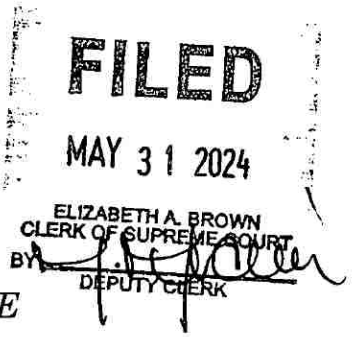
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MITCHELL KEITH GOODRUM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86613-COA



ORDER OF AFFIRMANCE

Mitchell Keith Goodrum appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on February 1, 2021, an amended petition filed on March 12, 2021, a second amended petition filed on May 17, 2021, and a supplemental petition filed on January 20, 2022. Tenth Judicial District Court, Churchill County; Robert E. Estes, Senior Judge.

Goodrum argues the district court erred by denying his claims that trial counsel were ineffective. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 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 687, 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).

First, Goodrum claimed that counsel were ineffective for failing to present mental health evidence at trial. After an evidentiary hearing, the district court found that, based on Goodrum's and counsel's testimony at the hearing, Goodrum was resistant to obtaining a psychological evaluation. This finding is supported by the record. At the evidentiary hearing, counsel testified that Goodrum would not cooperate to get a psychological evaluation done, and Goodrum testified he was "conflicted" over whether he wanted a mental health defense presented at trial. Further, while Goodrum testified that he had severe depression, acute anxiety, and post-traumatic stress disorder, Goodrum did not provide evidence or an expert at the evidentiary hearing to support this claim.[1] Therefore, Goodrum failed to demonstrate counsel was deficient for failing to present this evidence, and he failed to demonstrate how presenting his

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[1]Goodrum has included 15 pages of mental health records on appeal. However, it does not appear that these documents were a part of the district court record below. The documents do not appear to have been attached to any of his petitions, nor were they presented at the evidentiary hearing. Therefore, we decline to consider them on appeal. *See Carson Ready Mix v. First Nat'l Bk.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (stating that review is limited to the record actually considered by the district court).

alleged mental health issues would have resulted in a reasonable probability of a different outcome at trial. Accordingly, we conclude that the district court did not err by denying this claim.[2]

Second, Goodrum claimed that counsel were ineffective for failing to file a motion to suppress his confession to police because he was intoxicated at the time of the statement. "A confession is admissible as evidence only if it is made freely, voluntarily, and without compulsion or inducement." *Gonzales v. State*, 131 Nev. 481, 487, 354 P.3d 654, 658 (Ct. App. 2015) (quotation marks omitted). "[I]ntoxication is not, by itself, sufficient to render a confession involuntary when the totality of the circumstances otherwise indicate that the statements were voluntary." *Id.* at 488 n.2, 354 P.3d at 659 n.2. To render a confession involuntary, a defendant must have been so intoxicated that "he was unable to understand the meaning of his comments." *Kirksey v. State*, 112 Nev. 980, 992, 923 P.2d 1102, 1110 (1996) (quotation marks omitted).

The district court found that the only evidence Goodrum provided in support of his claim that he was intoxicated at the time of the interview was a copy of a preliminary breath test that showed Goodrum had a blood alcohol level of .149 before the interview began. The court viewed a video of the interview with police and agreed with trial counsel that a

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[2]Goodrum correctly argues that the district court erred by finding that he stated he refused to participate in a mental health evaluation. Goodrum stated he was "conflicted" about presenting a mental health evaluation, and he was not asked to elaborate. We nevertheless affirm for the reasons stated above.

motion to suppress would not have been successful because Goodrum's statements appeared to be voluntary. The record supports the finding of the district court.

The district court admitted the entire trial record at the evidentiary hearing and had a copy of the preliminary breath test. Counsel testified that he viewed the video of the confession and determined that a motion to suppress would not have been successful because Goodrum did not appear impaired. Goodrum did not provide this court with the transcript or video of the confession; therefore, this court presumes the video and transcript support the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007); *see also Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."); NRAP 30(b)(3). Further, Goodrum failed to testify at the evidentiary hearing about how his intoxication level caused him to be unable to understand the meaning of his comments. Accordingly, Goodrum failed to demonstrate that his confession was not made freely, voluntarily, and without compulsion or inducement. Thus, he failed to demonstrate counsel's performance was deficient for failing to file the motion to suppress or a reasonable probability of a different outcome at trial had counsel filed the motion. Therefore, we conclude the district court did not err by denying this claim.

Third, Goodrum claimed that counsel were ineffective for failing to object to a penalty phase jury instruction that improperly instructed the jury that "the law does not allow the [Pardons Board] to

change a sentence of life with the possibility of parole to any lesser or different sentence."[3] While this statement of the law is incorrect, the jury was also instructed that it "may not speculate as to whether the sentence you impose may be changed at a later date," and the jury is presumed to follow the instructions given. *See Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Thus, he failed to demonstrate a reasonable probability of a different outcome at the penalty phase had the jury been correctly instructed. Accordingly, we conclude the district court did not err by denying this claim.

Fourth, Goodrum claimed that counsel were ineffective for failing to ensure his right to represent himself. Specifically, he claimed that on the first day of trial, counsel failed to request that the trial court hold a *Faretta*[4] canvass. On the first day of trial, counsel informed the trial court that Goodrum wanted to represent himself and they would be standby counsel. Counsel allowed Goodrum to speak to the trial court, and the trial court stated that Goodrum would not be representing himself and counsel would not be standby counsel. Counsel brought the issue to the attention of the trial court, and Goodrum failed to demonstrate counsel should have done more. Therefore, Goodrum failed to demonstrate that counsel's performance was deficient. Further, given the trial court's denial, Goodrum

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[3]The jury instruction should have stated that the Pardons Board may not commute a prison sentence of life *without* the possibility of parole to a sentence that would allow for parole. *See* NRS 213.085(1).

[4]*Faretta v. California*, 422 U.S. 806 (1975).

failed to demonstrate a reasonable probability of a different outcome had counsel asked for a canvass. Therefore, we conclude that the district court did not err by denying this claim.[5]

Next, Goodrum argues that the district court should have held an evidentiary hearing on several of the claims raised in his second amended petition after this court reversed and remanded Goodrum's previous appeal from the denial of his petitions.[6] He also argues the district court erred by summarily denying the claims. This court previously

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[5]On appeal, Goodrum argues that counsel were ineffective for failing to bring previous requests to represent himself to the trial court's attention. This argument was not raised below, and we decline to consider it for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

[6]The State has asked this court to strike the portion of the appendix that purports to be the second amended petition. As represented in the appendix, the pleading consists of a cover page followed largely by what appears to be a responsive pleading to the State's answer to the second amended petition. Although we decline the State's request to strike the pleading, we decline to consider the "second amended petition" submitted in the appendix in this case as it appears to be inaccurate. *See Carson Ready Mix*, 97 Nev. at 476, 635 P.2d at 277.

However, it is clear the district court and the State had the second amended petition as the State filed an answer to the second amended petition with specific reference to the claims raised therein and the district court's order specifically references those claims. Further, a complete copy of the second amended petition was included in the supplemental record in *Goodrum v. State*, Docket No. 84484 (Supplemental Record on Appeal, December 19, 2022), and we take judicial notice of the pleading submitted in that record.

reversed and remanded Goodrum's appeal from the denial of his petitions because the district court's order did not address the claims raised in Goodrum's petition, amended petition, and second amended petition. *See Goodrum v. State*, No. 84484, 2023 WL 1433281 (Nev. Ct. App. Jan. 13, 2023) (Order of Reversal and Remand). On remand, the district court entered an order denying those claims.

Goodrum fails to demonstrate the district court was required to hold an evidentiary hearing on those claims or that they were summarily denied. The district court previously held an evidentiary hearing, and Goodrum failed to present evidence to support these claims at that hearing. Further, the district court did not summarily deny the claims. Instead, the district court found that Goodrum did not present evidence to support those claims. Therefore, we conclude that Goodrum is not entitled to relief on this claim.[7]

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[7]Goodrum also argues the district court erred by denying several of his claims on the ground that they could have been raised on direct appeal. He argues that he raised these claims as ineffective assistance of counsel claims. Our review of the second amended petition shows that Goodrum did raise several of these claims as ineffective assistance of counsel claims; thus, the district court erred by denying the claims on the ground that they could have been raised on direct appeal. *See Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1021 (2006) (stating the appellate courts have "repeatedly declined to consider ineffective-assistance-of-counsel claims on direct appeal unless the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be needless"). We nevertheless affirm for the reasons stated above.

Next, Goodrum argues the district court erred by denying his claims that appellate counsel was ineffective. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Goodrum claimed that counsel was ineffective for failing to argue that his confession should have been suppressed. As stated above, Goodrum failed to demonstrate his confession should have been suppressed. Therefore, he necessarily failed to demonstrate this claim would have had a reasonable probability of success on appeal. Accordingly, we conclude that the district court did not err by denying this claim.

Goodrum also claimed that counsel was ineffective for failing to raise more than one claim on direct appeal. Other than the claim above, Goodrum fails to allege what other claims counsel should have raised on appeal. Therefore, Goodrum failed to demonstrate counsel was deficient or a reasonable probability of success on appeal had counsel raised additional

claims. Accordingly, we conclude the district court did not err by denying this claim.[8]

Finally, Goodrum argues that the cumulative errors of counsel entitle him to relief. Even if multiple instances of deficient performance may be cumulated for purposes of demonstrating prejudice, *see McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Goodrum failed to demonstrate multiple errors to cumulate, *see Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (stating a claim of cumulative error requires multiple errors to cumulate). Thus, we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

[8]Goodrum has included in the appendix three letters that Goodrum allegedly sent to counsel regarding the appeal after the direct appeal had been filed. However, it does not appear that these letters were a part of the district court record below. The letters do not appear to have been attached to any of his petitions, nor were they presented at the evidentiary hearing. Therefore, we decline to consider them on appeal. *See Carson Ready Mix*, 97 Nev. at 476, 635 P.2d at 277.

cc: Presiding Judge, Tenth Judicial District Court
Hon. Robert E. Estes, Senior Judge
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Attorney General/Carson City
Churchill County District Attorney/Fallon
Churchill County Clerk