

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JACKIE HENDERSON A/K/A JACK  
LEE HENDERSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 75253-COA

**FILED**

FEB 13 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Jackie Henderson appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on September 18, 2017.<sup>1</sup> Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Henderson claims the district court erred by denying his claim that counsel was ineffective for failing to argue the deadly weapon enhancements violated the Double Jeopardy Clause. To prove ineffective assistance of counsel, a petitioner must demonstrate counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*,

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<sup>1</sup>This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

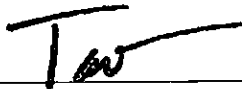
The district court found Henderson failed to demonstrate counsel was deficient or resulting prejudice because he failed to demonstrate the deadly weapon enhancements imposed in this case violated the Double Jeopardy Clause and counsel is not deficient for failing to make futile arguments. We conclude the district court did not err by denying this claim. See NRS 193.165(3) ("This section does not create any separate offense but provides an additional penalty for the primary offense"); *Nevada Dep't. of Prisons v. Bowen*, 103 Nev. 477, 479, 745 P.2d 697, 698 (1987) (there is "no conflict between the penalty imposed by NRS 193.165 and the double jeopardy clause of the United States Constitution"); *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (counsel is not deficient for failing to make futile objections).


To the extent Henderson challenges the district court's handling of his "amended" petition, these claims are not properly before this court. Henderson filed his "amended" petition after the district court orally denied his petition and the district court's written order specifically states it was only considering the documents on file at the time the petition was

orally denied. Therefore, we decline to address these claims. Accordingly,  
we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, A.C.J.  
Douglas

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. William D. Kephart, District Judge  
Jackie Henderson  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk