

IN THE SUPREME COURT OF THE STATE OF NEVADA

TED MICHAEL DONKO,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Electronically Filed
Sep 14 2022 02:32 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No: A-22-852928-W

Docket No: 85261

RECORD ON APPEAL

ATTORNEY FOR APPELLANT

TED DONKO #1080899,
PROPER PERSON
1200 PRISON RD.
LOVELOCK, NV 89419

ATTORNEY FOR RESPONDENT

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

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

I N D E X

VOLUME: **PAGE NUMBER:**

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Case No. A-22-852928-W
Dept. No. Dept. 17

FILED
MAY 20 2022

Ann L. Blum
CLERK OF COURT

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF Clark County

* * * * *

TED Michael Donko,)

Petitioner,)

-vs-)

The State of Nevada,)

Respondent.)

PETITION FOR WRIT
OF HABEAS CORPUS
(POST-CONVICTION)

INSTRUCTIONS:

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

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

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

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

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

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MAY 17 2022

CLERK OF THE COURT

1 future petitions challenging your conviction and sentence.

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

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

19 PETITION

20 1. Name of institution and county in which you are presently
21 imprisoned or where and how you are presently restrained of your
22 liberty: Lovelock Correctional Center, Pershing County, Nevada.

23 2. Name and location of court which entered the judgment of
24 conviction under attack: XXV Department XXV Clark County
25 Eighth Judicial District

26 3. Date of judgment of conviction: 02-13-2020

27 4. Case number: C-19-345584-1

28 5. (a) Length of sentence: 14 to 36 years

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

6. Are you presently serving a sentence for a conviction
other than the conviction under attack in this motion?

Yes ☐ No ☒

If "yes," list crime, case number and sentence being
served at this time: 2-Battery with Deadly Weapon with Bodily Harm, 3-Attempt Murder
with Deadly Weapon, 1-Battery with Deadly Weapon, 2-Discharge Firearm at or into Occupied Structure,
Vehicle, Aircraft or Watercraft, 1-Ownership or Possession of Firearm by Prohibited Person.

7. Nature of offense involved in conviction being challenged:
Battery with Deadly Weapon Resulting in Bodily Harm, Attempt Murder with DW, Assault with a
DW, Discharge Firearm at or into Occupied Structure, Vehicle, Aircraft, Watercraft, Ownership
or Possession of Firearm by Prohibited Person

8. What was your plea? (check one)

- 1
2 (a) Not guilty ☒
3 (b) Guilty _____
4 (c) Guilty but mentally ill _____
5 (d) Nolo contendere _____

6 9. If you entered a plea of guilty or guilty but mentally ill
7 to one count of an indictment or information, and a plea of not
8 guilty to another count of an indictment or information, or if a
9 plea of guilty or guilty but mentally ill was negotiated, give
10 details: _____
11 _____
12 _____

13 10. If you were found guilty or guilty but mentally ill after
14 a plea of not guilty, was the finding made by: (check one)

15 (a) Jury _____ (b) Judge without a jury _____

16 11. Did you testify at the trial? Yes ☒ No _____

17 12. Did you appeal from the judgment of conviction?

18 Yes ☒ No _____

19 13. If you did appeal, answer the following:

20 (a) Name of court: XIV Clark County

21 (b) Case number or citation: C-1a-345584-1

22 (c) Result: Denied

23 (d) Date of result: 4-26-22

24 (Attach copy of order or decision, if available.)

25 14. If you did not appeal, explain briefly why you did not:
26 _____
27 _____

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

16. If your answer to No. 15 was "yes," give the following
information:

(a) (1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your
petition, application or motion? Yes _____ No ☒

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(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ___ No X

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ___ No X

Citation or date of decision: _____

(2) Second petition, application or motion? Yes ___ No X

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes ___ No X

Citation or date of decision: _____

1 (e) If you did not appeal from the adverse action on any
2 petition, application or motion, explain briefly why you did
3 not. (You must relate specific facts in response to this
4 question. Your response may be included on paper which is 8 1/2
by 11 inches attached to the petition. Your response may not
exceed five handwritten or typewritten pages in length.)

5
6 17. Has any ground being raised in this petition been
7 previously presented to this or any other court by way of
8 petition for habeas corpus, motion, application or any other
postconviction proceeding? If so, identify:

9 (a) Which of the grounds is the same: _____

10 (b) The proceedings in which these grounds were raised: _____

11
12 (c) Briefly explain why you are again raising these
13 grounds. (You must relate specific facts in response to this
14 question. Your response may be included on paper which is 8 1/2
by 11 inches attached to the petition. Your response may not
exceed five handwritten or typewritten pages in length.)

15
16 18. If any of the grounds listed in Nos. 23(a), (b), (c) and
17 (d), or listed on any additional pages you have attached, were
18 not previously presented in any other court, state or federal,
19 list briefly what grounds were not so presented, and give your
20 reasons for not presenting them. (You must relate specific facts
in response to this question. Your response may be included on
paper which is 8 1/2 by 11 inches attached to the petition. Your
response may not exceed five handwritten or typewritten pages in
length.)

21
22 19. Are you filing this petition more than 1 year following
23 the filing of the judgment of conviction or the filing of a
24 decision on direct appeal? If so, state briefly the reasons for
25 the delay. (You must relate specific facts in response to this
26 question. Your response may be included on paper which is 8 1/2
27 by 11 inches attached to the petition. Your response may not
exceed five handwritten or typewritten pages in length.)

28 20. Do you have any petition or appeal now pending in any
court, either state or federal, as to the judgment under attack?

1
2 Yes ____ No X

3 If yes, state what court and the case number: _____

4 21. Give the name of each attorney who represented you in the
5 proceeding resulting in your conviction and on direct appeal:

6 Robson M. Hawser

7 22. Do you have any future sentences to serve after you
8 complete the sentence imposed by the judgment under attack?

9 Yes ____ No X

10 If yes, specify where and when it is to be served, if you
11 know: _____

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

16 (a) Ground one: The court did not ask for the Red Shirt to
17 get tested for GSR "Gun Shot Residue."

18 Supporting FACTS (Tell your story briefly without
19 citing cases or law.): I am being Accused of being The Shooter. They
20 got a Red Shirt in evidence that was used in trial with my DNA on it But
21 Tests were never made on The Red Shirt to check for Residue If That Shirt
22 was tested and came back Negative for GSR it would clear me as a Shooter
23 but when Donko Counsel asked why not it was not tested They said it cost
24 to much money for That test and only tested in more serious crimes That Shirt
25 Should be Tested because it could clear Donko as The Shooter

26 NRS 34.830

27 (b) Ground two: Ineffective Assistance of Counsel

28 Supporting FACTS (Tell your story briefly without
citing cases or law.): Donko Asked Numerous Times for Questions to
be asked with his Attorney never did Donko even asked to fire his Attorney And
The Judge said he will have to Represent himself If he does Donko Does not
know The Law So he continued with trial Donko feels like his Attorney
Didnt fight for him.

1
2
3 (c) Ground three: The Judge let a in-court investigation unreliable
4 happen in court

5 Supporting FACTS (Tell your story briefly without
6 citing cases or law.): WORDS GAVE multiple Different Descriptions of
7 a shooter he ALSO changed his Description of shooter and SAID The shooter had
8 NO TATTOOS Dunko had tattoos all over his Body he also Stated he is only
9 95% sure That Dunko was a shooter

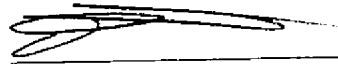
10 The other witness said he cant say it was Dunko because he didnt get
11 a good look at him he got on The stand and left The Court Room
12 And DA followed him out and he came back in got back on The stand
13 And Then said it was Dunko Dunko Attorney Objected and asked for
14 mistrial it was Denied.

15 (d) Ground four: not Tainted Jury

16 Supporting FACTS (Tell your story briefly without
17 citing cases or law.): most jury were hispanic victims in crime
18 were hispanic The Jury was 90% hispanic The Jury was also Tainted by DA
19 During trial Dunko ALSO Asked At Jury pick for certain jury but his
20 Attorney advised him not too.

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

23 EXECUTED at Lovelock Correctional Center on the 11 day of
24 the month of MAY of the year 2022.

25 
26 TED DUNKO #1030899
27 Lovelock Correctional Center
28 1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

1 (e) Ground Five: The District Courts Violated
2 Donko's Double Jeopardy Rights

3
4 Supporting Facts: Donko got Sentenced to 12 to 31 years
5 At Sentencing The Court went back After Donko Started his
6 Time and changed his Sentence to 14 to 36 years Donko's could
7 have gotten Less of a Time.

8
9
10 (F) Ground Six: Cumulative error warrants
11 Reversal of These convictions under The fifth, sixth and Fourteenth
12 Amendments and The Nevada Constitution.

13
14 Supporting Facts: Donko had cumulative errors in his
15 ~~case~~ Trial which caused him his Rights to a Fair Trial
16 multiple Times Did witnesses get on stand and give different
17 Descriptions of Shooter and different versions of The Crime Atleast Donko
18 should get a Retrial.

19
20 (G) Ground Seven: The State committed misconduct, violating
21 The Fifth, sixth, and Fourteenth Amendments and The Nevada Constitution.

22
23 Supporting Facts: Donko was Deprived of a Fair Trial The
24 state engaged in impermissible burden shifting by stating Donko
25 had to failed to sufficiently explain certain evidence The State
26 kept saying That Donko is ~~guilty~~ Guilty because he can't
27 explain how The Finger print of Red Shirt was found.

1 (H) Ground Eight. The court violated The fifth, sixth,
2 and Fourteenth Amendments and The Nevada constitution by Rejecting
3 proposed defense instructions.

4
5 Supporting Facts: The defense Requested substitution
6 of The word unless in The Reasonable doubt instruction in place
7 of "until" in proposed instruction. The court Rejected The
8 proposed defense instructions Donko is entitled to not only The
9 presumption of innocence but also to indicia of ~~innocence~~ innocence
10 Donko Attorney Requested proposed instructions which were all
11 Denied.

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VERIFICATION

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

TED Donto # 10808A
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

CERTIFICATE OF SERVICE BY MAIL

I, TED Donto, hereby certify, pursuant to N.R.C.P. 5(b), that on this 11 day of the month of May of the year 2012, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Warden
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada

Adam Aaron D. Ford
State of Nevada
Office of Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

County District Attorney

_____, Nevada 89_____

(District Attorney of County of Conviction)

TED Donto # 10808A
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

HABEAS corpus /
(Title of Document)

filed In District Court Case number C-19-345584-1

☐ Does not contain the social security number of any person.

-OR-

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

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.


Signature

5-4-22
Date

TED DUNKO #1080899
Print Name

HABEAS corpus
Title

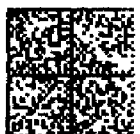
#1080899

ED Donko

200 PRISON RD.

LOVELOCK, NEVADA, 89419

LOVELOCK CORRECTIONAL CENTER



US POSTAGE
METRY BOWES
ZIP 89419 \$003.16⁰
02 4M
000369000 MAY 13 2022

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

1 MOT

2 TED Michael Donko # 108089A

3 Lovelock Correctional Center

1200 Prison Road

4 Lovelock, Nevada 89419

5 Petitioner In Pro Se

FILED

MAY 20 2022

John J. Johnson
CLERK OF COURT

6 DISTRICT COURT

7 CLARK COUNTY, NEVADA

8 * * * * *

9 TED Michael Donko,)

10 Petitioner,)

Case No.

A-22-852928-W

11 -vs-)

Dept. No.

Dept. 17

12 The State of Nevada,)

13 Respondent.)

14
15 MOTION FOR APPOINTMENT OF COUNSEL

16 COMES NOW Petitioner, TED Donko, in pro se,
17 and moves the Court for an order appointing counsel in the
18 instant petition for writ of habeas corpus (post-conviction).

19 This motion is based upon NRS 34.750; all papers and
20 documents on file herein; and the points and authorities below.

21 POINTS AND AUTHORITIES

22 Petitioner is unable to afford counsel. See Application to
23 Proceed In Forma Pauperis on file herein.

24 The substantive issues and procedural requirements of this
25 case are difficult and incomprehensible to Petitioner.

26 Petitioner, due to his incarceration, cannot investigate,
27 take depositions or otherwise proceed with discovery herein.

28 Petitioner's sentence is: 14 to 36 years.

1 There ____ are ____ are not additional facts in support of
2 this motion attached hereto on separate page(s).

3 Counsel would assist Petitioner with a clearer presentation
4 of his issues before this Court and would likewise facilitate
5 and ease this Court's task of discerning the issues and
6 adjudicating same upon their merits.

7 Discretion lies with the Court to appoint counsel under NRS
8 34.750. Crump v. Warden, 113 Nev. 293, 934 P.2d 247, 254
9 (1997). The Court is to consider: (1) the complexity of the
10 issues; (2) whether Petitioner comprehends the issues; (3)
11 whether counsel is necessary to conduct discovery; and (4) the
12 severity of Petitioner's sentence. NRS 34.750(1)-(1)(c).

13 Under similar discretionary standards, Federal courts are
14 encouraged to appoint counsel when the interests of justice so
15 require - a showing which increases proportionately with the
16 increased complexities of the case and the penalties involved in
17 the conviction. Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir.
18 1986). Attorneys should be appointed for indigent petitioners
19 who cannot "adequately present their own cases." Jeffers v.
20 Lewis, 68 F.3d 295, 297-98 (9th Cir. 1995).

21 Although Petitioner need meet but one (1) of the enumerated
22 criteria of NRS 34.750 in order to merit appointment of counsel,
23 he meets all of them. He also presents a classic example of one
24 meriting counsel under the interest of justice test bespoken by
25 the Ninth Circuit. Indeed, Petitioner's sentence, coupled with
26 the other factors set forth above, demonstrate that appointment
27 of counsel to him would not only satisfy justice, but
28 fundamental fairness, as well.

1 CONCLUSION

2 For the reasons set forth above, the Court should appoint
3 counsel to represent Petitioner in and for all further
4 proceedings in this habeas corpus action.

5 Dated this 11 day of MAY, 2022.

6 TED DUNTO
7 ~~_____~~ # 1080899
8 Lovelock Correctional Center
9 1200 Prison Road
10 Lovelock, Nevada 89419

11 Petitioner In Pro Se

12 CERTIFICATE OF SERVICE

13 I do certify that I mailed a true and correct copy of the
14 foregoing MOTION FOR APPOINTMENT OF COUNSEL to the below address
15 on this 11 day of MAY, 2022, by placing same
16 in the U.S. Mail via prison law library staff:

17
18 Attorney For Respondent

19 _____
20 _____
21 Petitioner In Pro Se

22 AFFIRMATION PURSUANT TO NRS 239B.030

23 The undersigned does hereby affirm that the preceding
24 MOTION FOR APPOINTMENT OF COUNSEL DOES not contain the social
25 security number of any person.

26 Dated this 11 day of MAY, 2022.

27 TED DUNTO # 1080899
28 ~~_____~~

Petitioner In Pro Se

**THIS SEALED
DOCUMENT,
NUMBERED PAGE(S)
16 - 19
WILL FOLLOW VIA
U.S. MAIL**

Heather A. Hume
CLERK OF THE COURT

1 PPOW
2

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

5 Ted Michael Donko,

6 Petitioner,

7 vs.

8 State of Nevada,

9 Respondent,
10

Case No: A-22-852928-W
Department 17

**ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS**

11 Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on
12 May 20, 2022. The Court has reviewed the Petition and has determined that a response would assist the
13 Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good
14 cause appearing therefore,

15 **IT IS HEREBY ORDERED** that Respondent shall, within 45 days after the date of this Order,
16 answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS
17 34.360 to 34.830, inclusive.

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

19 July 27, 2022 at 9:00 A.M.

20 Calendar on the _____ day of _____, 20____, at the hour of

21 _____ o'clock for further proceedings.
22

23 Dated this 23rd day of May, 2022

24 *Michael Villani*

25 District Court Judge

26 169 426 0E47 AE50

27 Michael Villani

28 District Court Judge

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 Electronic service was attempted through the Eighth Judicial District Court's
12 electronic filing system, but there were no registered users on the case.

13
14 If indicated below, a copy of the above mentioned filings were also served by mail
15 via United States Postal Service, postage prepaid, to the parties listed below at their last
known addresses on 5/24/2022

16 Ted Donko

#1080899

LCC

1200 Prison Road

17 Lovelock, NV, 89419
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**THIS SEALED
DOCUMENT,
NUMBERED PAGE(S)
22 - 22
WILL FOLLOW VIA
U.S. MAIL**

DISTRICT COURT
CLARK COUNTY, NEVADA

Electronically Filed
5/24/2022 3:54 PM
Steven D. Grierson
CLERK OF THE COURT



Ted Donko, Plaintiff(s)
vs.

Case No.: A-22-852928-W

State of Nevada, Defendant(s)

Department 17

NOTICE OF HEARING

Please be advised that the Plaintiff's Motion for Appointment of Counsel in the above-entitled matter is set for hearing as follows:

Date: July 27, 2022

Time: 8:30 AM

Location: RJC Courtroom 11A
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court



RSPN
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,
#2668752
Petitioner,

-vs-

THE STATE OF NEVADA,
Respondent.

CASE NO: A-22-852928-W
C-19-345584-1
DEPT NO: XVII

**STATE'S RESPONSE TO DONKO'S PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION) AND MOTION FOR APPOINTMENT OF COUNSEL**

DATE OF HEARING: JULY 27, 2022
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JOHN AFSHAR, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel.

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

//

//

//

//

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

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.

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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 **ARGUMENT**

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

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1 NRS 34.810(1) reads:

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

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

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

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

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

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

28 "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

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

8 **i. Alleged unreliable in-court identification**

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

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

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

27 ...

28 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.

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

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1 **ii. Double Jeopardy**

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

5 Second, Donko argues that the district court abused its discretion in amending
6 Donko's judgment of conviction after he started serving his sentence, thereby
7 improperly increasing his aggregate sentence and violating his protection from
8 double jeopardy. A claim that a conviction violates the Double Jeopardy Clause
9 generally is subject to de novo review on appeal. Davidson v. State, 124 Nev.
10 892, 896, 192 P.3d 1185, 1189 (2008); Ebeling v. State, 120 Nev. 401, 404, 91
11 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."

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

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

23 **iii. Alleged Prosecutorial Misconduct**

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

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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

1 proposed inverse instructions went to a specific theory of his case and were not
2 merely duplicative of the court-approved instructions. Additionally, district
3 courts do not err by refusing to accept duplicitous, misleading, or inaccurate jury
4 instructions. Carter v. State, 121 Nev. 759, 765, 121 P.3d 592,596 (2005); see
5 also McDermott v. State, No. 79296, 2020 WL 6743121 (Nev. Nov. 13, 2020)
6 (Order of Affirmance) (concluding that because the proffered instruction was
7 otherwise covered by the reasonable-doubt instruction, there was no abuse of
8 discretion by the district court in refusing to give it). Although the district court
9 could have properly given the inverse instructions, we cannot conclude that the
10 court reversibly erred. The instructions it did give were accurate and any error
11 was harmless beyond a reasonable doubt. See Guitron v. State, 131 Nev. 215,
12 229-31, 350 P.3d 93, 102-03 (Ct. App. 2016).

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

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

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

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

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

28 The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal
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

1 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865
2 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
3 representation fell below an objective standard of reasonableness, and second, that but for
4 counsel's errors, there is a reasonable probability that the result of the proceedings would have
5 been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State
6 Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-
7 part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach
8 the inquiry in the same order or even to address both components of the inquiry if the defendant
9 makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

10 The court begins with the presumption of effectiveness and then must determine
11 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
12 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel
13 does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of
14 competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432,
15 537 P.2d 473, 474 (1975).

16 Counsel cannot be ineffective for failing to make futile objections or arguments. See
17 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
18 "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
19 any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
20 (2002).

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

1 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
2 cannot create one and may disserve the interests of his client by attempting a useless charade.”
3 United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

12 Even if a defendant can demonstrate that his counsel’s representation fell below an
13 objective standard of reasonableness, he must still demonstrate prejudice and show a
14 reasonable probability that, but for counsel’s errors, the result of the trial would have been
15 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
16 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
17 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,
18 694, 104 S. Ct. at 2064-65, 2068).

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

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, Toxicology, Oct. 26, 2018, [https://www.okoricokorocha.com/the-](https://www.okoricokorocha.com/the-art-of-gunshot-residue-testing/)
21 [art-of-gunshot-residue-testing/](https://www.okoricokorocha.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 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)
28 [communications/fsc/july2006/research/2006_07_research01.htm](https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/july2006/research/2006_07_research01.htm) (Last Accessed July 6, 2022.)

29 ² Accessible at: [Forensic Science: Gunshot Residue Tests](https://www.ojp.gov/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 must be 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 Furthermore, 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 \(nih.gov\)](#) (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).

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


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

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

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

19 A petition may allege that the Defendant is unable to pay the costs
20 of the proceedings or employ counsel. If the court is satisfied that
21 the allegation of indigency is true and the petition *is not dismissed*
22 *summarily*, the court may appoint counsel at the time the court
23 orders the filing of an answer and a return. In making its
24 determination, the court may consider, among other things, the
severity of the consequences facing the petitioner and whether:
(a) The issues are difficult;
(b) The petitioner is unable to comprehend the proceedings; or
(c) Counsel is necessary to proceed with discovery

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

27 itioner’s request should still be denied as he has failed to meet any of the additional
28 statutory factors under NRS 34.750. The issues Petitioner presents are not complex. Petitioner

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

12 **CONCLUSION**

13 For the forgoing reasons, the State respectfully requests that Donko’s Petition for Writ
14 of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel be DENIED.

15 DATED this 6th day of July, 2022.

16 Respectfully submitted,

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

19 BY /s/ JOHN AFSHAR
20 JOHN AFSHAR
21 Deputy District Attorney
Nevada Bar #014408

22 **CERTIFICATE OF MAILING**

23 I hereby certify that service of the above and foregoing was made this 6th day of July,
24 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

25 TED DONKO, BAC#1080899
26 LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
27 LOVELOCK, NEVADA 89419

28 19F24531X/JN/ml/elm/GU BY /s/ L.M.
Secretary for the District Attorney’s Office

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:

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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.

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1 **FACTUAL BACKGROUND**

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

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

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

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

25 Espinoza confirmed that he too was at the residence moving furniture using his
26 brother’s vehicle. However, Espinoza testified that while he was facing the street at the time
27 of the shooting, he did not know from where the shots originated. Espinoza also testified that
28 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

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

9 **i. Alleged unreliable in-court identification**

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

12
13 Donko's counsel said that the identification was "improper," given that Ramos
14 failed to identify Donko during his initial testimony. Donko's counsel asked the
15 court to strike the identification. The State responded by indicating that there
16 was nothing objectionable about Ramos's testimony concerning the hallway
17 conversation with the prosecutor as it was accurate and with his identification of
18 Donko. The district court stated that defense counsel's objection to Ramos's in-
19 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.

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

24 ...

25 We conclude that the district court did not abuse its discretion in admitting
26 Ramos's in-court identification of Donko. Ramos did not make a pretrial
27 identification of Danko, but rather Ramos identified Donko during his testimony
28 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 convicti9n 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

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

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

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

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

II. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

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

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal 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 Okorochoa, The Art of
20 Gunshot Residue Testing, Toxicology, Oct. 26, 2018, [https://www.okoricokorochoa.com/the-](https://www.okoricokorochoa.com/the-art-of-gunshot-residue-testing/)
21 [art-of-gunshot-residue-testing/](https://www.okoricokorochoa.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 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)
28 [communications/fsc/july2006/research/2006_07_research01.htm](https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/july2006/research/2006_07_research01.htm) (Last Accessed July 6, 2022.)

29 ² Accessible at: [Forensic Science: Gunshot Residue Tests](https://www.ojp.gov/forensic-science/gunshot-residue-tests) Office of Justice Programs ([ojp.gov](https://www.ojp.gov)) (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 \(nih.gov\)](#) (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*
24 *summarily*, the court may appoint counsel at the time the court
25 orders the filing of an answer and a return. In making its
26 determination, the court may consider, among other things, the
27 severity of the consequences facing the petitioner and whether:

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

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

///

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

1/ Marie - Wilson

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

4
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 L. Hume

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:

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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 ///

1 **FACTUAL BACKGROUND**

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

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

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

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

25 Espinoza confirmed that he too was at the residence moving furniture using his
26 brother’s vehicle. However, Espinoza testified that while he was facing the street at the time
27 of the shooting, he did not know from where the shots originated. Espinoza also testified that
28 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

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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 convicti9n 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:

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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

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

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

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

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

II. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

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

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal 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. Cronin, 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 Okorochoa, The Art of
20 Gunshot Residue Testing, Toxicology, Oct. 26, 2018, [https://www.okoricokorochoa.com/the-](https://www.okoricokorochoa.com/the-art-of-gunshot-residue-testing/)
21 [art-of-gunshot-residue-testing/](https://www.okoricokorochoa.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 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)
28 [communications/fsc/july2006/research/2006_07_research01.htm](https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/july2006/research/2006_07_research01.htm) (Last Accessed July 6, 2022.)

29 ² Accessible at: [Forensic Science: Gunshot Residue Tests](https://www.ojp.gov/forensic-science/gunshot-residue-tests) Office of Justice Programs ([ojp.gov](https://www.ojp.gov)) (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 \(nih.gov\)](#) (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*
24 *summarily*, the court may appoint counsel at the time the court
25 orders the filing of an answer and a return. In making its
26 determination, the court may consider, among other things, the
27 severity of the consequences facing the petitioner and whether:

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

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

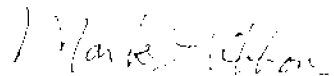
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1 Petitioner's request is denied as he has failed to meet any of the additional statutory
2 factors under NRS 34.750. The issues Petitioner presents are not complex, otherwise this Court
3 would have appointed counsel. Petitioner does not identify 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

Steven D. Grierson

NOAS

TED Donko #1080899
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

In Pro Se

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

TED Michael Donko,)

Petitioner,)

Case No. A-22-852928-W

-vs-)

Dept. No. 17

THE STATE OF NEVADA,)

Respondent.)

NOTICE OF APPEAL

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

Dated this 18 day of August, 2022.

TED Michael Donko #1080899
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

RECEIVED

AUG 25 2022

CLERK OF THE COURT

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CERTIFICATE OF SERVICE

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

Eight Judicial District
200 Lewis Ave, 3rd Floor
Las Vegas NV, 89155

AND

Attorney General
100 N. Carson St
Carson City, NV, 89701

TED Michael DeNKO #1080829
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated this 18 day of August, 2022.

Petitioner In Pro Se

#1080899

TED Donko

1200 PRISON RD.

X-CC

LOVELOCK, NV, 89419

LOVELOCK CORRECTIONAL CENTER



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



1 ASTA

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

10 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

Date Application(s) filed: N/A

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

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

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

13 11. Previous Appeal: No

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

15 12. Child Custody or Visitation: N/A

16 13. Possibility of Settlement: Unknown

17 Dated This 29 day of August 2022.

18 Steven D. Grierson, Clerk of the Court

19
20
21 /s/ Heather Ungermann

22 Heather Ungermann, Deputy Clerk

23 200 Lewis Ave

24 PO Box 551601

25 Las Vegas, Nevada 89155-1601

26 (702) 671-0512

27 cc: Ted Donko



**EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT**

REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd FL.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

September 02, 2022

Attorney:	Public Defender	Case Number:	C-19-345584-1/ A-22-852928-W
	Clark County Public Defender	Department:	Department 17
	309 S 3rd Street Suite #2		
	Las Vegas NV 89101		
Defendant:	Ted Michael Donko		

Attached are pleadings received by the Office of the District Court Clerk which are being forwarded to your office pursuant to Rule 3.70.

Pleadings: **Notice Of Motion For Evidentiary Hearing**

Rule 3.70. Papers which May Not be Filed

Except as may be required by the provisions of NRS 34.730 to 34.830, inclusive, all motions, petitions, pleadings or other papers delivered to the clerk of the court by a defendant who has counsel of record will not be filed but must be marked with the date received and a copy forwarded to the attorney for such consideration as counsel deems appropriate. This rule does not apply to applications made pursuant to Rule 7.40(b)(2)(ii).

Cordially yours,
DC Criminal Desk # 27
Deputy Clerk of the Court

1 Ted Michael Donko #1080899
2 1200 prison RD
3 Lovelock, NV, 89419
4 Lovelock correctional center
5

6 IN THE SUPREME COURT OF THE STATE OF NEVADA
7 ★★★★★

8 TED Michael Donko
9 Appellant
10 VS.
11 THE STATE OF NEVADA
12 Respondent

CASE NO. C-19-345584-1
OR
A-22-852928-W
DEPT NO _____

13 NOTICE OF MOTION FOR EVIDENTIARY HEARING

14 Comes now, TED Michael Donko, Respectfully Requests
15 TO have a Evidentiary hearing WHICH WAS NEVER DONE
16 Donko ASKED ATTORNEY TO DO A MOTION FOR THIS
17 WHICH WAS NEVER DONE DONKO ALSO HAS THE RIGHT
18 TO provide EVIDENCE ON HIS BEHALF THAT CAN PROVE
19 HIS INNOCENSE IT WOULD ONLY BE FAIR FOR DONKO
20 TO GET AN ATTORNEY AND HAVE A EVIDENTIARY HEARING.

21
22
23 RECEIVED

24 AUG 25 2022

25 CLERK OF THE COURT
26
27

#1080899

TED Donko

1200 PRISON RD.

X-CC

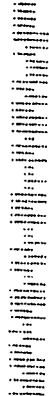
LOVELock, NV, 89419

LOVELOCK CORRECTIONAL CENTER



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

REGIONAL
JUDICIAL
CENTER



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AUG 22 2022

LCC LAW LIBRARY

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 and Transmittal of Record

State of Nevada }
County of Clark } SS:

Pursuant to the Supreme Court order dated September 9, 2022, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 92.

TED MICHAEL DONKO,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

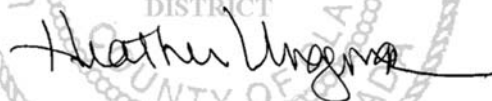
Case No: A-22-852928-W

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 14 day of September 2022.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk