probably be a better
15 statement, which is not as -- not like heads going through windows,
16 so --
17 Q Uh-huh. You would then say this was not a head-on collision? A Not
18 in the accident sense.
19 Q Right. You would agree with me on that one?
20 A I'm -- I'm not --
21 Q I know we're talking past each other.
22 A We are. Because I'm not really trying -- I'm not understanding, and I
23 don't think I'm articulating well about how I see it.
24 Q We are all in court. We're all nervous. I understand. You would not
25 describe it as, you know, head-on collision. He didn't run straight into
26 you, hit you in the face?
27 A I would -- I would say that.
28 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.

1 A I don't. To be honest with you, at the time of the preliminary hearing,
2 I was still in recovery mode. I mean, just to come to court took me
like four hours, two hours just to get ready.

3 Q I recall.

4 A And I was on medication. So I would be -- I would -- it was definitely
a hard day.

5 Q I understand that. But your testimony is you don't recall testifying to
that at preliminary hearing?

6 A That's correct.

7 Q All right.

8 MR. HAUSER: Your Honor, may I approach the witness with preliminary
hearing transcript that I will first share with opposing counsel.

9 THE COURT: Yes.

10 MR. HAUSER: May I approach, Your Honor?

11 THE COURT: Yes.

12 BY MR. HAUSER: Q Let me show you from the front of this so we get
13 some clarification. Officer, go ahead and read over this. Do you recognize
the caption here?

14 A I'm sorry. In what manner?

15 Q Do you recognize that it says this is the reporter's transcript of
preliminary hearing for this case?

16 A Okay. Yes.

17 Q All right. And do you recognize that your name is on here as a listed
witness?

18 A Yes.

19 Q All right. You recall testifying at this preliminary hearing?

20 A I do.

21 Q All right. I'm going to direct your attention to page 24.

22 A Uh-huh.

23 Q Lines 3 through 6. Go ahead and refresh -- just read over that, and then
look -- look at me when you're done.

24 A Okay.

25 Q All right.

26 MR. HAUSER: May I retrieve, Your Honor.

27 THE WITNESS: Well, can I -- I'm sorry. I'm sorry.

28 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.

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

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

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

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

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

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

18 Next, any claim of prejudice must fail as Petitioner cannot show that there is a
19 reasonable probability that the outcome at trial would have been different. Petitioner was
20 charged with Battery on a Protected Person pursuant to NRS 200.481. Pursuant to NRS
21 200.481, it is a category B felony for a person to commit a battery upon an officer who is
22 performing their duties when the battery results in substantial bodily harm and the person knew
23 or should have known that the victim was an officer. Here, there was overwhelming evidence
24 that Petitioner pushed Officer Karanikolas and caused significant injury. As such, any jury
25 instruction on "resisting arrest" would have been irrelevant and Petitioner's claim is denied.

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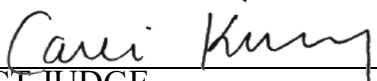
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ORDER

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

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

5EA DE0 09E7 C46B
Carli Kierny
District Court Judge

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

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Ronald Allen, Plaintiff(s)

CASE NO: A-20-815539-W

7 vs.

DEPT. NO. Department 2

8 William Gittere, Warden ESP,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 Electronic service was attempted through the Eighth Judicial District Court's
13 electronic filing system, but there were no registered users on the case. The filer has been
14 notified to serve all parties by traditional means.
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A-20-815539-W Ronald Allen, Plaintiff(s)
vs.
William Gittere, Warden ESP, Defendant(s)

February 23, 2021 09:00 AM Petition for Writ of Habeas Corpus

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

COURT CLERK: Brown, Kristen

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

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

"NOTICE OF APPEAL"; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; DISTRICT COURT MINUTES

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 29 day of September 2021.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk