

Steven D. Grierson

1 NOAS

2 TED Donko #1080899
3 Lovelock Correctional Center
4 1200 Prison Road
5 Lovelock, Nevada 89419

6 In Pro Se

Electronically Filed
Sep 01 2022 02:47 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

7 DISTRICT COURT

8 CLARK COUNTY, NEVADA

9 * * * * *

10 TED Michael Donko,)

11 Petitioner,)

Case No. A-22-852928-W

12 -vs-)

Dept. No. 17

13 THE STATE OF NEVADA,)

14 Respondent.)

15 NOTICE OF APPEAL

16 NOTICE IS GIVEN that Petitioner, TED Michael Donko,
17 in pro se, hereby appeals to the Nevada Supreme Court the
18 Findings of Fact, Conclusions of Law and Order Denying /
19 Dismissing Petition for Writ of Habeas Corpus, as filed/entered
20 on or about the 18 day of August, 2022, in the above-
21 entitled Court.

22 Dated this 18 day of August, 2022.

23
24 TED Michael Donko #1080899
25 Lovelock Correctional Center
26 1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

27 RECEIVED

28 AUG 25 2022

CLERK OF THE COURT

LCC LL FORM 24.064

1
2 CERTIFICATE OF SERVICE

3 I do certify that I mailed a true and correct copy of the
4 foregoing NOTICE OF APPEAL to the below address(es) on this
5 18 day of August, 2022, by placing same in the
6 U.S. Mail via prison law library staff:

7 Eighth Judicial District
8 200 Lewis Ave, 3rd Floor
9 Las Vegas NV, 89155

10 AND
11 Attorney General
12 100 N. Carson St
13 Carson City, NV, 89701
14
15
16

17 TED Michael DeNko # 1080849
18 Lovelock Correctional Center
19 1200 Prison Road
20 Lovelock, Nevada 89419

21 Petitioner In Pro Se

22 AFFIRMATION PURSUANT TO NRS 239B.030

23 The undersigned does hereby affirm that the preceding
24 NOTICE OF APPEAL filed in District Court Case No. A-22-852928-W
25 does not contain the social security number of any person.

26 Dated this 18 day of August, 2022.
27
28

Petitioner In Pro Se

#1080899

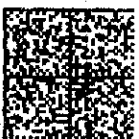
IED Donko

1200 PRISON RD.

XCC

LOVELOCK, NV, 89419

LOVELOCK CORRECTIONAL CENTER



US POSTAGE
ZIP 89419 \$001.44
02 4M
0000369000 AUG 23 2022

Regional Justice Center
Eighth Judicial District
200 Lewis Ave 3rd Floor
Las Vegas, NV, 89155

1000000001



1 ASTA

2
3
4
5
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**
9

10 TED DONKO,

11 Plaintiff(s),

12 vs.

13 STATE OF NEVADA,

14 Defendant(s),
15

Case No: A-22-852928-W

Dept No: XVII

16
17 **CASE APPEAL STATEMENT**
18

19 1. Appellant(s): Ted Donko

20 2. Judge: Mark Gibbons

21 3. Appellant(s): Ted Donko

22 Counsel:

23 Ted Donko #1080899
24 1200 Prison Rd.
Lovelock, NV 89419

25 4. Respondent (s): State of Nevada

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**: Yes, May 23, 2022

8 **Expires 1 year from date filed

9 Appellant Filed Application to Proceed in Forma Pauperis: N/A

10 Date Application(s) filed: N/A

11 9. Date Commenced in District Court: May 20, 2022

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

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

14 11. Previous Appeal: No

15 Supreme Court Docket Number(s): N/A

16 12. Child Custody or Visitation: N/A

17 13. Possibility of Settlement: Unknown

18 Dated This 29 day of August 2022.

19 Steven D. Grierson, Clerk of the Court

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: Ted Donko

CASE SUMMARY

CASE NO. A-22-852928-W

Ted Donko, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

§
§
§
§
§

Location: **Department 17**
Judicial Officer: **Vacant, DC 17**
Filed on: **05/20/2022**
Case Number History:
Cross-Reference Case Number: **A852928**

CASE INFORMATION

Related Cases
C-19-345584-1 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**

Case Status: **05/20/2022 Open**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number A-22-852928-W
Court Department 17
Date Assigned 07/18/2022
Judicial Officer Vacant, DC 17

PARTY INFORMATION

Plaintiff

Donko, Ted Michael

Lead Attorneys

Pro Se

Defendant

State of Nevada


Afshar, John
Retained
702-671-2749(W)


DATE


EVENTS & ORDERS OF THE COURT


INDEX


EVENTS


05/20/2022  Inmate Filed - Petition for Writ of Habeas Corpus
Party: Plaintiff Donko, Ted Michael
[1] *Post Conviction*

05/20/2022  Motion for Appointment of Attorney
Filed By: Plaintiff Donko, Ted Michael
[2] *Motion for Appointment of Counsel*

05/20/2022  Application to Proceed in Forma Pauperis
Filed By: Plaintiff Donko, Ted Michael
[3] *Application to Proceed in Forma Pauperis*

05/23/2022  Order for Petition for Writ of Habeas Corpus
[4] *Order for Petition for Writ of Habeas Corpus*

05/23/2022  Order to Proceed In Forma Pauperis
[5] *Order to Proceed In Forma Pauperis*

05/24/2022  Clerk's Notice of Hearing
[6] *Notice of Hearing*

CASE SUMMARY
CASE NO. A-22-852928-W

07/06/2022



Response

[7] State's Response to Donko's Petition for Writ of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel

07/18/2022

Administrative Reassignment - Judicial Officer Change

Cases Reassigned from Judge Michael Villani to Vacant, DC 17

08/19/2022



Findings of Fact, Conclusions of Law and Order

[8] Findings of Fact, Conclusions of Law and Order

08/24/2022



Notice of Entry of Findings of Fact, Conclusions of Law

[9] Notice of Entry of Findings of Fact, Conclusions of Law and Order

08/25/2022



Notice of Appeal

[10] Notice of Appeal

08/29/2022



Case Appeal Statement

Case Appeal Statement

HEARINGS

07/27/2022

Petition for Writ of Habeas Corpus (8:30 AM) (Judicial Officer: Ellsworth, Carolyn)
Denied;

07/27/2022

Motion for Appointment of Attorney (8:30 AM) (Judicial Officer: Ellsworth, Carolyn)
Plaintiff's Motion for Appointment of Counsel
Denied;

07/27/2022



All Pending Motions (8:30 AM) (Judicial Officer: Ellsworth, Carolyn)

Matter Heard;

Journal Entry Details:

PETITION FOR WRIT OF HABEAS CORPUS...PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL Plaintiff not present. Court noted the only issues raised in the post-conviction Petition, which were not raised in the appeal and rejected by the Supreme Court, were the gunshot residue and the ineffectiveness of counsel, and for the reasons in the State's Opposition, COURT ORDERED, Petition DENIED. Court FINDS the issues are not complex or it would have appointed counsel, therefore COURT FURTHER ORDERED, Plaintiff's Motion for Appointment of Counsel DENIED. State to prepare Findings of Facts, Conclusions of Law. NDC CLERK'S NOTE: A copy of this Minute Order was mailed to: Ted Michael Donko #1080899 1200 Prison Road Lovelock, NV 89419 (8/1/2022 SA);

DISTRICT COURT CIVIL COVER SHEET

County, Nevada

A-22-852928-W
Dept. 17

Case No.

(Assigned by Clerk's Office)

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

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

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

May 20, 2022

Date

PREPARED BY CLERK

Signature of initiating party or representative

See other side for family-related case filings.

Heather S. Linn

CLERK OF THE COURT

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JOHN AFSHAR
Deputy District Attorney
Nevada Bar #014408
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

TED MICHAEL DONKO,

#1080899

Petitioner,

CASE NO: A-22-852928-W

-vs-

(C-19-345584-1)

THE STATE OF NEVADA,

Respondent.

DEPT NO: XVII

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

DATE OF HEARING: JULY 27, 2022

TIME OF HEARING: 8:30 AM

THIS CAUSE having come on for hearing before the Honorable CAROLYN ELLSWORTH, District Judge, on the 27th day of July 2022, Petitioner not being present and in pro per, Respondent being represented by STEVEN WOLFSON, Clark County District Attorney, by and through JAMES PUCCINELLI, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, the Court makes the following findings of fact and conclusions of law:

///

///

///

///

///

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

2 **PROCEDURAL HISTORY**

3 On December 19, 2019, TED MICHAEL DONKO (hereinafter “Petitioner”) was
4 charged by way of Information as follows: Counts 1 and 2 – Battery with Use of a Deadly
5 Weapon Resulting in Substantial Bodily Harm (Category B Felony – NRS 200.481); Counts
6 3, 4, and 5 – Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS
7 200.010, 200.030, 193.330, 193.165); Count 6 – Assault with a Deadly Weapon (Category B
8 Felony - NRS 200.471 - NOC 50201); Count 7 – Discharging Firearm At or Into Occupied
9 Structure, Vehicle, Aircraft, or Watercraft (Category B Felony – NRS 202.285); and Count 8
10 – Ownership or Possession of Firearm by Prohibited Person (Category B Felony – NRS
11 202.360).

12 On February 10, 2020, the State filed an Amended Information whereby it severed
13 Count 8 – Ownership or Possession of Firearm by Prohibited Person. Petitioner’s jury trial
14 commenced that same day. On February 13, 2020, the State filed a Second Amended
15 Information that reflected the bifurcated charge of Ownership or Possession of Firearm by
16 Prohibited Person.

17 On February 13, 2020, after four (4) days of trial, the jury found Petitioner guilty of the
18 following: Counts 1 and 2 – Battery with Use of a Deadly Weapon; Counts 3, 4, and 5 –
19 Attempt Murder with Use of a Deadly Weapon; Count 6 – Assault with a Deadly Weapon;
20 and Count 7 – Discharging Firearm At or Into Occupied Structure, Vehicle, Aircraft,
21 Watercraft. After reaching this verdict, the second phase of the trial, involving solely
22 Petitioner’s bifurcated charge Ownership or Possession of Firearm by Prohibited Person,
23 commenced. V AA 949. The jury also found Petitioner guilty of such charge.

24 On April 20, 2020, the district court adjudicated Petitioner guilty of all charges and
25 orally pronounced the following terms of years for his sentence to the Nevada Department of
26 Corrections (“NDOC”): Count 1 – 24 to 60 months; Count 2 – 24 to 60 months, concurrent
27 with Count 1; Count 3 – 36 to 96 months, consecutive to Counts 1 and 2, plus 12 to 30 months
28 for the Use of a Deadly Weapon, consecutive to Count 3;1 Count 4 – 36 to 96 months, plus a

1 consecutive term of 12 to 30 months for the Use of a Deadly Weapon, to run consecutive to
2 Count 3; Count 5 – 36 to 96 months, plus 12 to 30 months for the Use of a Deadly Weapon,
3 to run consecutive to Count 4; Count 6 – 12 to 30 months, to run concurrent; Count 7 – 12 to
4 30 months, to run concurrent; and Count 8 – 12 to 30 months, to run concurrent.

5 The Court further clarified that the only sentences that would run consecutive were “the
6 three Attempt Murders with Use of a Deadly Weapon,” Petitioner would receive an aggregate
7 sentence of 12 to 31.5 years, including the deadly weapon enhancements, the District Court
8 would retain jurisdiction over the restitution, and he would receive 150 days credit for time
9 served. The Judgment of Conviction was filed on April 28, 2020, provided the aforementioned
10 sentences, and clarified more fully that Count 3 would run consecutive to Counts 1 and 2, but
11 listed the aggregate total sentence, including the deadly weapon enhancements, as 144 to 378
12 months, and the aggregate sentence, not including the deadly weapon enhancements, as 108
13 to 288 months.

14 On June 3, 2020, the State filed a Notice of Motion and Motion to Address Aggregate
15 Sentence Calculations, wherein the State argued that the appropriate aggregate sentence, based
16 upon the charges at sentencing, was 168 to 438 months. On November 24, 2020, the District
17 Court explained by way of Minute Order that while it made a clerical error in calculating the
18 aggregate sentence, it appropriately held that the weapons enhancements would run
19 consecutive to the Attempt Murder charges, and Count 3 would run consecutive to Counts 1
20 and 2. Accordingly, the District Court found that the appropriate aggregate sentence was 168
21 to 438 months and ordered that an Amended Judgment of Conviction be filed.

22 The Amended Judgment of Conviction was filed on May 25, 2021. Petitioner filed a
23 Notice of Appeal on June 1, 2021. Judgment of Conviction was affirmed on April 20, 2022.
24 Remittitur issued on May 16, 2022.

25 On May 20, 2022, Petitioner filed the instant Petition and a Motion for Appointment of
26 Attorney.

27 ///

28 ///

FACTUAL BACKGROUND

On October 1, 2019, at around 12:15 PM, Las Vegas Metropolitan Police Department (“LVMPD”) officers responded to a shooting at 56 North Linn Lane in Clark County, Nevada. The 911 call described the shooter as a Hispanic male, about 5 foot 11, and wearing red. Additionally, a gray Toyota Corolla was seen fleeing the scene of the shooting.

When officers arrived at the crime scene, they saw the two male shooting victims lying on the ground next to a truck. One of the men, Jonathan Sanchez-Loza, had been shot in the leg, while the other, Fernando Espinoza, had been shot in the abdomen and the hand. Officers also observed bullet impacts on the truck and the garage bay door of the residence as well as eight shell casings in the street.

Sanchez-Lopez testified that on the day of the shooting, he received a call at around 11:30 AM from Espinoza. Eventually, he met up with Espinoza, a man named Gilbert, a man named DeAndre Woods, and the owner of the home to take trash to the dump. Ultimately, however, he helped moved furniture into the white truck that was at the scene. At about 12:00 PM he recalled someone saying “Hey, where’s Shorty?” Sanchez-Loza then looked over in the direction of the voice and saw the passenger of a Toyota, with the passenger door open, pointing a firearm at him. Sanchez-Loza was then shot and dropped to the ground. While lying on the ground, he recalled seeing Espinoza fall into the back of the truck and, while in and out of consciousness, he called his uncle who lived up the street. Sanchez-Lopez heard about ten gunshots total.

The next thing Sanchez-Lopez remembered was waking up in the hospital. He had been shot in the right thigh and left thigh. As of the day of his trial testimony, he still had a bullet lodged in his left leg and had to walk with a cane. Sanchez-Lopez further testified that he had undergone surgery in his leg, still had pain, and had scars from the injuries.

Espinoza confirmed that he too was at the residence moving furniture using his brother’s vehicle. However, Espinoza testified that while he was facing the street at the time of the shooting, he did not know from where the shots originated. Espinoza also testified that he almost did not come to court because he did not want to testify and only participated because

1 he was under subpoena. However, LVMPD Detective Jason Marin testified that when he
2 interviewed Espinoza at UMC the day after the shooting, Espinoza told him that while
3 Espinoza was at the address of the shooting on October 1, 2019, an older model Toyota pulled
4 up to the residence. He further explained to Detective Marin that he saw a passenger get out
5 of the vehicle and had either asked about Shorty or said, "Fuck Shorty." However, Espinoza
6 stated he did not get a good look at the shooter.

7 The day before the shooting, on September 30, 2019, Woods recalled sitting on a chair
8 at his ex-girlfriend's house when two young men pulled up in an older Toyota. The two men,
9 one wearing a black shirt and the other wearing a red shirt, came up to Woods and asked if he
10 knew someone named Shorty. Woods responded to the men that he did not know who Shorty
11 was and the men left.

12 At the time of the shooting on the following day, Woods testified that he was sitting on
13 a chair while the other men were moving furniture to the truck. While sitting, Woods saw the
14 same Toyota pull up. Woods then saw the same white male wearing a red shirt that had asked
15 him who Shorty was on the previous day, and that he later identified as Petitioner, exit the
16 vehicle and point a gun at the person in front of Woods. Petitioner then said, "Fuck Shorty"
17 and started shooting. The Toyota subsequently fled from the scene. Woods, appearing scared,
18 later described the shooter to responding officers. He described the shooter as a Hispanic male,
19 about 5 foot 11, 200 pounds, had nearly bald hair, and was wearing a red t-shirt.

20 Genaro Ramos, who was down the street working on his mother's vehicle at her home,
21 heard about eight to ten gunshots. A couple of minutes later, he noticed a vehicle driving
22 quickly down the street. Ramos recalled that the vehicle he saw speeding was an older model,
23 gold, sand colored, Toyota Corolla. After the Toyota sped by, he saw the vehicle stop, and
24 then saw a person, wearing a red shirt, exit the vehicle, look around suspiciously, and search
25 his pockets. The person then tried to go back to the vehicle, but then started running or walking
26 down the street. Ramos described this person as a white male in his 30s. Although Ramos did
27 not initially identify Petitioner as the individual he saw at trial, after he was excused and the
28 State explained he was free to leave, Ramos indicated to the State that he was nervous. When

1 the State asked why that was, Ramos stated it was his first time testifying and that the man he
2 saw in court was the man he saw exiting the Toyota on the day of the shooting. Based on this
3 new information, the State recalled Ramos who nervously identified Petitioner as the man he
4 saw wearing a red shirt, parking the Toyota Corolla, and walking up the street on the day of
5 the shooting.

6 After LVMPD officers responded to the crime scene, they canvassed the surrounding
7 streets for evidence. Eventually, officers found a vehicle matching the description provided,
8 an unregistered, gray or silver, four-door Toyota Corolla, in the same neighborhood as the
9 shooting. When officers brought Ramos to view the Toyota Corolla, he told them it was the
10 same vehicle he saw speed by after he heard the gunshots. After locating the vehicle,
11 investigators processed the vehicle for fingerprints and recovered a license plate, a .40 caliber
12 cartridge, as well as a bullet that had a head stamp that matched the casings found at the scene.
13 The latent prints that were removed from the license plate that was recovered were later
14 determined to be a match to Petitioner's left middle finger.

15 Officers also found a red shirt which appeared to have been laid on the side of the road
16 in the same neighborhood as the crime scene. The DNA buccal swab that was later obtained
17 from Petitioner matched the DNA that was swabbed from the red shirt. Officers also recovered
18 surveillance video from a resident that depicted an individual matching the description of the
19 shooting suspect who was wearing a red shirt and had nearly bald hair in the video. The suspect
20 in the video was seen walking in the direction where the red shirt was eventually found.

21 Later, officers conducted a photograph lineup with Woods. They showed Woods six
22 photographs, including one of Petitioner. Complying with routine practice, all of the men in
23 the photographs met the same description as Petitioner as far as height, weight, skin tone, and
24 hair style. LVMPD Detective Jason Marin, who had conducted the photo lineup, provided the
25 directions to Petitioner and after Petitioner signed the form stating he understood the
26 instructions for the photo lineup, Woods wrote down that the man in photo number five was
27 the shooter and he was 95% sure. Petitioner was photo number five. Woods testified that the
28 reason he was 95% sure as opposed to 100% was because when he had previously seen the

1 shooter his hair was shorter which made him only 95% sure. Further, when asked whether
2 learning later that Petitioner was white instead of Hispanic changed his mind on his
3 identification, he stated no. Moreover, seeing that Petitioner did not have tattoos did not change
4 Woods' mind about Petitioner being the shooter because Woods was not focused on the tattoos
5 when he was trying to get out of the crossfire on the day of the shooting.

6 Detective Marin testified at trial that it did not change the officers' investigation when
7 Woods originally described the shooter as a Hispanic male because he could have interpreted
8 it differently since he had such a brief interaction with the shooter. In fact, a race mix up is
9 common. Notably, Detective Marin also testified that after Petitioner was apprehended the
10 first time, he only noticed Petitioner's tattoos was when he was sitting two feet from him
11 because Petitioner's tattoos were not immediately apparent.

12 When Detective Marin later interviewed Petitioner, Petitioner stated that he knew
13 Shorty, but there was no evidence that Petitioner and Woods knew each other. When Detective
14 Marin asked Petitioner about his fingerprint in the vehicle, Petitioner said he was the passenger
15 in the vehicle, which he described as an older model sedan, the night before the shooting.
16 Petitioner testified he met Woods in the past and hung out with him.

17 ANALYSIS

18 **I. PETITIONER'S CLAIMS ARE OUTSIDE THE SCOPE OF A PETITION**

19 Petitioner raises several claims that are outside the scope of a Petition, either because
20 the claims are waived for failure to raise on direct appeal or barred by case of the law doctrine.
21 Petitioner claims: (1) "The court did not ask for the red shirt to get tested for GSR 'gunshot
22 residue' (Petition at 6); (2) the Court allowed an unreliable in-court identification (Petition at
23 7); (3) "tainted jury" where the jury consisted of 90% Hispanics (Petition at 7); (4) the District
24 Court violated Petitioner's double jeopardy rights (Petition at 7a); (5) prosecutorial
25 misconduct when the State allegedly shifted the burden to Petitioner; and (6) the district court

26 ///

27 ///

28 ///

1 erred in denying the defense’s jury instructions (Petition at 7b).

2 NRS 34.810(1) reads:

3 The court shall dismiss a petition if the court determines that:

4 (a) The petitioner’s conviction was upon a plea of guilty or guilty
5 but mentally ill and the petition is not based upon an allegation
6 that the plea was involuntarily or unknowingly or that the plea was
7 entered without effective assistance of counsel.

8 (b) The petitioner’s conviction was the result of a trial and the
9 grounds for the petition could have been:

10 (2) Raised in a direct appeal or a prior petition for a writ of habeas
11 corpus or postconviction relief.

12 The Nevada Supreme Court has held that “challenges to the validity of a guilty plea and claims
13 of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction
14 proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on
15 direct appeal, or they will be *considered waived in subsequent proceedings.*” Franklin v. State,
16 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other
17 grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). “A court must dismiss a
18 habeas petition if it presents claims that either were or could have been presented in an earlier
19 proceeding, unless the court finds both cause for failing to present the claims earlier or for
20 raising them again and actual prejudice to the petitioner.” Evans v. State, 117 Nev. 609, 646-
21 47, 29 P.3d 498, 523 (2001).

22 Accordingly, claims one and three are waived for failure to raise on direct appeal. The
23 remaining claims – two, four, five, and six - fail because they are outside the scope of a post-
24 conviction proceeding. The only claims permissible on a petition are those “challenges to the
25 validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel.”
26 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)
27 (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)).
28 Additionally, these claims are also barred by the law of the case doctrine.

“The law of a first appeal is law of the case on all subsequent appeals in which the facts
are substantially the same.” Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting
Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). “The doctrine of the law of the

case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.” *Id.* at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. *Pellegrini v. State*, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing *McNelson v. State*, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6. Petitioner’s claims fail because Petitioner raised these claims on direct appeal wherein the Nevada Court of Appeals denied the claims on the merits.

i. Alleged unreliable in-court identification

Petitioner claims Ramos’s in-court identification after he was re-called to testify was improper. Petition at 7. The Nevada Court of Appeals held Petitioner’s claim without merit:

Donko's counsel said that the identification was "improper," given that Ramos failed to identify Donko during his initial testimony. Donko's counsel asked the court to strike the identification. The State responded by indicating that there was nothing objectionable about Ramos's testimony concerning the hallway conversation with the prosecutor as it was accurate and with his identification of Donko. The district court stated that defense counsel's objection to Ramos's in-court identification was "not a legal objection," that there was nothing inadmissible about Ramos's testimony, and that Danko's counsel would be able to cross-examine Ramos regarding the identification. Donko's counsel then orally requested a mistrial for the same reasons previously discussed. The district court denied the oral motion.

First, Donko argues that the district court abused its discretion by admitting Ramos's in-court identification testimony because Ramos failed to identify Donko as the shooter during his initial testimony and the admission of Ramos's in-court identification when he was recalled as a witness deprived Donko of due process.

...

We conclude that the district court did not abuse its discretion in admitting Ramos's in-court identification of Donko. Ramos did not make a pretrial identification of Danko, but rather Ramos identified Donko during his testimony after he was recalled as a witness at trial. Accordingly, the credibility and weight of Ramos's testimony is within the province of the jury.” *Wise*, 92 Nev. at 183, 547 P.2d at 315. Donko, through counsel, cross-examined Ramos, thus satisfying due process as to Ramos's in court identification of Danko.

1 Donko v. State, Order of Affirmance COA-83037 p. 3, 7-8.

2 **ii. Double Jeopardy**

3 Petitioner claims the District Court violated his Double Jeopardy rights by changing
4 his aggregate sentence after he started serving his sentence. Petition at 7a. The Nevada Court
5 of Appeals denied Petitioner's claim:

6
7 Second, Donko argues that the district court abused its discretion in amending
8 Donko's judgment of conviction after he started serving his sentence, thereby
9 improperly increasing his aggregate sentence and violating his protection from
10 double jeopardy. A claim that a conviction violates the Double Jeopardy Clause
11 generally is subject to de novo review on appeal. Davidson v. State, 124 Nev.
12 892, 896, 192 P.3d 1185, 1189 (2008); Ebeling v. State, 120 Nev. 401, 404, 91
13 P.3d 699, 601 (2004). NRS 176.566 states that "(c]lerical mistakes in judgments,
orders or other parts of the record and errors in the record arising from oversight
or omission may be corrected by the court at any time and after such notice, if
any, as the court orders."

14 Here, the district court did not amend the sentence on any individual conviction,
15 but simply corrected a clerical error pertaining to the calculation of the aggregate
16 sentence. Donko's argument that this error is not a "clerical error" is
17 unpersuasive. See Devlin v. State, No. 78518, 2019 2019 WL 4892531, at *1
18 (Nev. Sept. 12, 2019) (Order of Affirmance) (holding that a district court can
19 correct such clerical mistakes, when a district court entered an amended
20 judgment of conviction correcting an aggregate sentence from 11 years to 12
21 years). Here, the district court modified the aggregate sentence language to
22 comport with the individual sentences originally imposed at sentencing.
Therefore, the district court corrected its previous miscalculation of the
aggregate sentence to be consistent with the individual sentences set forth in the
judgment of conviction. Thus, we are not persuaded that the district court abused
its discretion in amending Donko's judgment of conviction to correct the
aggregate sentence.

23 Donko v. State, Order of Affirmance COA-83037 p. 8-9.

24 **iii. Alleged Prosecutorial Misconduct**

25 Petitioner claims the State committed prosecutorial misconduct by shifting the burden
26 to Donko by stating that Petitioner failed to "explain how the fingerprint [sic] or red shirt was
27 found." Petition at 7a. The Nevada Court of Appeals heard and rejected this claim:

28 ///

1 Fifth, Donko contends that the district court erred in allowing the State to
2 commit prosecutorial misconduct, through improper burden-shifting, when the
3 State argued in closing that during cross-examination Donko failed to provide
4 an explanation for his DNA being present on the red shirt found at the scene and
5 for his fingerprint being found on a license plate located inside the Toyota
6 vehicle. When reviewing claims of prosecutorial misconduct, this court
7 considers whether the conduct was improper and, if it was, whether it warrants
8 reversal or was harmless. ...

9 Here, Donko testified in his defense and the State properly cross-examined him
10 about his DNA being identified on the red shirt and his fingerprint lifted from a
11 license plate located inside the vehicle found near the scene. Donko attempted
12 to suggest that he was not the shooter, but he did not persuasively refute the
13 physical evidence suggesting otherwise during cross-examination, resulting in
14 the State arguing during closing that Donko "(g]ives no viable explanation" for
15 the physical evidence obtained at the scene. The State was permitted to comment
16 on the defendant's failure to explain physical evidence that directly tied him to
17 the shooting. See Evans, 117 Nev. at 630, 28 P.3d at 513 (noting that the State
18 may comment on the credibility of witnesses based on the evidence presented
19 and "comment on the failure of the defense to counter or explain evidence
20 presented"). The State here simply commented on the lack of support or
21 explanation for Donko's assertion that he was not the shooter. Further, the jury
22 was properly instructed that the State had the burden of proof. Accordingly, the
23 State did not impermissibly shift the burden of proof or engage in prosecutorial
24 misconduct during closing.

25 Donko v. State, Order of Affirmance COA-83037 p. 12-13

26 **iv. Jury Instructions**

27 Petitioner claims the District Court violated his rights by rejecting Petitioner's claim
28 to replace the word "unless" for "until" in the Reasonable Doubt Instruction. Petition at 7b.

Fourth, Donko contends that the district court abused its discretion when it
rejected his proposed jury instructions and revision to the verdict form.
Specifically, he states that the district court should have permitted instructions
that (1) modified the reasonable doubt instruction ...

NRS 175.211 provides the statutorily mandated language for a reasonable doubt
instruction, which does not include the language requested by Donko. To the
extent Donko argues under Crawford the district court abused its discretion when
it rejected his proffered other negatively-worded or inverse instructions, we note
"the district court may refuse a jury instruction on the defendant's theory of the
case which is substantially covered by other instructions." Runion. v. State, 116
Nev. 1041, 1050, 13 P.3d 52, 58 (2000). Donko fails to demonstrate that his
proposed inverse instructions went to a specific theory of his case and were not

1 merely duplicative of the court-approved instructions. Additionally, district
2 courts do not err by refusing to accept duplicitous, misleading, or inaccurate jury
3 instructions. Carter v. State, 121 Nev. 759, 765, 121 P.3d 592,596 (2005); see
4 also McDermott v. State, No. 79296, 2020 WL 6743121 (Nev. Nov. 13, 2020)
5 (Order of Affirmance) (concluding that because the proffered instruction was
6 otherwise covered by the reasonable-doubt instruction, there was no abuse of
7 discretion by the district court in refusing to give it). Although the district court
8 could have properly given the inverse instructions, we cannot conclude that the
9 court reversibly erred. The instructions it did give were accurate and any error
10 was harmless beyond a reasonable doubt. See Guitron v. State, 131 Nev. 215,
11 229-31, 350 P.3d 93, 102-03 (Ct. App. 2016).

12 Donko's contention that the district court also abused its discretion in denying
13 his request to place "Not Guilty" before "Guilty" is also unpersuasive, as the
14 Nevada Supreme Court has affirmatively rejected this argument. See Yandell v.
15 State, No. 78259, 2020 WL 4333604, at *4 (Nev. July 27, 2020) (Order of
16 Affirmance) (rejecting the appellant's argument that "not guilty" should have
17 been listed first on verdict form because there was no case adopting the "position
18 that the 'not guilty' [option] must be listed before the 'guilty' option on a verdict
19 sheet" (internal quotation marks omitted)).

20 Donko v. State, Order of Affirmance COA-83037 p. 10-11

21 Because all these claims have been adjudicated and denied on the merits by the Nevada
22 Court of Appeals, they are barred by law of the case doctrine and are all denied.

23 **II. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL**

24 Petitioner claims his trial counsel was ineffective for failing to ask the questions
25 Petitioner requested. Petition at 6. Petitioner implies an ineffective assistance of counsel
26 regarding counsel's failure to test the red t-shirt for gunshot residue. Petition at 6.

27 The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal
28 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
defense." The United States Supreme Court has long recognized that "the right to counsel is
the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686,
104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
(1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of
Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865

1 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
2 representation fell below an objective standard of reasonableness, and second, that but for
3 counsel's errors, there is a reasonable probability that the result of the proceedings would have
4 been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State
5 Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-
6 part test). “[T]here is no reason for a court deciding an ineffective assistance claim to approach
7 the inquiry in the same order or even to address both components of the inquiry if the defendant
8 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

9 The court begins with the presumption of effectiveness and then must determine
10 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
11 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
12 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
13 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
14 537 P.2d 473, 474 (1975).

15 Counsel cannot be ineffective for failing to make futile objections or arguments. See
16 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
17 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
18 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
19 (2002).

20 Based on the above law, the role of a court in considering allegations of ineffective
21 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
22 whether, under the particular facts and circumstances of the case, trial counsel failed to render
23 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
24 (1978). This analysis does not mean that the court should “second guess reasoned choices
25 between trial tactics nor does it mean that defense counsel, to protect himself against
26 allegations of inadequacy, must make every conceivable motion no matter how remote the
27 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
28 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel

1 cannot create one and may disserve the interests of his client by attempting a useless charade.”
2 United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

3 “There are countless ways to provide effective assistance in any given case. Even the
4 best criminal defense attorneys would not defend a particular client in the same way.”
5 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
6 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
7 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
8 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
9 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
10 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

11 Even if a defendant can demonstrate that his counsel’s representation fell below an
12 objective standard of reasonableness, he must still demonstrate prejudice and show a
13 reasonable probability that, but for counsel’s errors, the result of the trial would have been
14 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
15 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
16 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,
17 694, 104 S. Ct. at 2064-65, 2068).

18 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
19 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
20 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,
21 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must
22 be supported with specific factual allegations, which if true, would entitle the petitioner to
23 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”
24 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
25 34.735(6) states in relevant part, “[Petitioner] *must* allege specific facts supporting the claims
26 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your
27 petition to be dismissed.” (emphasis added).

28 ///

1 Petitioner claims his trial counsel was ineffective for failing to ask the questions
2 Petitioner requested. Petition at 6. This claim fails as bare and naked. Petitioner does not
3 identify what those questions were or who the questions should have been asked of. As such,
4 Petitioner fails to show that counsel’s performance was deficient. Petitioner also fails to show
5 prejudice as he does not state why the result of his trial would have been different had counsel
6 asked those questions. Additionally, which questions to ask a witness are virtually
7 unreviewable strategic decisions. Therefore, Petitioner fails to demonstrate deficiency or
8 prejudice.

9 Petitioner implies an ineffective assistance of counsel regarding counsel’s failure to test
10 the red t-shirt for gunshot residue. Petition at 6. To the extent Petitioner raises an ineffective
11 assistance of counsel claim regarding the t-shirt not being tested for gunshot residue (“GSR”),
12 this claim also fails for failure to show deficiency and prejudice. Petitioner cannot show
13 counsel’s performance was deficient because gunshot residue testing has been deemed
14 unreliable as there is a high probability of cross contamination. At the 2005 Federal Bureau
15 Investigation Laboratory’s Gunshot Residue Symposium in 2005, “[a]ll participants agreed
16 that GSR sampling should be done at the scene, where permissible, and as expeditiously as
17 possible.” FBI Laboratory’s Gunshot Residue Symposium, May 31-June 3, 2005.¹ The
18 probability of cross contamination is very high such that someone can have GSR on their
19 clothing despite never having direct contact with a firearm. Okorie Okorocha, The Art of
20 Gunshot Residue Testing, Toxicolawgy, Oct. 26, 2018, [https://www.okorieokorocha.com/the-](https://www.okorieokorocha.com/the-art-of-gunshot-residue-testing/)
21 [art-of-gunshot-residue-testing/](https://www.okorieokorocha.com/the-art-of-gunshot-residue-testing/) (Last Accessed July 6, 2022). Notably, GSR testing has
22 decreased to such degree that even the FBI no longer conducts GSR testing. *Id.*; *see also* U.S.
23 Department of Justice, Forensic Science: Gunshot Residue Tests, Criminal Law Bulletin Vol.
24 27 Issue 6 1991 (“even GSR tests are not conclusive.”)² Studies have found that only 50% of
25 known self-inflicted gunshot suicides tested positive for GSR when tested by scanning electron
26 microscopy with energy-dispersive x-ray spectroscopy. Molina DK, Martinez M, Garcia J,

27
28 ¹ Summary accessible at: https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/july2006/research/2006_07_research01.htm (Last Accessed July 6, 2022.)

² Accessible at: [Forensic Science: Gunshot Residue Tests | Office of Justice Programs \(ojp.gov\)](https://www.ojp.gov/forensic-science/gunshot-residue-tests) (Last Accessed: July 6, 2022)

1 DiMaio VJ. Gunshot Residue Testing in Suicides: Part I: Analysis by Scanning Electron
2 Microscopy with Energy-Dispersive X-ray., The American Journal of Forensic Medicine and
3 Pathology, Sept. 28, 2007.³ Moreover, the Las Vegas Metropolitan Police Department
4 Forensic Lab, nor any other lab in Nevada, conduct GSR testing. As such, trial counsel was
5 not deficient in not having the t-shirt tested for GSR.

6 Likewise, Petitioner cannot show prejudice given the overwhelming evidence of his
7 guilt. Police found a car matching the description of the shooter's car a few blocks from the
8 shooting. The car was impounded and a license plate, bullet, and unspent round of ammunition
9 was found. When tested, Petitioner's fingerprint was found on the license plate and the
10 cartridge found in the car was the same type of shell casings found at the scene of the shooting.
11 Additionally, the shooter was described as wearing red, and the t-shirt Petitioner highlights, is
12 the one found near the shooting. The t-shirt was tested and Petitioner's DNA was found on the
13 shirt. Further, at trial two witnesses identified Petitioner as the shooter. Thus, Petitioner cannot
14 satisfy Strickland.

15 Accordingly, Petitioner's claims are denied.

16 **III. NO CUMULATIVE ERROR**

17 Petitioner asserts a claim of cumulative error including in the context of ineffective
18 assistance of counsel. Petition at 7a. The Nevada Supreme Court has never held that instances
19 of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot.
20 However, even if they could be, it would be of no moment as there was no single instance of
21 ineffective assistance in Petitioner's case. See United States v. Rivera, 900 F.2d 1462, 1471
22 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters
23 determined to be error, not the cumulative effect of non-errors.").

24 Nonetheless, Petitioner's claim is without merit. "Relevant factors to consider in
25 evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity
26 and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev.
27 1, 17, 992 P.2d 845, 855 (2000). Furthermore, any errors that occurred at trial were minimal

28 ³ Accessible at: [Gunshot residue testing in suicides: Part I: Analysis by scanning electron microscopy with energy-dispersive X-ray - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/16111111/) (Last Accessed: July 6, 2022)

1 in quantity and character, and a defendant “is not entitled to a perfect trial, but only a fair trial.”
2 Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). Therefore, Petitioner’s cumulative
3 error claim is denied.

4 **IV. PETITIONER IS NOT ENTITLED TO APPOINTMENT OF COUNSEL**

5 Petitioner requests appointment of counsel. Motion at 1-3. However, Petitioner fails to
6 show that he is entitled to appointment of counsel.

7 Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-
8 conviction proceedings. See Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566
9 (1991). The Nevada Supreme Court similarly observed that “[t]he Nevada Constitution...does
10 not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada
11 Constitution’s right to counsel provision as being coextensive with the Sixth Amendment to
12 the United States Constitution.” McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258
13 (1996). McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling
14 appointed counsel when petitioner is under a sentence of death), one does not have “any
15 constitutional or statutory right to counsel at all” in post-conviction proceedings. Id. at 164,
16 912 P.2d at 258.

17 The Nevada Legislature has, however, given courts the discretion to appoint post-
18 conviction counsel so long as “the court is satisfied that the allegation of indigency is true, and
19 the petition is not dismissed summarily.” NRS 34.750. NRS 34.750 reads:

20
21 A petition may allege that the Defendant is unable to pay the costs
22 of the proceedings or employ counsel. If the court is satisfied that
23 the allegation of indigency is true and the petition *is not dismissed*
summarily, the court may appoint counsel at the time the court
orders the filing of an answer and a return. In making its
determination, the court may consider, among other things, the
severity of the consequences facing the petitioner and whether:

- 24 (a) The issues are difficult;
25 (b) The petitioner is unable to comprehend the proceedings; or
(c) Counsel is necessary to proceed with discovery

26 (emphasis added). Accordingly, under NRS 34.750, it is clear that the Court has discretion in
27 determining whether to appoint counsel.

28 ///

1 Petitioner's request is denied as he has failed to meet any of the additional statutory
2 factors under NRS 34.750. The issues Petitioner presents are not complex, otherwise this Court
3 would have appointed counsel. Petitioner does not identify any complex issues – six of the
4 issues are outside the scope of a Petition, and several of those are barred by law of the case
5 doctrine. Both of Petitioner's ineffective assistance of counsel claims are without merit. The
6 claim regarding counsel's alleged failure to ask questions Petitioner requested, does not allege
7 any specific facts which, if true, would entitle him to relief. Petitioner's implied ineffective
8 assistance of counsel claim regarding the GSR testing is not complex because studies have
9 shown that GSR is unreliable. Cumulative error does not apply to post-conviction and, even if
10 it did, he has not demonstrated any error in either of his two ineffective assistance of counsel
11 claims. Petitioner appears to be able to comprehend the proceedings, and there is no need for
12 discovery. His motion is just a form that provides no additional details beyond what his
13 Petition presents. Therefore, Petitioner's request for appointment of counsel is denied.

14 **ORDER**

15 THEREFORE, IT IS HEREBY ORDERED that Donko's Petition for Writ of Habeas
16 Corpus (Post-Conviction) and Motion for Appointment of Counsel are DENIED.

17 Dated this 19th day of August, 2022

18 

19
20 For Judge Ellsworth

21 **128 F48 02CF 2983**
Mark Gibbons
District Court Judge

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

24 BY /s/ JOHN AFSHAR
25 JOHN AFSHAR
26 Deputy District Attorney
Nevada Bar #014408
27
28

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 16th day of August, 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

TED MICHAEL DONKO, BAC #1080899
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

BY /s/ Janet Hayes
Secretary for the District Attorney's Office

19F24531X/JA/ml/jh/GANG

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Ted Donko, Plaintiff(s)

CASE NO: A-22-852928-W

7 vs.

DEPT. NO. Department 17

8 State of Nevada, Defendant(s)
9

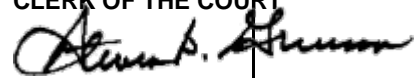
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Final Accounting was served via the court's electronic eFile system to
13 all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 8/19/2022

15 Dept 17 Law Clerk

dept17lc@clarkcountycourts.us



1 NEFF

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5 TED DONKO,

6 Petitioner,

Case No: A-22-852928-W

Dept No: XVII

7 vs.

8 STATE OF NEVADA,

9 Respondent,

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

10
11 PLEASE TAKE NOTICE that on August 19, 2022, 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
15 to you. This notice was mailed on August 24, 2022.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

17 /s/ Amanda Hampton

18 Amanda Hampton, Deputy Clerk

19 CERTIFICATE OF E-SERVICE / MAILING

20 I hereby certify that on this 24 day of August 2022, 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 Ted Donko # 1080899
1200 Prison Rd.
26 Lovelock, NV 89419

27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk

Heather S. Linn

CLERK OF THE COURT

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JOHN AFSHAR
Deputy District Attorney
Nevada Bar #014408
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

TED MICHAEL DONKO,

#1080899

Petitioner,

CASE NO: A-22-852928-W

-vs-

(C-19-345584-1)

THE STATE OF NEVADA,

Respondent.

DEPT NO: XVII

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

DATE OF HEARING: JULY 27, 2022

TIME OF HEARING: 8:30 AM

THIS CAUSE having come on for hearing before the Honorable CAROLYN ELLSWORTH, District Judge, on the 27th day of July 2022, Petitioner not being present and in pro per, Respondent being represented by STEVEN WOLFSON, Clark County District Attorney, by and through JAMES PUCCINELLI, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, the Court makes the following findings of fact and conclusions of law:

///

///

///

///

///

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

2 **PROCEDURAL HISTORY**

3 On December 19, 2019, TED MICHAEL DONKO (hereinafter “Petitioner”) was
4 charged by way of Information as follows: Counts 1 and 2 – Battery with Use of a Deadly
5 Weapon Resulting in Substantial Bodily Harm (Category B Felony – NRS 200.481); Counts
6 3, 4, and 5 – Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS
7 200.010, 200.030, 193.330, 193.165); Count 6 – Assault with a Deadly Weapon (Category B
8 Felony - NRS 200.471 - NOC 50201); Count 7 – Discharging Firearm At or Into Occupied
9 Structure, Vehicle, Aircraft, or Watercraft (Category B Felony – NRS 202.285); and Count 8
10 – Ownership or Possession of Firearm by Prohibited Person (Category B Felony – NRS
11 202.360).

12 On February 10, 2020, the State filed an Amended Information whereby it severed
13 Count 8 – Ownership or Possession of Firearm by Prohibited Person. Petitioner’s jury trial
14 commenced that same day. On February 13, 2020, the State filed a Second Amended
15 Information that reflected the bifurcated charge of Ownership or Possession of Firearm by
16 Prohibited Person.

17 On February 13, 2020, after four (4) days of trial, the jury found Petitioner guilty of the
18 following: Counts 1 and 2 – Battery with Use of a Deadly Weapon; Counts 3, 4, and 5 –
19 Attempt Murder with Use of a Deadly Weapon; Count 6 – Assault with a Deadly Weapon;
20 and Count 7 – Discharging Firearm At or Into Occupied Structure, Vehicle, Aircraft,
21 Watercraft. After reaching this verdict, the second phase of the trial, involving solely
22 Petitioner’s bifurcated charge Ownership or Possession of Firearm by Prohibited Person,
23 commenced. V AA 949. The jury also found Petitioner guilty of such charge.

24 On April 20, 2020, the district court adjudicated Petitioner guilty of all charges and
25 orally pronounced the following terms of years for his sentence to the Nevada Department of
26 Corrections (“NDOC”): Count 1 – 24 to 60 months; Count 2 – 24 to 60 months, concurrent
27 with Count 1; Count 3 – 36 to 96 months, consecutive to Counts 1 and 2, plus 12 to 30 months
28 for the Use of a Deadly Weapon, consecutive to Count 3;1 Count 4 – 36 to 96 months, plus a

1 consecutive term of 12 to 30 months for the Use of a Deadly Weapon, to run consecutive to
2 Count 3; Count 5 – 36 to 96 months, plus 12 to 30 months for the Use of a Deadly Weapon,
3 to run consecutive to Count 4; Count 6 – 12 to 30 months, to run concurrent; Count 7 – 12 to
4 30 months, to run concurrent; and Count 8 – 12 to 30 months, to run concurrent.

5 The Court further clarified that the only sentences that would run consecutive were “the
6 three Attempt Murders with Use of a Deadly Weapon,” Petitioner would receive an aggregate
7 sentence of 12 to 31.5 years, including the deadly weapon enhancements, the District Court
8 would retain jurisdiction over the restitution, and he would receive 150 days credit for time
9 served. The Judgment of Conviction was filed on April 28, 2020, provided the aforementioned
10 sentences, and clarified more fully that Count 3 would run consecutive to Counts 1 and 2, but
11 listed the aggregate total sentence, including the deadly weapon enhancements, as 144 to 378
12 months, and the aggregate sentence, not including the deadly weapon enhancements, as 108
13 to 288 months.

14 On June 3, 2020, the State filed a Notice of Motion and Motion to Address Aggregate
15 Sentence Calculations, wherein the State argued that the appropriate aggregate sentence, based
16 upon the charges at sentencing, was 168 to 438 months. On November 24, 2020, the District
17 Court explained by way of Minute Order that while it made a clerical error in calculating the
18 aggregate sentence, it appropriately held that the weapons enhancements would run
19 consecutive to the Attempt Murder charges, and Count 3 would run consecutive to Counts 1
20 and 2. Accordingly, the District Court found that the appropriate aggregate sentence was 168
21 to 438 months and ordered that an Amended Judgment of Conviction be filed.

22 The Amended Judgment of Conviction was filed on May 25, 2021. Petitioner filed a
23 Notice of Appeal on June 1, 2021. Judgment of Conviction was affirmed on April 20, 2022.
24 Remittitur issued on May 16, 2022.

25 On May 20, 2022, Petitioner filed the instant Petition and a Motion for Appointment of
26 Attorney.

27 ///

28 ///

FACTUAL BACKGROUND

On October 1, 2019, at around 12:15 PM, Las Vegas Metropolitan Police Department (“LVMPD”) officers responded to a shooting at 56 North Linn Lane in Clark County, Nevada. The 911 call described the shooter as a Hispanic male, about 5 foot 11, and wearing red. Additionally, a gray Toyota Corolla was seen fleeing the scene of the shooting.

When officers arrived at the crime scene, they saw the two male shooting victims lying on the ground next to a truck. One of the men, Jonathan Sanchez-Loza, had been shot in the leg, while the other, Fernando Espinoza, had been shot in the abdomen and the hand. Officers also observed bullet impacts on the truck and the garage bay door of the residence as well as eight shell casings in the street.

Sanchez-Lopez testified that on the day of the shooting, he received a call at around 11:30 AM from Espinoza. Eventually, he met up with Espinoza, a man named Gilbert, a man named DeAndre Woods, and the owner of the home to take trash to the dump. Ultimately, however, he helped moved furniture into the white truck that was at the scene. At about 12:00 PM he recalled someone saying “Hey, where’s Shorty?” Sanchez-Loza then looked over in the direction of the voice and saw the passenger of a Toyota, with the passenger door open, pointing a firearm at him. Sanchez-Loza was then shot and dropped to the ground. While lying on the ground, he recalled seeing Espinoza fall into the back of the truck and, while in and out of consciousness, he called his uncle who lived up the street. Sanchez-Lopez heard about ten gunshots total.

The next thing Sanchez-Lopez remembered was waking up in the hospital. He had been shot in the right thigh and left thigh. As of the day of his trial testimony, he still had a bullet lodged in his left leg and had to walk with a cane. Sanchez-Lopez further testified that he had undergone surgery in his leg, still had pain, and had scars from the injuries.

Espinoza confirmed that he too was at the residence moving furniture using his brother’s vehicle. However, Espinoza testified that while he was facing the street at the time of the shooting, he did not know from where the shots originated. Espinoza also testified that he almost did not come to court because he did not want to testify and only participated because

1 he was under subpoena. However, LVMPD Detective Jason Marin testified that when he
2 interviewed Espinoza at UMC the day after the shooting, Espinoza told him that while
3 Espinoza was at the address of the shooting on October 1, 2019, an older model Toyota pulled
4 up to the residence. He further explained to Detective Marin that he saw a passenger get out
5 of the vehicle and had either asked about Shorty or said, "Fuck Shorty." However, Espinoza
6 stated he did not get a good look at the shooter.

7 The day before the shooting, on September 30, 2019, Woods recalled sitting on a chair
8 at his ex-girlfriend's house when two young men pulled up in an older Toyota. The two men,
9 one wearing a black shirt and the other wearing a red shirt, came up to Woods and asked if he
10 knew someone named Shorty. Woods responded to the men that he did not know who Shorty
11 was and the men left.

12 At the time of the shooting on the following day, Woods testified that he was sitting on
13 a chair while the other men were moving furniture to the truck. While sitting, Woods saw the
14 same Toyota pull up. Woods then saw the same white male wearing a red shirt that had asked
15 him who Shorty was on the previous day, and that he later identified as Petitioner, exit the
16 vehicle and point a gun at the person in front of Woods. Petitioner then said, "Fuck Shorty"
17 and started shooting. The Toyota subsequently fled from the scene. Woods, appearing scared,
18 later described the shooter to responding officers. He described the shooter as a Hispanic male,
19 about 5 foot 11, 200 pounds, had nearly bald hair, and was wearing a red t-shirt.

20 Genaro Ramos, who was down the street working on his mother's vehicle at her home,
21 heard about eight to ten gunshots. A couple of minutes later, he noticed a vehicle driving
22 quickly down the street. Ramos recalled that the vehicle he saw speeding was an older model,
23 gold, sand colored, Toyota Corolla. After the Toyota sped by, he saw the vehicle stop, and
24 then saw a person, wearing a red shirt, exit the vehicle, look around suspiciously, and search
25 his pockets. The person then tried to go back to the vehicle, but then started running or walking
26 down the street. Ramos described this person as a white male in his 30s. Although Ramos did
27 not initially identify Petitioner as the individual he saw at trial, after he was excused and the
28 State explained he was free to leave, Ramos indicated to the State that he was nervous. When

1 the State asked why that was, Ramos stated it was his first time testifying and that the man he
2 saw in court was the man he saw exiting the Toyota on the day of the shooting. Based on this
3 new information, the State recalled Ramos who nervously identified Petitioner as the man he
4 saw wearing a red shirt, parking the Toyota Corolla, and walking up the street on the day of
5 the shooting.

6 After LVMPD officers responded to the crime scene, they canvassed the surrounding
7 streets for evidence. Eventually, officers found a vehicle matching the description provided,
8 an unregistered, gray or silver, four-door Toyota Corolla, in the same neighborhood as the
9 shooting. When officers brought Ramos to view the Toyota Corolla, he told them it was the
10 same vehicle he saw speed by after he heard the gunshots. After locating the vehicle,
11 investigators processed the vehicle for fingerprints and recovered a license plate, a .40 caliber
12 cartridge, as well as a bullet that had a head stamp that matched the casings found at the scene.
13 The latent prints that were removed from the license plate that was recovered were later
14 determined to be a match to Petitioner's left middle finger.

15 Officers also found a red shirt which appeared to have been laid on the side of the road
16 in the same neighborhood as the crime scene. The DNA buccal swab that was later obtained
17 from Petitioner matched the DNA that was swabbed from the red shirt. Officers also recovered
18 surveillance video from a resident that depicted an individual matching the description of the
19 shooting suspect who was wearing a red shirt and had nearly bald hair in the video. The suspect
20 in the video was seen walking in the direction where the red shirt was eventually found.

21 Later, officers conducted a photograph lineup with Woods. They showed Woods six
22 photographs, including one of Petitioner. Complying with routine practice, all of the men in
23 the photographs met the same description as Petitioner as far as height, weight, skin tone, and
24 hair style. LVMPD Detective Jason Marin, who had conducted the photo lineup, provided the
25 directions to Petitioner and after Petitioner signed the form stating he understood the
26 instructions for the photo lineup, Woods wrote down that the man in photo number five was
27 the shooter and he was 95% sure. Petitioner was photo number five. Woods testified that the
28 reason he was 95% sure as opposed to 100% was because when he had previously seen the

1 shooter his hair was shorter which made him only 95% sure. Further, when asked whether
2 learning later that Petitioner was white instead of Hispanic changed his mind on his
3 identification, he stated no. Moreover, seeing that Petitioner did not have tattoos did not change
4 Woods' mind about Petitioner being the shooter because Woods was not focused on the tattoos
5 when he was trying to get out of the crossfire on the day of the shooting.

6 Detective Marin testified at trial that it did not change the officers' investigation when
7 Woods originally described the shooter as a Hispanic male because he could have interpreted
8 it differently since he had such a brief interaction with the shooter. In fact, a race mix up is
9 common. Notably, Detective Marin also testified that after Petitioner was apprehended the
10 first time, he only noticed Petitioner's tattoos was when he was sitting two feet from him
11 because Petitioner's tattoos were not immediately apparent.

12 When Detective Marin later interviewed Petitioner, Petitioner stated that he knew
13 Shorty, but there was no evidence that Petitioner and Woods knew each other. When Detective
14 Marin asked Petitioner about his fingerprint in the vehicle, Petitioner said he was the passenger
15 in the vehicle, which he described as an older model sedan, the night before the shooting.
16 Petitioner testified he met Woods in the past and hung out with him.

17 ANALYSIS

18 **I. PETITIONER'S CLAIMS ARE OUTSIDE THE SCOPE OF A PETITION**

19 Petitioner raises several claims that are outside the scope of a Petition, either because
20 the claims are waived for failure to raise on direct appeal or barred by case of the law doctrine.
21 Petitioner claims: (1) "The court did not ask for the red shirt to get tested for GSR 'gunshot
22 residue' (Petition at 6); (2) the Court allowed an unreliable in-court identification (Petition at
23 7); (3) "tainted jury" where the jury consisted of 90% Hispanics (Petition at 7); (4) the District
24 Court violated Petitioner's double jeopardy rights (Petition at 7a); (5) prosecutorial
25 misconduct when the State allegedly shifted the burden to Petitioner; and (6) the district court

26 ///

27 ///

28 ///

erred in denying the defense’s jury instructions (Petition at 7b).

NRS 34.810(1) reads:

The court shall dismiss a petition if the court determines that:

(a) The petitioner’s conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly or that the plea was entered without effective assistance of counsel.

(b) The petitioner’s conviction was the result of a trial and the grounds for the petition could have been:

(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

The Nevada Supreme Court has held that “challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*.” Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). “A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

Accordingly, claims one and three are waived for failure to raise on direct appeal. The remaining claims – two, four, five, and six - fail because they are outside the scope of a post-conviction proceeding. The only claims permissible on a petition are those “challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel.” Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). Additionally, these claims are also barred by the law of the case doctrine.

“The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same.” Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). “The doctrine of the law of the

case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.” *Id.* at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. *Pellegrini v. State*, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing *McNelson v. State*, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6. Petitioner’s claims fail because Petitioner raised these claims on direct appeal wherein the Nevada Court of Appeals denied the claims on the merits.

i. Alleged unreliable in-court identification

Petitioner claims Ramos’s in-court identification after he was re-called to testify was improper. Petition at 7. The Nevada Court of Appeals held Petitioner’s claim without merit:

Donko's counsel said that the identification was "improper," given that Ramos failed to identify Donko during his initial testimony. Donko's counsel asked the court to strike the identification. The State responded by indicating that there was nothing objectionable about Ramos's testimony concerning the hallway conversation with the prosecutor as it was accurate and with his identification of Donko. The district court stated that defense counsel's objection to Ramos's in-court identification was "not a legal objection," that there was nothing inadmissible about Ramos's testimony, and that Danko's counsel would be able to cross-examine Ramos regarding the identification. Donko's counsel then orally requested a mistrial for the same reasons previously discussed. The district court denied the oral motion.

First, Donko argues that the district court abused its discretion by admitting Ramos's in-court identification testimony because Ramos failed to identify Donko as the shooter during his initial testimony and the admission of Ramos's in-court identification when he was recalled as a witness deprived Donko of due process.

...

We conclude that the district court did not abuse its discretion in admitting Ramos's in-court identification of Donko. Ramos did not make a pretrial identification of Danko, but rather Ramos identified Donko during his testimony after he was recalled as a witness at trial. Accordingly, the credibility and weight of Ramos's testimony is within the province of the jury.” *Wise*, 92 Nev. at 183, 547 P.2d at 315. Donko, through counsel, cross-examined Ramos, thus satisfying due process as to Ramos's in court identification of Danko.

1 Donko v. State, Order of Affirmance COA-83037 p. 3, 7-8.

2 **ii. Double Jeopardy**

3 Petitioner claims the District Court violated his Double Jeopardy rights by changing
4 his aggregate sentence after he started serving his sentence. Petition at 7a. The Nevada Court
5 of Appeals denied Petitioner's claim:

6
7 Second, Donko argues that the district court abused its discretion in amending
8 Donko's judgment of conviction after he started serving his sentence, thereby
9 improperly increasing his aggregate sentence and violating his protection from
10 double jeopardy. A claim that a conviction violates the Double Jeopardy Clause
11 generally is subject to de novo review on appeal. Davidson v. State, 124 Nev.
12 892, 896, 192 P.3d 1185, 1189 (2008); Ebeling v. State, 120 Nev. 401, 404, 91
13 P.3d 699, 601 (2004). NRS 176.566 states that "(c]lerical mistakes in judgments,
orders or other parts of the record and errors in the record arising from oversight
or omission may be corrected by the court at any time and after such notice, if
any, as the court orders."

14 Here, the district court did not amend the sentence on any individual conviction,
15 but simply corrected a clerical error pertaining to the calculation of the aggregate
16 sentence. Donko's argument that this error is not a "clerical error" is
17 unpersuasive. See Devlin v. State, No. 78518, 2019 2019 WL 4892531, at *1
18 (Nev. Sept. 12, 2019) (Order of Affirmance) (holding that a district court can
19 correct such clerical mistakes, when a district court entered an amended
20 judgment of conviction correcting an aggregate sentence from 11 years to 12
21 years). Here, the district court modified the aggregate sentence language to
22 comport with the individual sentences originally imposed at sentencing.
Therefore, the district court corrected its previous miscalculation of the
aggregate sentence to be consistent with the individual sentences set forth in the
judgment of conviction. Thus, we are not persuaded that the district court abused
its discretion in amending Donko's judgment of conviction to correct the
aggregate sentence.

23 Donko v. State, Order of Affirmance COA-83037 p. 8-9.

24 **iii. Alleged Prosecutorial Misconduct**

25 Petitioner claims the State committed prosecutorial misconduct by shifting the burden
26 to Donko by stating that Petitioner failed to "explain how the fingerprint [sic] or red shirt was
27 found." Petition at 7a. The Nevada Court of Appeals heard and rejected this claim:

28 ///

1 Fifth, Donko contends that the district court erred in allowing the State to
2 commit prosecutorial misconduct, through improper burden-shifting, when the
3 State argued in closing that during cross-examination Donko failed to provide
4 an explanation for his DNA being present on the red shirt found at the scene and
5 for his fingerprint being found on a license plate located inside the Toyota
6 vehicle. When reviewing claims of prosecutorial misconduct, this court
7 considers whether the conduct was improper and, if it was, whether it warrants
8 reversal or was harmless. ...

9 Here, Donko testified in his defense and the State properly cross-examined him
10 about his DNA being identified on the red shirt and his fingerprint lifted from a
11 license plate located inside the vehicle found near the scene. Donko attempted
12 to suggest that he was not the shooter, but he did not persuasively refute the
13 physical evidence suggesting otherwise during cross-examination, resulting in
14 the State arguing during closing that Donko "(g]ives no viable explanation" for
15 the physical evidence obtained at the scene. The State was permitted to comment
16 on the defendant's failure to explain physical evidence that directly tied him to
17 the shooting. See Evans, 117 Nev. at 630, 28 P.3d at 513 (noting that the State
18 may comment on the credibility of witnesses based on the evidence presented
19 and "comment on the failure of the defense to counter or explain evidence
20 presented"). The State here simply commented on the lack of support or
21 explanation for Donko's assertion that he was not the shooter. Further, the jury
22 was properly instructed that the State had the burden of proof. Accordingly, the
23 State did not impermissibly shift the burden of proof or engage in prosecutorial
24 misconduct during closing.

25 Donko v. State, Order of Affirmance COA-83037 p. 12-13

26 **iv. Jury Instructions**

27 Petitioner claims the District Court violated his rights by rejecting Petitioner's claim
28 to replace the word "unless" for "until" in the Reasonable Doubt Instruction. Petition at 7b.

Fourth, Donko contends that the district court abused its discretion when it
rejected his proposed jury instructions and revision to the verdict form.
Specifically, he states that the district court should have permitted instructions
that (1) modified the reasonable doubt instruction ...

NRS 175.211 provides the statutorily mandated language for a reasonable doubt
instruction, which does not include the language requested by Donko. To the
extent Donko argues under Crawford the district court abused its discretion when
it rejected his proffered other negatively-worded or inverse instructions, we note
"the district court may refuse a jury instruction on the defendant's theory of the
case which is substantially covered by other instructions." Runion. v. State, 116
Nev. 1041, 1050, 13 P.3d 52, 58 (2000). Donko fails to demonstrate that his
proposed inverse instructions went to a specific theory of his case and were not

1 merely duplicative of the court-approved instructions. Additionally, district
2 courts do not err by refusing to accept duplicitous, misleading, or inaccurate jury
3 instructions. Carter v. State, 121 Nev. 759, 765, 121 P.3d 592,596 (2005); see
4 also McDermott v. State, No. 79296, 2020 WL 6743121 (Nev. Nov. 13, 2020)
5 (Order of Affirmance) (concluding that because the proffered instruction was
6 otherwise covered by the reasonable-doubt instruction, there was no abuse of
7 discretion by the district court in refusing to give it). Although the district court
8 could have properly given the inverse instructions, we cannot conclude that the
9 court reversibly erred. The instructions it did give were accurate and any error
10 was harmless beyond a reasonable doubt. See Guitron v. State, 131 Nev. 215,
11 229-31, 350 P.3d 93, 102-03 (Ct. App. 2016).

12 Donko's contention that the district court also abused its discretion in denying
13 his request to place "Not Guilty" before "Guilty" is also unpersuasive, as the
14 Nevada Supreme Court has affirmatively rejected this argument. See Yandell v.
15 State, No. 78259, 2020 WL 4333604, at *4 (Nev. July 27, 2020) (Order of
16 Affirmance) (rejecting the appellant's argument that "not guilty" should have
17 been listed first on verdict form because there was no case adopting the "position
18 that the 'not guilty' [option] must be listed before the 'guilty' option on a verdict
19 sheet" (internal quotation marks omitted)).

20 Donko v. State, Order of Affirmance COA-83037 p. 10-11

21 Because all these claims have been adjudicated and denied on the merits by the Nevada
22 Court of Appeals, they are barred by law of the case doctrine and are all denied.

23 **II. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL**

24 Petitioner claims his trial counsel was ineffective for failing to ask the questions
25 Petitioner requested. Petition at 6. Petitioner implies an ineffective assistance of counsel
26 regarding counsel's failure to test the red t-shirt for gunshot residue. Petition at 6.

27 The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal
28 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
defense." The United States Supreme Court has long recognized that "the right to counsel is
the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686,
104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
(1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of
Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865

1 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
2 representation fell below an objective standard of reasonableness, and second, that but for
3 counsel's errors, there is a reasonable probability that the result of the proceedings would have
4 been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State
5 Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-
6 part test). “[T]here is no reason for a court deciding an ineffective assistance claim to approach
7 the inquiry in the same order or even to address both components of the inquiry if the defendant
8 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

9 The court begins with the presumption of effectiveness and then must determine
10 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
11 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
12 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
13 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
14 537 P.2d 473, 474 (1975).

15 Counsel cannot be ineffective for failing to make futile objections or arguments. See
16 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
17 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
18 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
19 (2002).

20 Based on the above law, the role of a court in considering allegations of ineffective
21 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
22 whether, under the particular facts and circumstances of the case, trial counsel failed to render
23 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
24 (1978). This analysis does not mean that the court should “second guess reasoned choices
25 between trial tactics nor does it mean that defense counsel, to protect himself against
26 allegations of inadequacy, must make every conceivable motion no matter how remote the
27 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
28 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel

1 cannot create one and may disserve the interests of his client by attempting a useless charade.”
2 United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

3 “There are countless ways to provide effective assistance in any given case. Even the
4 best criminal defense attorneys would not defend a particular client in the same way.”
5 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
6 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
7 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
8 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
9 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
10 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

11 Even if a defendant can demonstrate that his counsel’s representation fell below an
12 objective standard of reasonableness, he must still demonstrate prejudice and show a
13 reasonable probability that, but for counsel’s errors, the result of the trial would have been
14 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
15 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
16 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,
17 694, 104 S. Ct. at 2064-65, 2068).

18 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
19 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
20 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,
21 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must
22 be supported with specific factual allegations, which if true, would entitle the petitioner to
23 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”
24 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
25 34.735(6) states in relevant part, “[Petitioner] *must* allege specific facts supporting the claims
26 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your
27 petition to be dismissed.” (emphasis added).

28 ///

1 Petitioner claims his trial counsel was ineffective for failing to ask the questions
2 Petitioner requested. Petition at 6. This claim fails as bare and naked. Petitioner does not
3 identify what those questions were or who the questions should have been asked of. As such,
4 Petitioner fails to show that counsel’s performance was deficient. Petitioner also fails to show
5 prejudice as he does not state why the result of his trial would have been different had counsel
6 asked those questions. Additionally, which questions to ask a witness are virtually
7 unreviewable strategic decisions. Therefore, Petitioner fails to demonstrate deficiency or
8 prejudice.

9 Petitioner implies an ineffective assistance of counsel regarding counsel’s failure to test
10 the red t-shirt for gunshot residue. Petition at 6. To the extent Petitioner raises an ineffective
11 assistance of counsel claim regarding the t-shirt not being tested for gunshot residue (“GSR”),
12 this claim also fails for failure to show deficiency and prejudice. Petitioner cannot show
13 counsel’s performance was deficient because gunshot residue testing has been deemed
14 unreliable as there is a high probability of cross contamination. At the 2005 Federal Bureau
15 Investigation Laboratory’s Gunshot Residue Symposium in 2005, “[a]ll participants agreed
16 that GSR sampling should be done at the scene, where permissible, and as expeditiously as
17 possible.” FBI Laboratory’s Gunshot Residue Symposium, May 31-June 3, 2005.¹ The
18 probability of cross contamination is very high such that someone can have GSR on their
19 clothing despite never having direct contact with a firearm. Okorie Okorocha, The Art of
20 Gunshot Residue Testing, Toxicolawgy, Oct. 26, 2018, [https://www.okorieokorocha.com/the-](https://www.okorieokorocha.com/the-art-of-gunshot-residue-testing/)
21 [art-of-gunshot-residue-testing/](https://www.okorieokorocha.com/the-art-of-gunshot-residue-testing/) (Last Accessed July 6, 2022). Notably, GSR testing has
22 decreased to such degree that even the FBI no longer conducts GSR testing. *Id.*; *see also* U.S.
23 Department of Justice, Forensic Science: Gunshot Residue Tests, Criminal Law Bulletin Vol.
24 27 Issue 6 1991 (“even GSR tests are not conclusive.”)² Studies have found that only 50% of
25 known self-inflicted gunshot suicides tested positive for GSR when tested by scanning electron
26 microscopy with energy-dispersive x-ray spectroscopy. Molina DK, Martinez M, Garcia J,

27
28 ¹ Summary accessible at: [https://archives.fbi.gov/archives/about-us/lab/forensic-science-](https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/july2006/research/2006_07_research01.htm)
communications/fsc/july2006/research/2006_07_research01.htm (Last Accessed July 6, 2022.)

² Accessible at: [Forensic Science: Gunshot Residue Tests | Office of Justice Programs \(ojp.gov\)](https://www.ojp.gov/forensic-science/gunshot-residue-tests) (Last Accessed: July 6, 2022)

1 DiMaio VJ. Gunshot Residue Testing in Suicides: Part I: Analysis by Scanning Electron
2 Microscopy with Energy-Dispersive X-ray., The American Journal of Forensic Medicine and
3 Pathology, Sept. 28, 2007.³ Moreover, the Las Vegas Metropolitan Police Department
4 Forensic Lab, nor any other lab in Nevada, conduct GSR testing. As such, trial counsel was
5 not deficient in not having the t-shirt tested for GSR.

6 Likewise, Petitioner cannot show prejudice given the overwhelming evidence of his
7 guilt. Police found a car matching the description of the shooter's car a few blocks from the
8 shooting. The car was impounded and a license plate, bullet, and unspent round of ammunition
9 was found. When tested, Petitioner's fingerprint was found on the license plate and the
10 cartridge found in the car was the same type of shell casings found at the scene of the shooting.
11 Additionally, the shooter was described as wearing red, and the t-shirt Petitioner highlights, is
12 the one found near the shooting. The t-shirt was tested and Petitioner's DNA was found on the
13 shirt. Further, at trial two witnesses identified Petitioner as the shooter. Thus, Petitioner cannot
14 satisfy Strickland.

15 Accordingly, Petitioner's claims are denied.

16 **III. NO CUMULATIVE ERROR**

17 Petitioner asserts a claim of cumulative error including in the context of ineffective
18 assistance of counsel. Petition at 7a. The Nevada Supreme Court has never held that instances
19 of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot.
20 However, even if they could be, it would be of no moment as there was no single instance of
21 ineffective assistance in Petitioner's case. See United States v. Rivera, 900 F.2d 1462, 1471
22 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters
23 determined to be error, not the cumulative effect of non-errors.").

24 Nonetheless, Petitioner's claim is without merit. "Relevant factors to consider in
25 evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity
26 and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev.
27 1, 17, 992 P.2d 845, 855 (2000). Furthermore, any errors that occurred at trial were minimal

28 ³ Accessible at: [Gunshot residue testing in suicides: Part I: Analysis by scanning electron microscopy with energy-dispersive X-ray - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/15111111/) (Last Accessed: July 6, 2022)

1 in quantity and character, and a defendant “is not entitled to a perfect trial, but only a fair trial.”
2 Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). Therefore, Petitioner’s cumulative
3 error claim is denied.

4 **IV. PETITIONER IS NOT ENTITLED TO APPOINTMENT OF COUNSEL**

5 Petitioner requests appointment of counsel. Motion at 1-3. However, Petitioner fails to
6 show that he is entitled to appointment of counsel.

7 Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-
8 conviction proceedings. See Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566
9 (1991). The Nevada Supreme Court similarly observed that “[t]he Nevada Constitution...does
10 not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada
11 Constitution’s right to counsel provision as being coextensive with the Sixth Amendment to
12 the United States Constitution.” McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258
13 (1996). McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling
14 appointed counsel when petitioner is under a sentence of death), one does not have “any
15 constitutional or statutory right to counsel at all” in post-conviction proceedings. Id. at 164,
16 912 P.2d at 258.

17 The Nevada Legislature has, however, given courts the discretion to appoint post-
18 conviction counsel so long as “the court is satisfied that the allegation of indigency is true, and
19 the petition is not dismissed summarily.” NRS 34.750. NRS 34.750 reads:

20
21 A petition may allege that the Defendant is unable to pay the costs
22 of the proceedings or employ counsel. If the court is satisfied that
23 the allegation of indigency is true and the petition *is not dismissed*
summarily, the court may appoint counsel at the time the court
orders the filing of an answer and a return. In making its
determination, the court may consider, among other things, the
severity of the consequences facing the petitioner and whether:

- 24 (a) The issues are difficult;
25 (b) The petitioner is unable to comprehend the proceedings; or
(c) Counsel is necessary to proceed with discovery

26 (emphasis added). Accordingly, under NRS 34.750, it is clear that the Court has discretion in
27 determining whether to appoint counsel.

28 ///

Petitioner's request is denied as he has failed to meet any of the additional statutory factors under NRS 34.750. The issues Petitioner presents are not complex, otherwise this Court would have appointed counsel. Petitioner does not identify any complex issues – six of the issues are outside the scope of a Petition, and several of those are barred by law of the case doctrine. Both of Petitioner's ineffective assistance of counsel claims are without merit. The claim regarding counsel's alleged failure to ask questions Petitioner requested, does not allege any specific facts which, if true, would entitle him to relief. Petitioner's implied ineffective assistance of counsel claim regarding the GSR testing is not complex because studies have shown that GSR is unreliable. Cumulative error does not apply to post-conviction and, even if it did, he has not demonstrated any error in either of his two ineffective assistance of counsel claims. Petitioner appears to be able to comprehend the proceedings, and there is no need for discovery. His motion is just a form that provides no additional details beyond what his Petition presents. Therefore, Petitioner's request for appointment of counsel is denied.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Donko's Petition for Writ of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel are DENIED.

Dated this 19th day of August, 2022

Mark Gibbon

For Judge Ellsworth

128 F48 02CF 2983
Mark Gibbons
District Court Judge

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

BY /s/ JOHN AFSHAR

JOHN AFSHAR

Deputy District Attorney
Nevada Bar #014408

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 16th day of August, 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

TED MICHAEL DONKO, BAC #1080899
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

BY /s/ Janet Hayes
Secretary for the District Attorney's Office

19F24531X/JA/ml/jh/GANG

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Ted Donko, Plaintiff(s)

CASE NO: A-22-852928-W

7 vs.

DEPT. NO. Department 17

8 State of Nevada, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Final Accounting was served via the court's electronic eFile system to
13 all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 8/19/2022

15 Dept 17 Law Clerk

dept17lc@clarkcountycourts.us

Writ of Habeas Corpus

COURT MINUTES

July 27, 2022

A-22-852928-W Ted Donko, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

July 27, 2022 08:30 AM All Pending Motions

HEARD BY: Ellsworth, Carolyn COURTROOM: RJC Courtroom 11A

COURT CLERK: Albrecht, Samantha

RECORDER: Santi, Kristine

REPORTER:

PARTIES PRESENT:

James Andrew Puccinelli Attorney for Defendant

JOURNAL ENTRIES

PETITION FOR WRIT OF HABEAS CORPUS...PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL

Plaintiff not present.

Court noted the only issues raised in the post-conviction Petition, which were not raised in the appeal and rejected by the Supreme Court, were the gunshot residue and the ineffectiveness of counsel, and for the reasons in the State's Opposition, COURT ORDERED, Petition DENIED. Court FINDS the issues are not complex or it would have appointed counsel, therefore COURT FURTHER ORDERED, Plaintiff's Motion for Appointment of Counsel DENIED. State to prepare Findings of Facts, Conclusions of Law.

NDC

CLERK'S NOTE: A copy of this Minute Order was mailed to: Ted Michael Donko #1080899
1200 Prison Road Lovelock, NV 89419 (8/1/2022 SA)

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

TED MICHAEL DONKO,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-22-852928-W

Dept No: XVII

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 August 2022.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk