IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID CRAIG MORTON,
Appellant,
vs.
DWIGHT NEVEN, WARDEN,
Respondent.

No. 86443

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge. Appellant David Craig Morton argues that he received ineffective assistance of counsel. The district court denied the petition after conducting an evidentiary hearing. We affirm.

To demonstrate ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and that 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*). 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), and both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697. For purposes of the deficiency prong, counsel is strongly presumed to have provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Id.* at 690. We give deference to the district court's factual findings that are supported by substantial evidence and not clearly wrong but review its application of

the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Morton first argues that counsel should not have advised him to reject a plea offer and proceed to trial. The right to effective assistance of counsel extends to plea negotiations. *Missouri v. Frye*, 566 U.S. 134, 140 (2012). Here, the State offered a plea to second-degree murder. Morton rejected the offer on counsel's advice and, after a jury trial, was convicted of second-degree murder with the use of a deadly weapon. At the evidentiary hearing, counsel testified that, in light of the circumstances surrounding the shooting, he believed that Morton would either be acquitted or convicted of the lesser-included offense of manslaughter. Substantial evidence supports the district court's finding that counsel's advice was based on a colorable defense theory. Insofar as Morton relies on *Lafler v. Cooper*, 566 U.S. 156 (2012), that case is distinguishable. In *Lafler*, the parties conceded deficient performance where counsel advised the defendant to reject a plea offer based on counsel's objectively unreasonable assessment that the prosecution could not prove the intent required for a murder conviction given that the defendant shot the victim below the waist. *Id.* at 174. But in this case, defense counsel's theory of the case—that the rifle discharged accidentally, such that the evidence supported either an acquittal or a manslaughter conviction—was not objectively unreasonable. We thus conclude that Morton has not shown that relief is warranted in this regard.

Morton next argues that the district court violated his right to due process by failing to timely adjudicate the postconviction habeas petition. Morton asserts that he timely filed a pro se postconviction habeas petition in December 2011, postconviction counsel was appointed in January 2012 but took no action, a second postconviction counsel was

appointed in March 2015 but took no action, a third postconviction counsel was retained in June 2019 and filed a supplemental postconviction habeas petition in December 2019, and the district court held an evidentiary hearing in October 2021. While the delay here was concerning, we decline to consider this argument for two reasons. First, insofar as Morton complains about the delay before the supplemental petition was filed, that issue was not raised below. Second, Morton has not cited any relevant authority addressing the right to due process in relation to delay in resolving a postconviction proceeding; instead, Morton relies on a single case about the right to due process in general. Accordingly, we need not address Morton's due process argument based on the delay in resolving the postconviction habeas petition and supplemental petition. *See Ford v. Warden*, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) (declining to consider a theory of relief raised for the first time on appeal); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

Morton next argues that counsel provided ineffective assistance during the sentencing proceeding in two respects. We agree with the district court that both lack merit.

First, Morton argues that counsel should have moved to strike the presentence investigation (PSI) report because it contained inflammatory language. The district court found that counsel's failure to move to strike the inflammatory language in the PSI fell below an objective standard of reasonableness but that Morton failed to show prejudice. Trial counsel addressed the inflammatory nature of the PSI report in a

sentencing memorandum.[1] The record shows that the sentencing judge considered the sentencing memorandum and specifically noted that the PSI report reflected the author's personal interpretation of the circumstances but that the judge was "independent of that thinking." And before imposing sentence, the judge reflected thoroughly on the jury's verdict, the evidence adduced at trial, and the pattern of domestic violence between Morton and the victim. Accordingly, we conclude that Morton has not shown a reasonable probability of a different sentence had trial counsel again challenged the inflammatory phrasing of the PSI report by moving to strike it.

Second, Morton argues that trial counsel should have corrected the sentencing judge's misunderstanding that Morton's children were not present at sentencing to support him. The sentencing judge commented briefly on their absence in the course of thoroughly reflecting on the evidence and verdict. The district court once more found that counsel's failure to correct the sentencing judge's error was deficient performance but that Morton failed to show prejudice where there was no indication in the record that the judge relied on this misunderstanding in imposing sentence. The record shows that the sentencing judge considered seven letters from family members supporting Morton. These were not included in the appellate record, and thus, we presume that they support the district court's decision. *See Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (concluding that materials omitted from the record on appeal "are presumed to support the district court's decision"), *rev'd on other grounds by Riggins*

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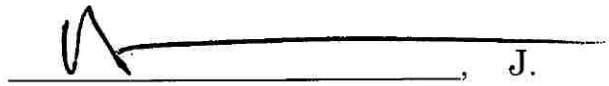
[1]Although Morton has not included the sentencing memorandum in the appellate record, Morton concedes that defense counsel addressed the PSI's inflammatory language in that memorandum.

v. Nevada, 504 U.S. 127 (1992). Morton's mother also testified on his behalf during the sentencing hearing. And, again, in imposing the sentence, the judge focused on the circumstances and nature of the crime, not whether Morton had support from his family. In these circumstances, we conclude that there is no reasonable probability of a different outcome at sentencing had trial counsel corrected the judge's brief comment about the absence of Morton's family and pointed out that Morton had more family support at the sentencing hearing. Insofar as Morton comments on other facets of the sentencing hearing, they are not articulated as claims supported by cogent argument. We therefore need not address those comments.

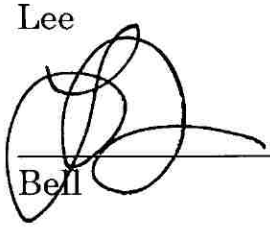
Having concluded that Morton has not shown that relief is warranted, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Herndon

_____, J.
Lee



_____, J.
Bell

cc: Hon. Michael Montero, District Judge
Karla K. Butko
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk