

EXHIBIT A

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October 20, 2013

Brett Whipple, Esq.
Justice Law Center
1100 S. Tenth Street
Las Vegas, NV 89104

RE: Marlo Thomas
REPORT: Neuropsychological and Psychological
Evaluation
DATE(S) OF EVALUATION: 4/2/2012 and 4/3/2012
DATE OF BIRTH: 11/6/1972
AGE: 39
MEDICATION: None
YEARS OF EDUCATION: 12 years
EXAMINERS: Jonathan H. Mack, Psy.D.

Dear Mr. Whipple:

The following represents my report of my neuropsychological evaluation of Marlo Thomas, whom I evaluated on 4/2/12 and 4/3/12. As you know, Mr. Thomas is currently on death row for capital murder in the state of Nevada, and this evaluation was performed at your request to address neuropsychological impairments that may provide mitigating circumstances related to his sentencing. This report is based on my clinical interview of Mr. Thomas, administration of a battery of neuropsychological tests by me, and an extensive review of records summarized below.

TESTS ADMINISTERED:

Beck Anxiety Inventory
Beck Depression Inventory-II
Beck Hopelessness Scale
Boston Diagnostic Aphasia Screening Examination, Complex Ideational Material Subtest
Conners' Adult ADHD Rating Scales-Long Version Self-Report
Controlled Oral Word Association Test/Animal Naming
Grooved Pegboard
Halstead-Reitan Neuropsychological Test Battery
Aphasia Screening Test
The Booklet Category Test-II
Grip Strength Test
Lateral Dominance Examination with Right/Left Orientation
Manual Finger Tapping Test
Reitan-Klove Sensory Perceptual Examination with Visual Field Screening
Seashore Rhythm Test
Speech Sounds Perception Test
Tactual Performance Test

Trail Making Tests, A and B
Ruff Figural Fluency Test
Stroop Color and Word Test
Test of Memory Malingering
Wechsler Adult Intelligence Scale-IV
Wide Range Achievement Test – 4
Wisconsin Card Sorting Test

RECORDS REVIEWED:

DATE	SUMMARY	DOCUMENT
11/12/1981	<p>Clark County School District Special Student Services Psychological Report was reviewed. The WISC-R, WRAT, PIAT, PPVT, Beery VMI, Motor Free, and Behavior Problem Checklist were the instruments used for this evaluation.</p> <p><u>WISC-R</u> Verbal IQ = 85 Information, ss = 6 Similarities, ss = 8 Arithmetic, ss = 8 Vocabulary, ss = 9</p> <p>Performance IQ = 86 Picture Completion, ss = 8 Picture Arrangement, ss = 8 Block Design, ss = 9 Object Assembly, ss = 10 Coding, ss = 5</p> <p>Full Scale IQ = 84</p> <p><u>PPVT</u> IQ = 81</p> <p><u>WRAT</u> Reading, SS = 66, 1st Percentile Spelling, SS = 69, 2nd Percentile Arithmetic, SS = 84, 14th Percentile</p> <p><u>PIAT</u> Math, SS = 82, 12th Percentile Reading Recognition, SS = 72, 3rd Percentile Spelling, SS = 69, 2nd Percentile</p> <p><u>Beery</u> VMI Age 6-5</p> <p><u>Motor Free</u> Perceptual Age 6-8</p> <p><u>Behavior Problem Checklist</u> Acting out and aggressive tendencies.</p>	<p>Clark County School District Special Student Services Psychological Report by Jerry Swan, School Psychologist</p>

	<p>SUMMARY: “The results of this evaluation would suggest that Marlo is currently functioning in the slow learner range of intellectual development and that current achievement levels are below the expected level in reading and spelling. The obtained discrepancy was of a magnitude that it would meet the significant ability – achievement discrepancy criteria for special education services. Significant behavioral concerns were also identified, specifically acting out and aggressive tendencies in unstructured settings.”</p> <p>RECOMMENDATIONS: “It is recommended that the Multidisciplinary Diagnostic Team consider placement in the resource room program on the basis of a learning disability. A behavioral control problem is also recommended relative to unstructured time. Behavior in the classroom should be closely monitored and if this area becomes a problem, the Multidisciplinary Team should be reconvened to consider appropriate alternatives.”</p>	
2/2/1984	<p>Clark County School District Special Student Services Psychological Report was reviewed. The WRAT, PIAT, SIT, Bender, and Behavior Problem Checklist were the instruments used for this evaluation.</p> <p><u>Slosson Intelligence Test (SIT)</u> IQ = 83, M.A. = 83</p> <p><u>WRAT</u> Reading, SS = 75, 5th Percentile Spelling, SS = 62, 1st Percentile Arithmetic, SS = 82, 12th Percentile</p> <p><u>PIAT</u> Math, SS = 85, 16th Percentile Reading Recognition, SS = 74, 4th Percentile Reading Comprehension, SS = 72, 3rd Percentile Spelling, SS = 65, 1st Percentile</p> <p><u>Behavior Problem Checklist</u> Aggressive behavior, failure to follow school rules, disruptive behavior and insubordination.</p> <p>DISCUSSION/SUMMARY: “Marlo was evaluated to determine current levels of functioning and to address appropriate programming. He was initially placed in the resource program on the basis of a learning disability with secondary behavioral concerns relative to unstructured settings. Current information would suggest that behavior has become the factor of primary educational significance. Inappropriate behavior has become a major factor in structured and unstructured settings. Specific areas of concern include: aggressive behavior, failure to follow school rules, disruptive behavior and insubordination.”</p> <p>RECOMMENDATIONS: “It is recommended that the MDT consider eligibility as an</p>	Clark County School District Special Student Services Psychological Report by Jerry Swan, School Psychologist

	educationally handicapped student on the basis of the discordant peer relationships, failure to adapt and function at an age appropriate level, and aggressive and acting out behaviors. Although the learning deficits still exist and need to be addressed they would appear to be secondary contributory factors at this time. It would appear that the possibility of a more restrictive educational environment should be pursued as a means of meeting Marlo's educational needs."	
11/13/1972	<p>Confidential Psychological Evaluation by Eric Smith, Ph.D. was reviewed. Mr. Thomas, 12-years-old at the time of evaluation, was referred due to his aggressive behavior and because he was charged with Trespassing and Battery. He allegedly entered a house unlawfully and kicked a female occupant as he left.</p> <p><u>Mental Status:</u> Marlo was cooperative with examiner. Mild deficits were noted in attention span and concentration. Memory, orientation, level of consciousness, perceptual processes, and thought content were unremarkable. Intellectual functioning appeared below average, mood was composed with limited affect, and mood changes were not noted. Judgment appears to be "extremely poor." No serious history of substance abuse or suicide attempts was noted.</p> <p><u>Diagnosis:</u> 312.00 Conduct Disorder</p> <p><u>Prognosis:</u> "The probability for further acts of antisocial behavior is high and the court will most likely witness a repetitive and persistent pattern. This, in turn, will obviously impair both his school and social functioning. Marlo's disorder precursor to the antisocial personality and he will need a highly controlled living system which includes all aspects of functioning."</p>	Confidential Psychological Evaluation by Eric Smith, Ph.D.
Undated, 1997	<p>Neuropsychological Assessment by Thomas F. Kinsora, Ph.D. was reviewed. Mr. Thomas was awaiting trial for his alleged connection to the robbery of the Lone star restaurant and the murder of two employees at that restaurant on 4/15/96.</p> <p><u>Social History</u> Mr. Thomas reported that he has three brothers, ages 29, 28 and 16, and that he was primarily raised by his older brother because his mother often was working as a custodian when he was at home. His brothers were characterized as "strict authoritarians" who tried to keep Mr. Thomas out of trouble. He reported that his mother kept the house well-stocked with food, took the children in for medical attention, and sought help for Mr. Thomas' behavioral problems. He stated that emotional support and nurturing were "very good" from his mother and brothers. Physical and sexual abuse were each denied, and Mr. Thomas stated that discipline consisted of restriction and occasional spanking.</p> <p>Mr. Thomas reported getting in trouble often because of difficulties controlling his temper and for fighting. He attended many different schools, including alternative schools that instituted strict behavioral modification programs. At age 13, he was found guilty of felony battery and was sent to Elko, NV for six months. This charge was</p>	Neuropsychological Assessment by Thomas F. Kinsora, Ph.D.

	<p>related to beating an adult with a pool cue, and Mr. Thomas claimed that he was helping a friend who was being beaten by the adult. During his juvenile years, Mr. Thomas was reportedly picked up for over ten incidences of battery, two incidences of trespassing, evading a police officer, vagrancy and prowling, three incidents of grand larceny, possession of a stolen vehicle, domestic violence, robbery with the use of a deadly weapon and curfew violations. Many of these incidences were dismissed. Mr. Thomas served an unstated amount of time in Elko, NV for the stolen vehicle at 16-years-old, and he spent six years in the Nevada State Penitentiary for attempted robbery.</p> <p><u>Education/Work History</u></p> <p>Mr. Thomas has 11 years of education. He moved schools frequently, including nine school changes by 4th grade. Part of his education occurred at correctional facilities and alternative schools that had behavioral components. Mr. Thomas reported persistent problems with reading, spelling, and arithmetic. Psychological reports suggest significant difficulties in each of these areas and the presence of pathognomonic signs of dyslexia including letter reversals and poor letter-sound association skills. His grades were C's and D's. His verbal IQ was measured at be 85 and 81 at various points, his performance IQ at 86 and 92, and his full scale IQ at 84 at 85. Reading, spelling and arithmetic scores have all fallen well below his grade level and age level across assessments.</p> <p>Vocationally, Mr. Thomas was employed at Lone Star Restaurant for several months prior to his arrest. He held several jobs at McDonald's and made money doing other odd jobs at other times.</p> <p><u>Social History according to Georgia Thomas, Marlo's Mother</u></p> <p>Georgia reported that she became extremely intoxicated on wine and vodka everyday when she was pregnant with Marlo. She was frequently abused by Marlo's father while pregnant, including being kicked and punched in the stomach. She did not recall if Marlo's delivery was difficult. Georgia stated that Marlo was a quiet baby who rarely cried. She recalled difficulty with toilet training and that Marlo had bladder incontinence nearly every other day until he was 12. Marlo reportedly had difficulty with anger control and hyperactivity as a child, and unknown medications were tried. He accepted love and affection and liked to be hugged. Marlo tended to sympathize with others and defend those who could not defend themselves. He reportedly liked animals and often took strays home. He was never observed to be cruel to animals, and he was never observed to set fires.</p> <p>Georgia reported that she viewed Marlo as "temperamental, argumentative, and unable to get along with authority." Peers reportedly called him "Stinky" and picked on him "incessantly." Because he refused to shower and because he smelled of urine from his enuresis. Georgia reported that he spent time with peers who were similarly rejected and that he was very eager to find acceptance and excitement through various means that were often illegal, including experimenting with drugs and stealing vehicles. Marlo ran away on two occasions during elementary school, but always returned home.</p>	
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	<p>Georgia reported that she “beat [Marlo] up” and frequently “whipping his behind” when he misbehaved. She reported that Marlo believed that others were out to get him, that no one loved him, and that his mother preferred her other children. She reported that Marlo’s behavior began using drugs frequently in the month prior to the Long Horn Restaurant incident. Georgia stated that his behavior changed, and there was an incident in which he came home “drunk and drugged up” and attempted to beat everyone up at his mother’s house. She did not know what drugs Marlo may have been using.</p> <p><u>Neuromedical History</u></p> <p>Marlo was using no medications at the time of the evaluation, and his past medical history was negative for significant illnesses or ongoing medical problems. Developmental milestones were on time. Marlo was diagnosed with a “hyperactive disorder” according to his mother and placed on a variety of unknown medications for a short time. Marlo reported that he enjoyed smoking marijuana and drank alcohol occasionally. No significant neuromedical conditions, early childhood illnesses or head injuries were reported by Mr. Thomas. He is unaware of neuro-toxic exposure.</p> <p><u>Behavioral Observations</u></p> <p>Mr. Thomas appeared to be a good historian who neither overstated accomplishments nor over-criticized himself. He offered a rationale for each of his illegal actions, and in most cases, he believed that he was unfairly treated or falsely accused. Mr. Thomas talked excessively at times, but mechanical aspects of speech were unremarkable. Test results appear to be valid based on understanding and effort, and all other observations were unremarkable.</p> <p><u>Tests Administered</u></p> <p>Boston Naming Test Controlled One-Word Association Test Finger Oscillation Test Grooved Pegboard Test Hare Psychopathy Checklist-Revised (PCL-R) Interview Minnesota Multiphasic Personality Inventory-2 (MMPI-2) Paced Auditory Serial Addition Test (PASAT) Proverb Screen Recognition Memory Test Rey Auditory Verbal Learning Test Rey Complex Figure Short Category Test Test of Problem Solving Trails A & B Wechsler Adult Intelligence Scale-Revised (WAIS-R) Wechsler Memory Scale-Revised (selected subtests) Wide Range Achievement Test-Revised (WRAT-R) Wisconsin Card Sorting Test</p> <p><u>Test Results</u></p> <p>Overall, it appears that Mr. Thomas put forth adequate effort and did not attempt to appear impaired in his cognitive or personality functioning.</p>	
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	<p><i>Intellectual Testing</i> WAIS-R FSIQ = 79, 8th percentile VIQ = 82, 12th percentile PIQ = 78, 7th percentile</p> <p><i>Academic Achievement</i> WRAT-R Word Reading = 4th percentile Spelling = 1st percentile Arithmetic = 1st percentile</p> <p>Dr. Kinsora concluded that these academic difficulties appear to be due to true learning disability, limited intellectual capacity, and an impoverished environment. Analysis of spelling errors suggested "great difficulty translating auditory information into correct sound units in written language." His reading problems appear to "come from an inability to decode sounds of written information."</p> <p><i>Attention, Concentration, Mental Speed</i> Trails A = 31", average Trails B = 113", mildly impaired Digit Symbol = 41", mildly impaired PASAT = severely impaired Digit Span Forward = average Digit Span Backward = mildly impaired</p> <p>Dr. Kinsora concluded that "Mr. Thomas demonstrates attention, concentration, and mental processing speed that are significantly below average when compared to other his age and with similar education. His ability to manipulate information in his mind and his ability to concentrate when solving personal or hypothetical problems will likely be significantly below normal for his age. The severity of his deficits is consistent with a mild but significant level of organic brain dysfunction.</p> <p><i>Language Skills</i> "Simple visual confrontational naming was intact, no significant difficulty was noted enunciating multisyllabic words, and repetition of language was intact. No deficits related to auditory comprehension were noted. His ability to think abstractly is clearly in the low average range compared to others his age." With regard to functional impairments, "language skills are intact but reflect an impoverished background with limited and intellectual resources."</p> <p><i>Spatial-Constructional Abilities</i> Rey Complex Figure = average, with organized approach Block Design , T = 37, mildly impaired Object Assembly, T = 42, low average</p> <p>Dr. Kinsora concluded that "overall, Mr. Thomas' perceptual and constructional skills are adequate but in the borderline range. Functionally, will have at least mild difficulties in any situation that require him to analyze spatial details, differentiate subtle features, or</p>	
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	<p>put complex objects or products together.</p> <p><i>Memory</i> WMS-R Logical Memory = 19/50, 17th percentile Rey Complex Figure, Delayed Recall = average Rey Auditory Verbal Learning Test = average for delayed, immediate, and recognition memory, though intrusions were "slightly high."</p> <p>Dr. Kinsora concluded that "Mr. Thomas's memory and new learning skills are well within normal limits and no functional problems should be noted in this area. His learning is adequately organized and follows a typical pattern of recall.</p> <p><i>Frontal Systems/Self-Regulation</i> COWAT = average TRAILS B = 113", mildly impaired WCST = average Short Category Test = low average Mr. Thomas was administered the TOPS, a measure of problem-solving skills in which he was required to generate solutions and rationales for 13 hypothetical problems. On this measure he performed at the level of a 14-year, 4-month old person.</p> <p>Dr. Kinsora concluded that "Mr. Thomas possesses significantly impaired skills related to social judgment and social problem solving. He may fail to understand social situation and may fail to apply good judgment in his attempts to solve personal issues. He has difficulty rapidly generating solutions to problems, yet if given time he is able to use feedback given to him to change his behavior."</p> <p><i>Motor Skills</i> Overall, both fine motor speed and fine motor dexterity were bilaterally intact.</p> <p><i>Social/Emotional Functioning</i> MMPI-2: No validity scales were elevated, and this profile appears to be valid. His profile was elevated on multiple clinical scales. He showed a particularly high elevation on scale 9 (Hypomania), and further clinically significant elevations on scales 7 (Anxiety), 8 (Schizophrenia), 6 (Paranoia), and 4 (Psychopathic Deviate). According to Dr. Kinsora, Mr. Thomas' profile is consistent "with an individual who has experienced significant hypomanic episodes, characterized by excessive energy, feelings of imperturbability and grandiosity. He also appears to be significantly paranoid with persistent feelings of persecution and betrayal. Likewise, he admits to persistent bizarre sensory experiences and intrusive thoughts that may be related to an underlying formal thought disorder, such as seen in schizophrenia. Impulse control is a problem. He feels dejected and alienated from others, and does not appear to have a good grasp of who he is and his place in society. He has great difficulty with authority."</p> <p>HARE PCL-R: Factor 1 = 7</p>	
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	<p>Factor = 16 Total adjusted score = 24.2 This total score is consistent with the score for 51.1% of the prison population. His profile is not consistent with that seen in severe sociopathic individuals with no capacity for remorse, but is generally consistent with that seen in an individual with an antisocial personality disorder.</p> <p><u>Summary and Recommendations:</u> Malingering and suboptimal effort were not noted. The following pattern of performance emerged from the assessment:</p> <ol style="list-style-type: none">1. Intellectual functioning is in the borderline range at 79, and both verbal reasoning and visual/perceptual abilities are consistent with this score.2. Academic skills testing suggest a learning disorder for reading, writing and arithmetic.3. Attention, concentration and mental processing speed are significantly below average. Complex forms of concentration are severely impaired.4. Basic language skills including word finding and comprehension are adequate, though vocabulary is "rather poor."5. Visual processing and constructional skills are in the borderline-impaired range.6. Memory skills are fairly intact.7. Social problem solving is clearly impaired and he has great difficulty generating solutions to problems while under the duress of time or stress.8. Motor skills are grossly intact in terms of speed and dexterity.9. Personality assessment revealed a highly suspicious man with persistent feelings of betrayal, impulse control problems, and difficulties with authority. <p>According to Dr. Kinsora, Mr. Thomas "has a great deal of difficulty managing his impulses in society. He has limited intellectual skills and when faced with problems, he is unable to properly arrive at solutions. His routine response to difficulty is anger and physical threats. His anger has and will likely continue to get him into trouble in society for some time to come. His sense of being persecuted and perpetually wronged by others stems from his childhood and his unique manner of interpreting his world. Unfortunately, this world view has caused him to act out against authority and society. I do not believe, however, that Mr. Thomas is a cold sociopath who has no remorse for his actions. In fact he seems to have very strong beliefs and a code of moral[ity]. In this sense, he is capable of showing remorse and has the ability to care deeply for others. Such qualities are lacking in a true sociopath.</p> <p>"With some qualification, he fits within the diagnosis of Antisocial Personality Disorder. Research suggests that the criminal behavior and antisocial traits dissipate significantly in the fourth decade of life for most of these individuals, at which time they typically become law abiding citizens despite their violent, crime ridden early life. M.</p>	
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	<p>Thomas will likely function well within the structure provided by the correctional system where there are fewer ambiguities and more immediate feedback regarding the appropriateness of his behavior than are found in society.</p> <p>ICD-9 Diagnostic Impressions Antisocial Personality Disorder.</p>	
11/09/2009	<p>Request for Funds for Investigative Assistance in Nevada vs. Marlo Thomas was reviewed. Marlo has been convicted of two counts of first degree capital murder. It is necessary to fully investigate any and all adaptive deficits that existed before Mr. Thomas was 18 years of age. Factors such as mental retardation and Fetal Alcohol Syndrome Spectrum Disorder, maternal abandonment, and a number of other mitigating factors that were not presented at his capital sentencing trial must be investigated by a competent neuropsychologist.</p> <p>Dr. Kinsora testified that Mr. Thomas had low intellectual functioning based on his evaluation of Mr. Thomas in 1996-1997 following his arrest for the present crime. Dr. Kinsora testified that Mr. Thomas was considered to be in the borderline range of intellectual functioning as his full scale IQ fell in the 8th percentile. He also stated that Mr. Thomas' reading skills were in the 4th percentile range and his spelling skills were in the 1st percentile. Mr. Thomas was reportedly four IQ points from the mentally retarded range. In the 2002 case <i>Atkins vs. Virginia</i>, the US Supreme Court ruled that it was cruel and unusual punishment to execute someone who is mentally retarded. Taking into account the Flynn Effect, which states that an IQ score can increase by 0.33 points per year or up to 0.45 point per year for someone who is mentally retarded, Mr. Thomas' score could be seven to ten points lower than the measured IQ of 79. Dr. Kinsora asserts that Mr. Thomas' IQ may, then, qualify as falling in the mentally retarded range. Dr. Kinsora stated that Mr. Thomas meets the other two prongs of the mentally retarded diagnosis under <i>Atkins</i> as he showed significant adaptive functioning deficits due to his learning problems and that these problems occurred before his 18th birthday.</p> <p>There is evidence that Mr. Thomas may suffer from Fetal Alcohol Spectrum Disorder (FASD) although he does not currently display the physical characteristics associated with FASD. Some of the hallmarks of FASD reportedly consist of deficits in cognition or intellect, reasoning, memory, or concentration. Regarding concentration, Dr. Kinsora testified that Mr. Thomas performed at the 1st percentile rank or lower over two trials of an unnamed concentration task (PASAT) and that Mr. Thomas "had a very, very ... hard time with this test." Dr. Kinsora also stated that Mr. Thomas is impaired in his ability to solve problems, functioning at the level of a 13-14 year-old according to his estimation. Finally, Mr. Thomas' mother admitted that she drank wine and vodka every day until she was "extremely drunk." This level of alcohol consumption is consistent with a diagnosis of FASD.</p> <p>Dr. Kinsora stated that Mr. Thomas' mother virtually abandoned him at a young age, he suffered from physical abuse, an impoverished upbringing, and as a result, Mr. Thomas developed severe behavioral</p>	Request for Funds for Investigative Assistance in Nevada vs. Marlo Thomas

	<p>problems. More specifically, Mr. Thomas' mother was punched and kicked in her stomach while pregnant with Mr. Thomas "many times" according to her report. He was also "whipped" by his mother, and his father was incarcerated at a young age. Dr. Kinsora testified that Mr. Thomas believed that his mother loved his brothers more than him, creating a sense of abandonment. He also suffered from "very poor" peer relations for much of his childhood according to Dr. Kinsora.</p> <p>In regards to personality functioning, Dr. Kinsora testified that Mr. Thomas has an MMPI-2 profile consistent with someone who has hypomanic episodes, difficulty controlling their impulses, difficulty with authority, feelings of paranoia, and persistent intrusive thoughts. Dr. Kinsora testified regarding Mr. Thomas' Hare Psychopathy Checklist profile. Dr. Kinsora stated that Mr. Thomas is "kind of an antisocial personality. He has a great deal of difficulty with authority. He's had a very hard life growing up, he gotten into multiple brushes with the law. He has difficulty controlling his behavior. But he differs qualitatively or in several ways from what we call the cold sociopath, the person who may glibly go about or happily go about using people and hurting people throughout their lifetimes." Dr. Kinsora continues to testify that Mr. Thomas believes that his actions are justified, typically. He stated that his problem solving is "defective" and that Mr. Thomas is different from someone who has no emotion or kills "for the fun of it," leading to the conclusion that Mr. Thomas is not a "cold sociopath" but often loses his temper due to his difficult childhood. Dr. Kinsora added that his paranoid ideation is involved in his criminal past, again creating a sense that Mr. Thomas feels justified for his crimes.</p> <p>When asked, Dr. Kinsora testified that he would diagnose Mr. Thomas with the following:</p> <ul style="list-style-type: none"> -ADHD, Predominantly Hyperactive/Impulsive Type -Reading Disorder (possible Dyslexia) -Disorder of Written Expression -Mathematics Disorder -Learning Disorder, NOS (related to Borderline Intellectual Functioning) -Antisocial Personality Disorder -Intermittent Explosive Disorder <p>Dr. Kinsora stated that Antisocial Personalities tend to "burn out" by the person's fourth decade of life. He added that Mr. Thomas would function "well, in general" in the prison system because of "controls" on his behavior that are not present outside of the prison system. He reported that Mr. Thomas' past troubles within the prison system were related to his "hot temper," his inability to control his impulses, and his difficulties with social reasoning and problem solving.</p>	
10/26/2011	<p>Chronological life history of Marlo Thomas was reviewed. Mr. Thomas' father, Bobby Lewis, reportedly beat Mr. Thomas' mother, Georgia, while she was pregnant. He was described as "extremely violent and kicked and punched Georgia in the abdomen. Georgia reportedly drank wine and vodka every night to the point of "extreme intoxication." She also worked at an industrial laundry during her pregnancy, so that she was exposed to chemicals that made her ill. Her daily symptoms included: lightheadedness, nausea, vomiting, and</p>	Chronological Life History of Marlo Thomas

	<p>headache.</p> <p>Mr. Thomas was born on 11/6/1972 at his mother's apartment. His father beat her the day of his birth, and Georgia's father beat Bobby "badly" in retaliation. Mr. Thomas is described as being a "sickly child." He had flu-like symptoms for a full month beginning when he was several weeks old. Dr. Laruso, Mr. Thomas' doctor, prescribed strong antibiotics, though Georgia believed that he should have been hospitalized. Mr. Thomas was reportedly dropped on his head by a babysitter, but he was not taken to the hospital. Mr. Thomas' father and a friend reportedly gave Mr. Thomas an undetermined amount of Vodka between that ages of one and two years old causing him to sleep for an unusually long time. Georgia reportedly had difficulty waking him up for approximately two hours. Georgia reportedly did not take care of her children and expected Darrel, Mr. Thomas' older brother, to raise the children in many ways. She was neglectful with homework, grocery-shopping, cooking, laundry and bill-paying. She also made no effort to make sure the children attended school. Georgia reported that she beat Marlo, neglected him, and did not bring him for medical treatment when it was necessary. She explained that this was because of her "hatred" for Bobby. Bobby reportedly told Mr. Thomas that he was not his child because of his lighter skin tone, and Mr. Thomas began asking why his father didn't love him beginning at age 6. Mr. Thomas was reportedly "shunned" overall. Mr. Thomas and his brothers reportedly switched schools frequently because they moved often, generally due to inability to pay bills. Georgia described Mr. Thomas as a "mean" child and that he bit and hit and picked fight with neighborhood children. He also repeated bad behaviors despite punishment, appearing not to understand why he was being punished. He was also described as "quiet" and not interested in toys. Mr. Thomas reportedly suffered from enuresis until 12-years-old and ran away on at least two occasions during his elementary school years.</p> <p>Bobby left the family for good when Mr. Thomas was four-years-old, and Georgia began dating Paul Hardwick whom she dated for 12 years. Bobby wanted to see the children but was not permitted to do so by Georgia. Mr. Thomas fell out of a moving car when he was five-years-old and sustained a closed head injury. No medical treatment was received. Mr. Thomas was apparently unable to learn school material or complete homework from kindergarten forward despite his older brother, Darrell, reportedly helping him. Teachers often stated that it was an inability to pay attention that led to Mr. Thomas' academic difficulties. Mr. Thomas reportedly misinterpreted the actions of others assuming that the other person was disrespecting him or accusing him of something. Mr. Thomas had no impulse control and got in fights nearly every day. He was unable to complete complex chores around the house. Mr. Thomas refused to bathe or change his clothes causing him to "stink." He was also unable to match his shirt and pants so that he looked "silly." Bobby reentered the children's life when Mr. Thomas was seven, and Bobby began visiting again.</p> <p>Paul reportedly did not contribute to the home or work and was not faithful to Georgia, but was "a good stand-in father" according to Mr.</p>	
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	<p>Thomas. By 1980, Mr. Thomas lived in a neighborhood characterized by gangs and violence. Mr. Thomas often got into fights at school where he acted "weird" and was "short-tempered."</p> <p>In the second grade, Mr. Thomas was given a psychological evaluation. His WISC-R scores were as follows: FSIQ 84; Verbal 85; Perceptual 86. WRAT scores were at the 1st percentile for reading, 2nd percentile for spelling, and 14th percentile for math. He scored slightly below his chronological age on the Beery VMI at the 6.5 age equivalent. The examiner noted that Mr. Thomas had "difficulty with language related concepts" and stated he lacked "phonetic analysis skills." He was placed in the Resource Classroom and was labeled as Learning Disabled. By fourth grade, Mr. Thomas had attended 10 different schools. Around this time, his father was sentenced to life in prison for kidnap, burglary, use of a deadly weapon, and sexual assault. Mr. Thomas reported a somewhat contradictory story in which his father was paroled after a short prison stint.</p> <p>With regard to his teenage years, Mr. Thomas used marijuana and cocaine frequently. He was designated as Specialized Emotionally Handicapped at Children's Behavioral Services (CBS) due to "severe acting out behaviors." Consequently, he did not attend mainstream school. He was kicked out of CBS in 12/1984 for being "agitated and disruptive, verbally and physically." Mr. Thomas was re-evaluated because he was unable to excel in the resource program. His FSIQ was 83. He was described as a "slow learner" and was at the 5th percentile for reading, 1st percentile for spelling, and 12th percentile for math. The evaluator noted the following: "poorly developed phonetic analysis skills;" "comprehension comparable to and limited by decoding skills;" spelling and written language is an area of significant difficulty;" and "significant deficits in encoding." It was recommended that Mr. Thomas be considered educationally handicapped, and his behavior was the primary factor in education. Mr. Thomas was then enrolled at Miley Achievement Center which has small class sizes and groups children by their behavior. When they behave better, they move up to other classes progressively until they can be mainstreamed. He struck a teacher here and was detained. His disposition was judicial remand. Mr. Thomas also struck a student at Miley Behavioral Services. This charge was amended to battery and his disposition on 1/2/85 was probation. Following these incidents, Georgia requests that Mr. Thomas be enrolled in a mainstream school, where he begins his sixth grade year. When Mr. Thomas is 11-years-old, he was also charged with evading a police officer and vagrancy/prowling, charges that were dismissed.</p> <p>At age 12, Mr. Thomas had a court-ordered psych evaluation by Eric Smith, PhD. He was referred by juvenile probation for the dismissed charge above. Dr. Smith concluded the following: "Although his manner of speech is coherent, Marlo's stream of speech is sometimes incoherent. Mild deficits in attention span and concentration. Below average intellectual functioning. Impulse control and judgment very poor. Conduct disorder, undersocialized, aggressive. Headed towards ASPD diagnosis."</p> <p>On 1/2/85, Mr. Thomas was placed on formal probation for the above</p>	
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	<p>cases. He was charged with disorderly conduct, and battery was added 5 days later, though the second charge was denied. On 10/2/85, Mr. Thomas was charged with four counts of battery, though all of these charges were later dismissed.</p> <p>In 1986, Georgia tires of Mr. Harding's cheating and kicks him out of the house. Mr. Thomas' older brother, Larry, moves out of the house the same year. Mr. Thomas returned to Miley Achievement Center for his eighth grade year, but he withdraws on 3/27/87 to attend a mainstream junior high school. After one month, he is transferred back to Miley. He earned B's at Miley. Mr. Thomas' older brother, Darrell, moved out of the house as soon as he turned 18, marrying his first wife. Darrell reported that he "checked in" on Mr. Thomas and his other younger brother to make sure that they were being cared for by Georgia. A teacher named Sherron Robinson befriended Mr. Thomas at Miley. They had off-site lunches together, and he visited her at his house. Mr. Thomas reportedly had a crush on her. Mr. Thomas was arrested on 7/9/87 for Grand Larceny and Battery with a Deadly Weapon. The battery charge was later dropped. The larceny charge was for stealing a bike from a rack outside a junior high that Mr. Thomas had attended in the past. Darrell reported that Mr. Thomas was often treated unfairly by the police as they would approach him, insisting that he talked to them. In these types of situations, Mr. Thomas was generally unable to control himself from mouthing off, and would be handcuffed.</p> <p>A psychological evaluation was completed on 7/22/86 related to the grand larceny charge. Tests were the Carlson Psychological Survey (CPS) and Junior-Senior High School Personality Questionnaire (HSPQ). Mr. Thomas was classified as "Type 3" on the CPS: immature and rebellious, looking for approval from peers even by way of bad acts, not anti-social. Immaturity was seen as a cause for his difficulty coping with structured settings as this personality type typically follows other peers rather than regard the rules. The HSPQ showed that he was "obedient and easily led by others." Overall, it appeared that Mr. Thomas was easily manipulated by peers.</p> <p>On 9/2/87, Mr. Thomas was adjudicated delinquent and made a ward of the court for an incident on 7/9/87 in which he struck a security officer when the man attempted to apprehend him for shoplifting. He then stole a mall security vehicle and crashed it during his getaway. Mr. Thomas was then sent to the Third Cottage Program, which is a juvenile detention dorm on the same campus as the regular juvenile detention dorms. Third Cottage residents live in single-person rooms about the size of a prison cell according to Mr. Thomas. He attended school and was punished by being locked in his room. He allegedly assaulted another student at Third Cottage in the dining hall with a fork or knife. Mr. Thomas was placed in "closed status" for his remaining time at Third Cottage. He was kicked out of school for disruptive behavior 7 times in 3 weeks at Third Cottage, often agitating his peers by throwing gang signs. Mr. Thomas was then sent from Third Cottage to Zenoff Hall, where he "exhibited hostile, threatening behavior towards staff and peers." Consequently he was sent to Nevada Youth Treatment Center (NYTC) at Elko, and his commitment ended on 6/21/88.</p>	
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	<p>In 1988, a NYTC Treatment Plan was submitted to the court stating that his intellectual functioning was in the Borderline range according to the Wide Range Intelligence and Personality Test. His capacity score on the same test was "above" this level. The Tennessee Self Concept Scale revealed a profile diagnosis of "Psychological Problem a Conduct Disorder, and Acting Out Types of Behavior." On the Jesness Behavior Checklist, Mr. Thomas scored above the 50th percentile on three observer ratings and below the 31st on eleven others. He was determined to be functioning at the following grade levels: 4.7 for reading; 4.1 for language; and 6.9 for math.</p> <p>After his release from Elko, he discovers that he has a child with his ex-girlfriend, who was involved with Mr. Thomas' best friend during his incarceration. Mr. Thomas is convinced the baby is his, but he does not continue to pursue this relationship because the child's mother states that it is her current boyfriend's. Mr. Thomas' youth parole counselor details his prior involvement with the law and notes Marlo's "total lack of impulse control and an inability to control his temper is cause for his problems." He had a curfew violation, so he was referred to parole and remained on parole. Mr. Thomas attended three different schools, including an alternative school, in his 11th grade year. On 12/27/89 Mr. Thomas was arrested for battery of his nine year old cousin and was released pending a plea hearing for 02/1990. On 12/28/89, Mr. Thomas and another man, Champ, went to a third man's hotel room offering to sell him crack. This man refused, and Mr. Thomas and his friend beat the victim. Mr. Thomas attempted to "bash" the victim with a "boulder." The victim suffered a broken wrist and had his teeth knocked out.</p> <p>On 1/4/90, Mr. Thomas was arrested for robbery. On 2/8/90, he was certified as an adult and committed to Clark County Detention Center where he remained for three weeks. He was released and no further action was taken, though he was withdrawn from another high school when they are notified of his arrest. On 3/8/90, he was arrested for auto theft. This was reduced to a misdemeanor on 7/25/90, credit for time served. On 4/10/90, he was charged with robbery with use of a deadly weapon and obstruction of a police officer after a teenager tried to buy drugs from and he stole the teen's money. He pleads guilty to attempted robbery on 10/23/90 and sentenced to six years in state prison. As of 11/20/90, Mr. Thomas had eight outstanding warrants regarding traffic matters.</p> <p>Sometime in 1991, Mr. Thomas becomes reacquainted with his father, who is also in Ely State Prison. They visit one another in the visiting room. On 9/30/91, Mr. Thomas allegedly attacked an inmate.</p> <p>In 1992, Mr. Thomas' cousin, Jody, died in a drug deal. Sometime in the same year, he exposed himself in prison, made threats, was generally "very disrespectful," and torn sheets were confiscated from him. Mr. Thomas threatened officers again in 1993. He threw urine into a female guard's face in 1994, and he was discharged later in that year.</p> <p>After he is released from prison, Mr. Thomas sought out his child.</p>	
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	<p>The child's mother continued her relationship with Mr. Thomas' friend, and this man asked Mr. Thomas if he could continue to act as the child's father. Mr. Thomas agreed, knowing that he would be back in prison at some point. Mr. Thomas reportedly tried to be "showy," drove a Cadillac, and tried to make himself look important by running with "thugs" according to his older brother, Darrell. In the summer of 1995, he began a relationship with Angela Love with whom he was with until his arrest for murder eight months later.</p> <p>On 3/5/96, Mr. Thomas noticed that his wife's rings were missing. He confronted two neighbors, and recovered two of the rings, but not Angela's wedding ring. Mr. Thomas was then arrested and bailed out by Angela. Mr. Thomas was reportedly intoxicated and violent to both Angela and his younger brother, PJ, in the weeks leading up to his arrest for murder. On 4/15/96, Mr. Thomas planned a robbery with Kenya Hall, a 15-year-old, so that Angela would have money if and when he went to jail for the offenses involving the rings above. He reported that he did not intend for anyone to get hurt during this robbery. He reported that he and Kenya drank alcohol and smoked blunts that day. Carl Dixon and Matt Gianakis were the victims of these murders.</p> <p>On 6/27/97, Dr. Kinsora testified that Mr. Thomas had an IQ of 79, 82 for Verbal and 78 for Perceptual. Mr. Thomas was diagnosed with ADHD, Reading Disorder (Dyslexia), Math Disorder, Borderline Intellectual Functioning, Antisocial Personality Disorder, Intermittent Explosive Disorder, and Impulse Control Disorder.</p> <p>Since his sentence to death, there have been several incidents at Ely State Prison.</p>	
11/04/2011	<p>Marlo Thomas Psycho-Medical-Social History Synopsis was reviewed.</p> <p>Age 0 – Prenatal assault to Marlo's brain: Mother's consumption of alcohol; beating sustained by mother at hands of father; Mother's exposure to toluene and other toxins.</p> <p>1 Month – Suffered from possible respiratory infection, admitted to hospital.</p> <p>Birth to Age 4 – Witnessed violence: Father and mother were extremely violent to each other in front of children.</p> <p>Birth to Teenage Years – Abandonment: Emotionally and physically, by mother and father. Father denied paternity. Mother hated Marlo because of resemblance to his father. Both parents shunned and berated him. Father disappeared completely from Marlo's life.</p> <p>Approximately 1 Year of Age – Closed Head Injury: Marlo was dropped on his head by a babysitter.</p> <p>1 to 2 Years of Age – Intoxication: Marlo is given alcohol by his father; his mother is unable to wake him for several hours.</p>	Marlo Thomas Psycho-Medical-Social History Synopsis

	<p>Age 2 through Teenage Years – Victim of Physical Violence: Various.</p> <p>5 Years Old – Closed Head Injury: Marlo fell out of a moving car, striking the pavement.</p> <p>5 Years old through Teenage Years – Problems in school from beginning: Marlo is “not capable” of doing homework; he is “antagonistic” to peers and teachers; suffers from enuresis; is “tormented” by peers because of enuresis and other reasons; Marlo attends many different schools.</p> <p>Age 9 – Low IQ: On 11/12/81, Marlo’s FSIQ is 84, VIQ is 85 and PIQ is 86 according to the WISC-R. The PPVT Intelligence Test measures his IQ to be 81. WRAT ranks him in the 1st and 2nd percentile for reading and spelling, respectively, and the 14th in math. He reportedly lacked phonetic analysis skills. He was at the 6.5 and 6.8 grade levels on the Beery VMI. He was placed in the Learning Disabled category in the Resource Room at his school.</p> <p>Age 11 – Marlo’s father is sent to prison for what is believed to be murder.</p> <p>Age 11 – Specialized Education: Marlo is placed in the Specialized Emotionally Handicapped (SHE) program at Children’s Behavioral Services (CBS). Marlo was described as “agitated and disruptive, verbally and physically” by CBS. He moves in and out of the CBS program until he is sent to state prison at 17 years old.</p> <p>Age 11 – Entry into Juvenile Court: Marlo is frequently charged with batter, robbery and other charges related to behavioral difficulties at school.</p> <p>Age 11 – CCSD Psych Evaluation: FSIQ = 83. Learning deficits were determined to be secondary to behavior problems. Spelling and written language was significant deficit, more specifically in encoding. Math was a relative strength. Marlo was classified as Educationally Handicapped by this point.</p> <p>Age 12 – Court-ordered psych evaluation: 11/13/84 by Eric Smith. He was referred by juvenile probation for the dismissed charge above. Dr. Smith concluded the following: “Although his manner of speech is coherent, Marlo’s stream of speech is sometimes incoherent. Mild deficits in attention span and concentration. Below average intellectual functioning. Impulse control and judgment very poor. Conduct disorder, undersocialized, aggressive. Headed towards ASPD diagnosis.”</p> <p>Age 14 – CCSD psych re-evaluation: 03/87 by James A. Treanor, school psychologist. WISC-R scores: FS 85, VIQ 81, PIQ 92.</p> <p>Age 14 & 15 – Court ordered psych evaluation: Tests were the Carlson Psychological Survey (CPS) and Junior-Senior High School Personality Questionnaire (HSPQ). Mr. Thomas was classified as “Type 3” on the CPS: immature and rebellious, looking for approval</p>	
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	<p>from peers even by way of bad acts, not anti-social. Immaturity was seen as a cause for his difficulty coping with structured settings as this personality type typically follows other peers rather than regard the rules. The HSPQ showed that he was "obedient and easily led by others." Overall, it appeared that Mr. Thomas was easily manipulated by peers.</p> <p>Age 14 & 15 – Adjudicated delinquent and made ward of court for larceny and battery offenses. His P.O. recommended placement in a lock-down institution, though none were available at the time in Nevada. P.O. stated that Marlo "has a total lack of impulse control and an inability to control his temper." He was committed to NNYTC twice where he stayed for a total of 14 months.</p> <p>Age 15 – Institutional psych evaluation: a NYTC Treatment Plan was submitted to the court stating that his intellectual functioning was in the Borderline range according to the Wide Range Intelligence and Personality Test. His capacity score on the same test was "above" this level. The Tennessee Self Concept Scale revealed a profile diagnosis of "Psychological Problem a Conduct Disorder, and Acting Out Types of Behavior." On the Jesness Behavior Checklist, Mr. Thomas scored above the 50th percentile on three observer ratings and below the 31st on eleven others. He was determined to be functioning at the following grade levels: 4.7 for reading; 4.1 for language; and 6.9 for math.</p> <p>Age 17 – Arrested for "strong-arm type robberies." On two occasions, Marlo was arrested only after returning to the scene of his crimes while the victims were still there, speaking to police about the incident. He received a six-year sentence.</p> <p>Age 18 to 21 – Marlo was incarcerated in state prison.</p> <p>Age 23 – Date of robbery and murders.</p> <p>Age 24 – Defense psych evaluation by Dr. Kinsora: Dr. Kinsora testified that Mr. Thomas had an IQ of 79, 82 for Verbal and 78 for Perceptual. Mr. Thomas was diagnosed with ADHD, Reading Disorder (Dyslexia), Math Disorder, Borderline Intellectual Functioning, Antisocial Personality Disorder, Intermittent.</p> <p>Age 24 – Sentenced to death row.</p>	
11/08/2011	<p>Investigative Memorandum, Regarding Social History Report and Narrative by Tena S. Francis was reviewed.</p> <p>POSSIBLE MITIGATING ISSUES</p> <p><u>Possible Intellectual Deficiencies</u> Marlo had serious learning disabilities that were observed beginning in kindergarten. Because of his behavioral issues, however, determining the nature and etiology of his deficits is difficult. Reports from family members regarding adaptive behavior indicate that he may suffer from symptoms related to intellectual disability or mental retardation.</p>	Investigative Memorandum, Regarding Social History Report and Narrative by Tena S. Francis

	<p><u>Possible Neurological Impairment</u></p> <p>Marlo's mother drank excessively and consistently throughout her pregnancy with Marlo. She also worked during pregnancy at an industrial laundry where she became sick due to exposure to chemicals, likely toluene. Additionally, Marlo frequently used PCP, cocaine, and marijuana beginning as an adolescent.</p> <p><u>Dysfunctional Family</u></p> <p>Marlo's family consisted of an absent father, physical violence against the children, emotional neglect, psychological maltreatment, constant school and home relocations, and drug/alcohol addictions. Neither of his parents nor his step-parent appeared to be able to meet the emotional needs of Marlo and his siblings. Greater detail is listed in each of the above areas:</p> <ol style="list-style-type: none">Ineffective parenting – "Substance dependence and emotional instability prevented Marlo's parents from identifying, understanding, and responding appropriately to their children's psychological and physical needs. Marlo's parents proved to be ineffective in many ways. As noted ... Marlo's father was absent from the home (emotionally) throughout Marlo's life due to alcoholism, drug use and his denial of paternity. He was absent (physically) for most of Marlo's childhood. Marlo's mother (Georgia Thomas) was unavailable to provide for the emotional needs of her children. Because Marlo's mother played a critical role in his life as a genetic contributor, caretaker, attachment figure and role model, it is important to understand the patterns of behavior that he learned from his relationships; not just with Marlo, but with all the members of the family. It is apparent that Marlo did not learn to show affection, to solve problems, or how to communicate effectively from his mother."Absent father – "Research indicates that the most important figure in the life of a child is the same-sex parent. Research also indicates the lack of father (or the presence of a negative father figure) has a serious impact on the development of a male child. Marlo spent much of his childhood either being with a man who refused paternity or being without his father and in the presence of a negative replacement father-figure."Physical abuse of the children – "Undoubtedly, Marlo was traumatized by the anger and violence he was subjected to, both as victim and as a witness. Research indicates the pattern of treatment a child receives during his childhood is as traumatic as any single act of violence. When Marlo was a child, anger and violence was all around him. Children in this position have no place to feel safe and no one to make them feel safe. This does incredible damage to a child's psychological and emotional self. And, the absence of protective forces in Marlo's life exacerbated the long-term consequences of the trauma. The trauma Marlo endured at home made it impossible for him to attend to those matters set aside for children. Documenting childhood trauma is important for every aspect of a capital case, as trauma is often a cause for false confessions, offers explanation for the manner in which the client interacted with police, etc.Psychological abuse – It is widely recognized that the psychological maltreatment of a child is as serious a problem as	
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	<p>physical abuse. There is ample evidence that Marlo was mistreated as a child. His father pushed him away, denying paternity. Marlo's mother did not hide her dislike for Marlo; he reminded her of his abusive father.</p> <p>e. Neglect – Neglect is defined as the failure of caretakers to provide for basic needs of children and to provide for an adequate level of care. There are many kinds of neglect; the type seen in Marlo's life is emotional neglect (the child's needs for security, support, affection and nurturance are not met). Characteristics of neglectful parents include at least one trait seen in Marlo's mother: lack of judgment and/or lack of motivation and energy (due to her own emotional problems).</p> <p><u>Marlo's Addictive Disease</u> "Although more information is needed, it is clear that Marlo was drug dependent beginning in adolescence."</p>	
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INTERVIEW OF MARLO THOMAS:

Marlo Thomas is a 39-year-old, African-American male who was interviewed at Ely State Prison on April 2, 2012.

MEDICAL/PSYCHIATRIC HISTORY:

Mr. Thomas said he has had a few concussions in his lifetime. He said he had this occur with some arguments in his current incarceration at Nevada State Prison, Ely. Mr. Thomas denied a history of significant headaches, dizziness, tinnitus, vertigo, or loss of sense of taste or smell. He said he has glasses for reading and astigmatism, but otherwise denied blurred vision or diplopia. Photophobia and phonophobia were denied. He said he has some ankle pain due to arthritis.

Mr. Thomas said he hears people calling his name and does not see who it is. He said he hears voices every now and then. He said he talks to himself. He said he saw a couple of people who were ghosts, which may have been shapes or silhouettes. He said he was not thinking there were other people in his cell. He said he has seen a lot of death. He said he saw a silhouette two times this year, and has seen them before in the past as well.

He said he sleeps six to seven hours a night. He said his hearing is not good, and that it is hard for him to comprehend things. He said his concentration is decreased.

In regard to emotional symptoms, Mr. Thomas said he would not commit suicide because he believes in God. He said he has nightmares of the homicides and that the homicides stay with him in his sleep. He said every person has the potential to kill someone. He said he has flashbacks of the homicides and nightmares and cannot shake them. He said he has remorse for what he did to those individuals and began to cry when he said this. He said he gets frustrated easily and is easily irritated.

Mr. Thomas feels like he may have high blood pressure and diabetes.

EDUCATIONAL/VOCATIONAL/CRIMINAL/SOCIAL HISTORY:

Mr. Thomas said he finished high school and was in special education in Las Vegas. He said he should have been in special education earlier, but he was stubborn and started it in sixth grade. He said he appears to understand things a lot when he does not. He said he has been in Ely State Prison since the early 1990s.

When he was 17, he was involved in an attempted robbery with his cousin. He turned 18 before he was convicted. He served four and a half years. He was released in 1994 and within eight months he had two jobs. He married his girlfriend when he got out of prison. He had a job at the Lone Star Restaurant. When he first got out of prison, he worked at McDonald's as a cook and was there for two and a half months. He said he then began work at Lone Star. He was confused about the name of the restaurant calling it Lone Star, All Star and Long Horn at different points. He said he stayed at Lone Star for two to three months, and while there his wife was fighting with his neighbors, and an argument ensued. He wanted to go home to his wife, but he was fired because he had not gone into work to help his wife, and they did not want to let him take a few days off.

He went over to get his last check and once he arrived at the restaurant there were two prep cooks in the kitchen. Mr. Thomas was a dishwasher. One of the prep cooks was named Matt. Mr. Thomas said he had a history of arguing with Matt, who would throw knives into pots and pan. He said the other prep cook involved was Carl. He said Carl let him in. Mr. Thomas said as he was heading to the office, he also tried to see if he could get his job back. His wife had lost her job, and she "went downhill." He saw Matt walking past him and headed to the restroom. He hung out in the restrooms. The restaurant was pretty big. He introduced his brother-in-law who was with him. His name was Kenya. His wife, Angela, stayed in the car. She is 37 now. He has no kids by her and had one child, for whom he was never there. He said he chooses not to speak of this son.

He said the homicides were in April 1996. He said he knocked on the door of the manager's office. The manager was in there, and the safe was open. The manager was counting the money. When they walked in he said his name was Marlo and he asked him for his check. An argument pursued early in the morning. Mr. Thomas said he always carried a gun. He said the guy gave him his check. Mr. Thomas demanded the money in the safe. The manager gave the money to Kenya. He gave the gun to Kenya as well. Matt and Carl went to the restroom. Mr. Thomas went to the restroom, and they were in there. Matt was at the stall/urinal and Carl was by the sink. He said Matt stepped away from the urinal towards the stalls and Carl was by the sink looking in the mirror. When he walked in things were quiet. He started talking to Carl.

Mr. Thomas said he has two counts of murder, two charges of kidnapping, and charges related to robbery. Mr. Thomas said he leaned against the door to the stall. He said he held them inside the restroom and he still does not understand the kidnapping charge. Matt said he did not want to be involved in the conversation. A "tussle" started. Kenya

had his gun in his hand. Carl was by the sink. Carl had a prep knife with him and he had a towel. He said there was a wall between the sink and the door. He said Matt had his hands on Mr. Thomas's shirt and he was pushing him away towards the door and he saw the knife and grabbed it and stabbed Matt in the arm. Carl ran to the sink and tried to help Matt and he stabbed Carl. He said he kept stabbing Carl. Kenya came out of the office. The manager had just left. Carl fell and he died in the restroom and Matt died on the way to the hospital.

Mr. Thomas said he feels the murders were provoked and that he went into the bathroom to prevent a surprise attack. He said he went in there to try to stall them and there was a lot of money in the safe and he said the whole incident spiraled out of control. He said he liked Carl a lot. He said he feels it is terrible that Carl died. He said he feels the murders occurred very quickly. He said he wishes he could change the past and undo his actions. He said he did not go in there with the intent to rob.

Observationally and by history, he appears very impulsive, has poor judgement, and a hair trigger temper, and he admits to these. He said he was teased in school because of his slowness with comprehension, problems spelling, problems with saying a word and forgetting what the word means. He said his learning disability causes him difficulty understanding, and he cannot figure something out. He said he was teased a lot in school and got into fights a lot. He said he started to steal at 13 years old and got away from his mother as soon as he could. He got in with older guys and copied and imitated them, and they led him in the wrong direction. He said he wanted to follow in line. He said the outcome was very terrible. He said he is easily manipulated.

He said Kenya, Angela's brother, was 14 at the time of the homicides. He said Kenya was released in 2006.

He said he was more aggressive in the past and used to be extremely aggressive. He said he is more comfortable as a person now, and he does not have to fake it to please people.

His mother is Georgia Ann Thomas, whom he said drank a lot of Boone Farms Wine. He said his father smoked and used alcohol. He said his father got out of prison in 2009 and he died. He said he has three older brothers and one younger brother. All are on the street except one, Shaeke, who is in prison in California for robbery. He said his oldest brother is 49 and his mother may be 71. He said he has not seen his mother since 2005.

SUBSTANCE HISTORY:

He said around age 14 he began using marijuana and drinking beer. He used PCP every day and cocaine until he was 21 years old. On the day of the crime, he said he had taken cocaine the night before the arrest. He had done ¼ ounce of cocaine and two sticks of "cherm" the night before the arrest. He also smoked about one ounce of marijuana a day, about five blunts a day. He did not smoke cigarettes.

BEHAVIORAL OBSERVATIONS, MENTAL STATUS AND MEASURES OF NEUROPSYCHOLOGICAL EFFORT:

Beck Inventories

Test Type	Raw Score
Beck Depression Inventory-II	38
Beck Anxiety Inventory	23
Beck Hopelessness Scale	11

Test of Memory Malinger

Trial	Score	Cutoff
Trial 1	47	
Trial 2	50	<45

Mr. Thomas cried when talking about the homicides. During the Tactual Performance Test, in which he was blindfolded, he asked if I was laughing at him. He approached to tasks was disorganized, but he did persist. He said he feels he may have high blood pressure and diabetes. This is not yet confirmed. He said he can never forget what he did.

The Beck Inventories are face-valid measures of depression, anxiety and hopelessness. On the BDI-II, Mr. Thomas reported a severe level of depression. He reported a moderate-to-severe level of anxiety on the BAI. Mr. Thomas reported moderate hopelessness on the BHS.

The Test of Memory Malinger (TOMM) is a measure of mental effort on a memory task. Intact performance on the TOMM is generally considered to be predictive of valid and reliable performances across the neuropsychological test battery. Mr. Thomas' score of 50/50 on Trial 2 of the TOMM was above the cutoff for good effort at less than 45. Given Mr. Thomas' performance on the TOMM, along with his observable level of cooperation and motivation, the results of this evaluation are considered a valid and reliable estimate of his current psychological and neuropsychological functioning.

NEUROPSYCHOLOGICAL TEST FINDINGS:

() = standard deviation units from the mean in a (+) positive or (-) negative direction
SS = standard score (mean of 100, standard deviation of 15)
ss = scaled score (mean of 10, standard deviation of 3)
wnl = within normal limits
T = T-score (mean of 50, standard deviation of 10)
" = Seconds
PR = Percentile Rank
NDS = Neuropsychological Deficit Scale
HRB = Heaton 2004 Normative Data

INTELLECTUAL FUNCTIONS:

Wechsler Adult Intelligence Scale-IV

Index	Composite Score	Percentile Rank
Verbal Comprehension	85	16
Perceptual Reasoning	71	3
Working Memory	69	2
Processing Speed	81	10
Full Scale	72	3
General Ability	76	5

Wechsler Adult Intelligence Scale-IV, Verbal Comprehension

Verbal Subtests	Raw	ss	Percentile Rank	Strength or Weakness
Similarities	18	6	9	
Vocabulary	25	7	16	
Information	11	9	37	S

Wechsler Adult Intelligence Scale-IV, Perceptual Reasoning

Perceptual Subtests	Raw	ss	Percentile Rank	Strength or Weakness
Block Design	24	6	9	
Matrix Reasoning	5	3	1	W
Visual Puzzles	9	6	9	

Wechsler Adult Intelligence Scale-IV, Working Memory

Working Memory Subtests	Raw	ss	Percentile Rank	Strength or Weakness
Digit Span	19	6	9	
Arithmetic	6	3	6	W

Wechsler Adult Intelligence Scale-IV, Processing Speed

Processing Speed Subtests	Raw	ss	Percentile Rank	Strength or Weakness
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Symbol Search	24	7	16	
Coding	46	6	9	

Wechsler Adult Intelligence Scale-IV, Discrepancy Comparisons

Discrepancy Comparisons	Score 1	Score 2	1 st - 2 nd	Sig.
Verbal Comprehension-Perceptual Reasoning	85	71	14	Y
Verbal Comprehension-Working Memory	85	69	16	Y
Verbal Comprehension-Processing Speed	85	81	4	N
Perceptual Reasoning-Working Memory	71	69	2	N
Perceptual Reasoning-Processing Speed	71	81	-10	N
Working Memory-Processing Speed	69	81	-12	N
Full Scale-General Ability	72	76	-4	Y

The Wechsler Adult Intelligence Scale-IV (WAIS-IV) is a reliable and valid measure of intellectual functioning. Mr. Thomas' Full Scale IQ (FSIQ) was in the Borderline/mild-to-moderate range of impairment at the 3rd percentile rank. His General Ability Index (GAI) was slightly higher in the Borderline/mild-to-moderate range of impairment at the 5th percentile rank, partially due to a low Working Memory score, which is not included in the GAI.

On the Verbal Comprehension Index (VCI), Mr. Thomas scored in the low/below average range at the 16th percentile rank. His score on the Perceptual Reasoning Index (PRI) was in the Borderline range at the 3rd percentile rank. There was a significant discrepancy between these two indices in favor of Verbal Comprehension. Mr. Thomas scored in the extremely low range on the Working Memory Index (WMI), at the 2nd percentile, indicating difficulty with attention and concentration. A significant discrepancy between the VCI and the WMI was present, again in favor of Verbal Comprehension. Finally, Mr. Thomas' Processing Speed Index (PSI) was in the Borderline/mildly impaired range at the 10th percentile rank.

With regard to specific subtests, Mr. Thomas showed a relative strength at the 37th percentile rank on the Information subtest, part of the VCI, requiring general knowledge. He showed relative weaknesses on the Arithmetic subtest, assessing Working Memory, at the 6th percentile rank as well as the Matrix Reasoning subtest, part of the Perceptual Reasoning Index, at the 1st percentile rank.

ATTENTION AND CONCENTRATION:

Conners' Adult ADHD Rating Scales-Long Version Self-Report

Scale	Raw Score	T-Score	Percentile Rank
A. Inattention/Memory Problems	13	54	68
B. Hyperactivity/Restlessness	12	48	42-45
C. Impulsivity/Emotional Lability	17	59	83
D. Problems with Self-Concept	7	53	61-63
E. DSM-IV Inattentive Symptoms	15	74	99
F. DSM-IV Hyperactive-Impulsive Symptoms	9	54	66-68
G. DSM-IV ADHD Symptoms Total	24	68	96
H. ADHD Index	20	66	95

Speech Sounds Perception Test

# Errors	T-Score	Percentile Rank	NDS
20	30	2-3	3

Seashore Rhythm Test

# Correct	T-Score	Percentile Rank	NDS
16	29	2	3

The Conners' Adult ADHD Rating Scales-Long Version Self-Report was administered to Mr. Thomas to assess his perception of his attentional difficulties. A total of three subscales were in the range of clinical significance. Mr. Thomas' DSM-IV ADHD Symptoms Total score was significant at the 96th percentile rank. This was largely due to his report of Inattentive Symptoms, which was highly significant at the 99th percentile rank. His ADHD Index score was also significantly elevated at the 95th percentile rank.

The Speech Sounds Perception Test and Seashore Rhythm Test are auditory, verbal and auditory, non-verbal measures of attention and processing, respectively. Mr. Thomas' score on the Speech Sounds Perception Test was in the mild to moderate range of impairment at the 2nd-3rd percentile ranks. His performance on the Seashore Rhythm Test was moderately impaired at the 2nd percentile rank.

MEMORY FUNCTIONS:

Tactual Performance Test

Variable	Raw Score	T-Score	Percentile	NDS
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			Rank	
Memory	6	39	14	1
Localization	1	39	14	1

The Tactual Performance Test measures incidental recall, which is memory for items in which the examinee is not cued beforehand of the need to remember. Mr. Thomas' incidental recall was mildly impaired at the 14th percentile rank on this measure. His Localization score was also mildly impaired at the 14th percentile rank.

LANGUAGE FUNCTIONS:

Controlled Oral Word Association Test

Total Score	T-Score	Percentile Rank
23	39	14

Animal Naming

Total Score	T-Score	Percentile Rank
15	45	30-32

BDAE Complex Ideational Material Subtest

Raw Score	T-Score	Percentile Rank
10/12	37	9-10

Aphasia Screening Test

Pathognomonic Signs
Dysnomia, Spelling Dyspraxia, Central Dysarthria, Constructional Dyspraxia

Wide Range Achievement Test-4

Subtest	Standard Score	Percentile Rank	Grade Equivalent
Word Reading	75	5	4.9
Sentence Comprehension	72	3	6.0
Spelling	77	6	5.5
Math Computation	71	3	4.0

Reading Composite	71	3	
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Verbal fluency is the ability to recite words rapidly to certain categories. Mr. Thomas' phonemic fluency, defined as stating as many words as possible beginning with certain letters, was in the mild range of impairment at the 14th percentile rank. His semantic fluency, or his ability to cite as many words as possible belonging to a conceptual category, was in the average range at the 45th percentile rank.

The Complex Ideational Material subtest of the Boston Diagnostic Aphasia Battery was given to Mr. Thomas to assess his level of auditory, semantic comprehension. His score on this measure was 10/12, which is mildly impaired at the 9th-10th percentile rank.

The Aphasia Screening Test screens for pathognomonic signs of language impairment. On this measure, Mr. Thomas showed pathognomonic signs of dysnomia, spelling dyspraxia, central dysarthria, and constructional dyspraxia.

On the Wide Range of Achievement Test-4, Mr. Thomas demonstrated consistently impaired academic skills. Mr. Thomas' Word Reading ability was mildly impaired at the 5th percentile rank, 4.9 grade equivalent. His Sentence Comprehension skills were also mildly-to-moderately impaired at the 3rd percentile rank, 6.0 grade equivalent. The Reading Composite score is made up of the Word Reading and Sentence Comprehension scores, and this composite was mildly-to-moderately impaired at the 3rd percentile rank. Mr. Thomas' Spelling ability was in the mild-to-moderate range of impairment at the 6th percentile rank, 5.5 grade equivalent. His Math Computation score was in the mild range of impairment at the 3rd percentile rank, 4.0 grade equivalent.

MOTOR & PERCEPTUAL-MOTOR FUNCTIONS:

Lateral Dominance Exam

	Right	Left	Mixed
Hands	X		
Feet			X

Right-Left Orientation

Raw Score	T-Score	Percentile Rank
15	16.9	.06-.07

Grip Strength

Hand	Kilograms	T-Score	Percentile Rank
	34	32	4

Right Dominant			
Left Non-Dominant	33	31	3

Manual Finger Tapping Test

Hand	Raw Score	T-Score	Percentile Rank	NDS
Right Dominant	52.2	48	42-45	1
Left Non-Dominant	49.4	51	53-55	0

Grooved Pegboard

Hand	Raw Score	T-Score	Percentile Rank
Right Dominant	94	36	8
Left Non-Dominant	89	40	16

Trail Making Test A

Time	Errors	T-Score	Percentile Rank	NDS
30"	0	50	50	1

Tactual Performance Test

Hand	Time (minutes)	# Blocks Placed	T-Score	Percentile Rank
Dominant	10.1	10	42	21-23
Non-Dominant	14.0	8	34	5-6
Both	8.3	10	32	4
Total	32.4	28	35	7

On the Lateral Dominance Examination, Mr. Thomas was right-hand dominant for his hands and mixed-dominant for his feet. Mr. Thomas' right-left orientation was severely impaired at the .06th-.07th percentile rank. His answers were incorrect for all prompts involving pointing at the examiner's body, but he was able to correctly answer all prompts that asked him to touch the examiner's body. Mr. Thomas made one additional error when asked to touch his own right ear with his left hand.

On a measure of Grip Strength Mr. Thomas was mildly impaired for both his right dominant and left non-dominant hands at the 4th and 3rd percentile ranks, respectively. On a measure of Finger Tapping, Mr. Thomas' score was in the average range for both hands

at the 42nd-45th percentile rank for his right, dominant hand and at the 53rd-55th percentile rank for his left, non-dominant hand. On the Grooved Pegboard, a measure of manual dexterity, Mr. Thomas performed in the mild range of impairment for both hands. His score was at the 8th percentile rank for his right, dominant hand and at the 16th percentile rank for his left, non-dominant hand.

Simple sequencing, as assessed by Trail Making Test A, was average at the 50th percentile rank.

The Tactual Performance Test is a measure of tactile-kinesthetic problem solving. Mr. Thomas' Total score on this test was in the mild range of impairment at the 7th percentile rank. His performance with his Dominant hand was in the low average range at the 21st-23rd percentile rank. Mr. Thomas' score with his Non-Dominant hand was mildly impaired at the 5th-6th percentile rank. Finally, his score on the Both hands trial was in the mild-to-moderate range of impairment at the 4th percentile rank.

SENSORY-PERCEPTUAL FUNCTIONS:

Sensory Imperception			Sensory Suppressions		
Modality	Right	Left	Modality	Right	Left
Tactile	0	0	Tactile	0	0
Auditory	0	0	Auditory	0	0
Visual	0	0	Visual	1	0
Total	0	0	Total	1	0

Finger Agnosia

Hand	Errors
Right	1/20
Left	2/20

Fingertip Number Writing

Hand	Errors
Right	8/20
Left	9/20

Tactile Form Recognition Test

Hand	Errors	Time	T-Score	Percentile Rank
Right	2	20"	29	2
Left	3	19"	29	2

Sensory-Perceptual Total Score

Hand	Errors	T-Score	Percentile Rank
Right	12	29	2
Left	14	25	1
Total	26	29	2

The Reitan-Klove Sensory-Perceptual examination was administered to Mr. Thomas. Mr. Thomas' visual fields were full to confrontation screening. Extraocular movements and convergence appeared intact. Auditory, tactile, and visual stimulation were bilaterally intact with no imperceptions on either side. Bilateral, simultaneous processing of the auditory and tactile modalities was intact. Mr. Thomas made one error in regards to simultaneous processing of the visual modality on the right side. Therefore, Mr. Thomas had one right-sided suppression error. There was significant bilateral dysgraphesthesia with 8 errors on the right and 9 on the left spread relatively evenly across all of the fingers representing severe impairment. Mr. Thomas had minimal finger dysgnosia bilaterally with one error on his right hand and two errors on his left hand on the Tactile Finger Recognition Test. Mr. Thomas made two tactile dystereognostic errors on the right side and three errors on the left side on the Tactile Form Recognition Test representing severe impairment. Tactile processing speed was moderately impaired for both the right and left hands. The Sensory-Perceptual Total scores were bilaterally impaired on this measure.

EXECUTIVE FUNCTIONS, SEQUENCING AND MENTAL FLEXIBILITY:

Trail Making Test B

Time	Errors	T-Score	Percentile Rank	NDS
156"	4	34	5-6	3

The Booklet Category Test-II

# Errors	T-Score	Percentile Rank	NDS
113	25	1	3

Wisconsin Card Sorting Test

	Raw Score	T-Score	Percentile Rank
Number of Categories Completed	5		11-16
Trials to Complete First Category	10		>16
Failure to Maintain Set	2		11-16
Learning to Learn	-3.3%		11-16
Total Number of Errors	48	37	9-10
Perseverative Responses	26	38	12
Perseverative Errors	23	37	9-10
Percent Perseverative Errors	18.0%	39	13
Nonperseverative Errors	25	37	9-10
Percent Conceptual Level Responses	53.1%	39	13

Ruff Figural Fluency Test

Subtest	Raw Score	Corrected Score	T-Score	Percentile Rank
Total Unique Designs	45	58	36.9	8-9
Perseverations	111		<13	<0.02
Error Ratio	2.4667	2.4467	<25	<0.02

Stroop Color and Word Test

Subtest	Raw Score	Age/Education Predicted Score	T-Score	Percentile Rank
Word	52	98	18	.09-.10
Color	36	74	18	.09-.10
Color-Word	18	38	31	3
Interference	3-5		45-47	30-39

Complex sequencing, as assessed by Trail Making Test B, was in the mildly-to-moderately impaired range for speed at the 5th-6th percentile rank. Mr. Thomas made four errors on this task.

The Booklet Category Test-II is a measure of concept formation and nonverbal problem solving. Mr. Thomas made 113 errors on this task, which is in the moderate range of impairment using the Halstead-Reitan scoring criteria.

The Wisconsin Card Sorting Test is a measure of mental flexibility and the ability to Shift Mental Set. Mr. Thomas completed 5/6 categories, which is in the mildly impaired range at the 11th-16th percentile rank. He made 48 Total Errors, which was mildly impaired at the 9th-10th percentile rank. Twenty-three of these errors were Perseverative Errors, and 25 were Nonperseverative errors, and each of these scores was in the mildly impaired range at the 9th-10th percentile rank. Finally, Mr. Thomas exhibited Failure to Maintain Set on two occasions, which is in the mildly impaired range at the 11th-16th percentile rank.

The Ruff Figural Fluency Test is a measure of design fluency. Mr. Thomas's score for Total Unique Designs was mildly impaired at the 8th-9th percentile rank. He made 111 Perseverative errors on this task, which was severely impaired at less than the 0.02 percentile rank. Mr. Thomas's Error Ratio was also in the severe range of impairment at less than the 0.02 percentile rank.

The Stroop Color and Word Test was administered to Mr. Thomas to assess processing speed and mental flexibility. On both the Word and Color tasks, he scored in the severe range of impairment at the .09-.10 percentile rank. On the Color-Word task, Mr. Thomas scored in the mildly-to-moderately impaired range at the 3rd percentile rank. Mr. Thomas scored in the average range on the Interference task at the 30th-39th percentile rank.

GENERAL MEASURES OF NEUROPSYCHOLOGICAL FUNCTIONING:

Neuropsychological Deficit Scale (NDS)

Indicator	Raw Score
General Neuropsychological Deficit Scale score	47

Right Neuropsychological Deficit Scale score	9
Left Neuropsychological Deficit Scale score	12
Halstead Impairment Index	0.7

The Halstead-Reitan Neuropsychological Battery yields different summary scores for the assessment of brain damage. The General Neuropsychological Deficit Scale (NDS) score of 47 indicates that Mr. Thomas has moderate neuropsychological impairment. Mr. Thomas had an Impairment Index of 0.7, indicating moderate impairment. His right and left NDS scores were 9 and 12.

FORMULATIONS AND IMPRESSIONS:

Marlo Thomas is a 40-year-old, African-American male. History indicates a strong probability of severe exposure to alcohol on a daily basis during pregnancy with his mother Georgia. Although Mr. Thomas does not have the pathognomonic facial features of Fetal Alcohol Syndrome, his neuropsychological profile and behavioral characteristics are highly consistent with the known chronic effects of Fetal Alcohol Spectrum Disorder. In addition, Mr. Thomas reportedly had intrauterine exposure to Talwin as well as trauma due to his mother being repeatedly kicked in the stomach by Mr. Thomas. Also, Mr. Thomas was also reportedly exposed to vodka as an infant and his mother could not wake him for two hours. He was reportedly dropped on his head on another occasion as an infant. As an older child, Mr. Thomas had chronic enuresis, smelled of urine, and was teased by peers and called "Stinky." He has a long history of academic learning difficulties, emotional and behavioral dyscontrol, dysregulation of aggression, and anger starting at an early age. He was raised in an environment where his mother did not pay the attention to him that she paid to his siblings, and his father disowned him and rejected him. The history supports the idea that Mr. Thomas had neurodevelopmental brain damage with borderline intellectual functions, severe learning disabilities, and communication deficits documented at an early age. The enuresis may have been an indication of childhood anxiety or possibly due to other causes.

Mr. Thomas's prior diagnoses by Dr. Kinsora are Attention Deficit Hyperactivity Disorder, Intermittent, Explosive Disorder, specific learning disorders, Learning Disorder NOS, and Antisocial Personality Disorder. Unfortunately, Dr. Kinsora failed to conduct a thorough, comprehensive neuropsychological battery on Mr. Thomas, including the Halstead-Reitan Battery, nor did he administer tests of executive frontal dysfunction.

Current neuropsychological assessment is reflective of moderate impairment of neuropsychological functions on a diffuse basis. The GNDS score of 47, the Halstead Impairment Index of 0.7, the Halstead Category Test score of 113 errors, Trail-Making Test B of 156 seconds with 4 errors, Tactual Performance Test Localization score of 1/10, and intellectual functions overall in the lower borderline range with full scale IQ of 72 and General Ability Index of 76, are all confirmatory to this statement.

Neuropsychological testing is indicative of diffuse brain damage; however, with a very specific localization of dysfunction in the anterior frontal cortex with 26 perseverative responses on the Wisconsin Card Sorting Test and 111 perseverations on the Ruff Figural Fluency Test, which is one of the worst scores I have ever seen, and is at a T-score of less than 13 or less than the 0.02 percentile rank.

Mr. Thomas's 113 errors on the Halstead Category Test is in the range of neurocognitive deficits that impair activities of daily life to a significant extent. Neuropsychological testing confirms deficits in the areas of comprehension of written language and comprehension of spoken, auditorily perceived language, as well as in the interpersonal, social realm with extremely disinhibited impulse control and control of emotions.

In the book, ADHD and Fetal Alcohol Spectrum Disorders by K.D. O'Malley, the author cites that 75 to 80% of people with Fetal Alcohol Spectrum Disorder have IQs over 70. On page 40, the author states that people with FASD often have emotional dysregulation, emotional lability, clumsiness, behavioral and motoric disorganization, and ADHD due to sensory processing difficulties. On page 26 of that book, the author states that FASD causes "specific CNS irritability and dysregulation" due to neurotoxic effects of alcohol toxicity on neurotransmitters, sleep regulation, and so forth. On page 222, the author states that individuals with FASD with low executive function tend to predict the expression of violent or aggressive behaviors.

"A Meta-Analytic Review of the Relation of Antisocial Behavior and Neuropsychological Measures of Executive Function," 2000, by Morgan and Lilienfeld document the existence of the relationship between executive frontal deficits and antisocial behavior. This is a meta-analysis of 39 studies yielding a total combined N of 4,589.

Comprehensive neuropsychological evaluation of Mr. Thomas indicates a current full scale IQ of 72, at the 3rd percentile rank, which is 2 points above the upper level of the definition of Mental Retardation by DSM-IV-TR, which is an IQ of approximately 70 or below. Mr. Thomas has functional deficits in at least two areas including functional academic skills, communication, and also in the area of social/interpersonal skills. The third prong of mild mental retardation requires an age of onset before 18 years. The Flynn effect of an increase of 0.3 IQ points per year based on current testing using the WAIS-IV, which was published in 2008, which yields a Flynn effect of at least 1.3 to the current data, suggesting a full IQ scale score very close to 70. However, this score was deflated by Working Memory at the 2nd percentile rank, related to Mr. Thomas's severe attentional deficits/ADHD. There is also now a 14-point split between Verbal Comprehension at 85 and Perceptual Reasoning at 71. This discrepancy was not appreciated on earlier testing conducted prior to the age of 18 on Mr. Thomas. In 1981, his WISCAR score yielded a verbal IQ of 85, a performance IQ of 86, and an overall scale IQ of 84, at the age of about 10. A Slosson Intelligence Test, which is less reliable and comprehensive, yielded an IQ of 83 in 1984. A report by Dr. Kinsora gives some different numbers, but IQs were generally in the 80s.

Thus, overall, it is difficult to diagnose Mr. Thomas with mild mental retardation due to his IQ scores before the age of 18. However, the neuropsychological testing does absolutely substantiate the presence of a chronic, likely predominantly neurodevelopmental, encephalopathy in the moderate brain damage range in Mr. Thomas with broad diffuse effects in attention including auditory verbal and nonverbal attention processing, auditory comprehension, word finding, central dysarthria, constructional dyspraxia, auditory/verbal dysgnosia/auditory comprehension defect, and marked and predominant executive frontal dysfunction across five out of six measures of executive frontal function including Controlled Oral Word Association Test, Trail-Making Test B, Booklet Category Test II, Wisconsin Card Sorting Test, Ruff Figural Fluency Test, and the Stroop Color and Word Test. The Stroop is the least robust measure of executive frontal function, which showed severe impairments in terms of processing speed, but not interference, which is partly explained by the fact that individuals with reading disability typically do better on Color and Word than they do on the Word and Color scores, due to the fact that since they have difficulty reading, as the word is not a salient distractor for those individuals.

There may have been some contributing factor to Mr. Thomas's chronic use of PCP, cocaine, and marijuana, but it is my opinion that due to the severity of the executive frontal deficits of this individual, essentially 14 years after his last exposure to these substances, the effects of the drugs on his behavior were likely not the causative factor, as opposed to his brain damage and especially executive frontal dysfunction.

Diagnostic impressions using DSM-IV-TR and ICD-9 criteria are as follows:

Axes		Codes	Descriptions
Axis I	Clinical Disorders	310.9	Chronic Encephalopathy Secondary To Neurodevelopmental Dysfunction;
		310.1	Personality Change Due To Conditions Classified Elsewhere/Organic Personality Disorder;
		310.0	Frontal Lobe Syndrome;
		314.01	Attention Deficit Hyperactivity Disorder, Combined Type;
		315.00	Reading Disorder, by history;
		315.2	Disorder of Written Expression, by history;
		315.1	Mathematics Disorder, by history;
		304.80	Remote Polysubstance Dependence/Abuse including phencyclidine, cocaine, and marijuana in institutional remission.
Axis II	Personality Disorders/MR	V62.89	Borderline Intellectual Functioning;
Axis III	Medical Conditions		Fetal Alcohol Spectrum Disorder/Prenatal Alcohol Exposure and Prenatal Talwin

			Disorder, by history.
Axis IV	Psychosocial Problems		Incarceration on death row.
Axis V	Global Assessment of Functioning		40/100

CONCLUSIONS:

It is my considered professional opinion, as stated within a reasonable degree of neuropsychological and psychological scientific certainty, that Mr. Thomas had the above-specified disorders at the time of the commission of the two homicides on April 15, 1996. It is my opinion that Dr. Kinsora's diagnosis of Antisocial Personality Disorder was largely inappropriate because the antisocial behavior that Mr. Thomas certainly displayed up to the time of the incidents in question, are entirely predictable by his Fetal Alcohol Spectrum Disorder, his ADHD, his borderline intellectual functioning, and his executive frontal dysfunction. These diagnostic entities explain his propensity towards emotional dyscontrol, effective impulsivity, and dysregulation of aggressive behavior as a consequence of an organic brain syndrome, fetal alcohol exposure and, in essence, the overall consequence of organic brain damage.

Therefore, I agree that, of course, Mr. Thomas has a history of antisocial behavior, but this behavior is explained by organic brain damage and organic personality syndrome. It is also clear Mr. Thomas's history of emotional neglect and abuse by his parents further contributed to and aggravated his already extremely compromised brain and organically disinhibited behavior.

Based on my understanding of the facts of the crime, the murders in question were not specifically premeditated, but were rather impulsive. It is my opinion that Mr. Thomas was under a state of extreme emotional disturbance on the one hand, and an inability to conform his conduct to the requirements of law as a consequence of his above cited disorders.

The above opinions are offered within a reasonable degree of psychological and neuropsychological certainty, based on all the information available to me and reviewed above. I reserve the right to amend my opinions if more information is received.

Sincerely yours,

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DISTRICT COURT
CLARK COUNTY, NEVADA

MARLO THOMAS,

Petitioner,

vs.

RENEE BAKER, Warden of
Ely State Prison, et al.,

Respondent.

Case No.: 96C136862-1

Dept. No.: 23

SUPPLEMENTAL PETITION FOR WRIT OF
HABEAS CORPUS (POST CONVICTION)

COMES NOW, Petitioner MARLO THOMAS, by and through his attorney BRET O. WHIPPLE, ESQ., and hereby files this Supplemental Petition for Writ of Habeas Corpus and Supplemental Points and Authorities in Support thereof.

DATED this 31st day of March, 2014.

JUSTICE LAW CENTER


BRET O. WHIPPLE, ESQ.
Nevada Bar No.6168

POINTS AND AUTHORITIES

I.

STATEMENT OF THE CASE

Petitioner Marlo Thomas is currently in the custody of the State of Nevada at Ely State Prison in Ely, Nevada pursuant to a judgment of conviction and sentence of death. Mr. Thomas was charged on April 23, 1996, with Conspiracy to Commit Murder and/or Robbery; Murder with Use of a Deadly Weapon (two counts); Robbery with Use of a Deadly Weapon; Burglary While in Possession of a Firearm; and First Degree Kidnapping with Use of a Deadly Weapon. The case arose out of the stabbing deaths of Matthew Gianakis and Carl Dixon at the Lone Star restaurant at Cheyenne and Rainbow in Las Vegas, Nevada.

When the case reached District Court, the State filed a Notice of Intent to Seek the Death Penalty setting forth the following aggravating circumstances: (1) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence upon the person of another, Attempt Robbery, Case No. 96794; (2) the Murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another, Battery with Substantial Bodily Harm, Case No. C134709; (3) the murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary; (4) the Murder was committed while the person was engaged in the commission of or an attempt to commit any Robbery; (5) the Murder was committed to avoid or prevent a lawful arrest; and (6) the defendant has, in the immediate proceeding, been convicted of more than one offense of Murder in the first or second degree.

On June 16, 1997, a jury trial commenced before the Honorable Joseph Bonaventure, Eighth Judicial District Court, Department VI. Trial counsel were Lee Elizabeth McMahon and

1 Peter LaPorta of the Special Public Defender's Office. At the conclusion of trial, Mr. Thomas
2 was convicted of Count I – Conspiracy to Commit Murder and/or Robbery; Count II – Murder
3 of the First Degree with use of a Deadly Weapon; Count III – Murder of the First Degree with
4 Use of a Deadly Weapon; Count IV – Robbery with the Use of a Deadly Weapon; Count V –
5 Burglary While in Possession of a Firearm; Count VI – First Degree Kidnapping with Use of a
6 Deadly Weapon.
7

8 The penalty hearing took place on June 25, 1997, the jury found in its' special verdict
9 the existence of all six (6) charged aggravating circumstances and found no mitigating
10 circumstances and based thereon returned two verdicts of death.
11

12 Mr. Thomas' direct appeal was denied by the Nevada Supreme Court on November 25,
13 1998, and his conviction and sentence of death affirmed. Subsequently, Mr. Thomas filed a
14 Petition for Writ of Habeas Corpus (Post Conviction) in the Eighth Judicial District Court. On
15 August 27, 2001, newly appointed counsel, David M. Schieck, filed a Supplemental Petition for
16 Writ of Habeas Corpus (Post Conviction) on behalf of Mr. Thomas. Mr. Schieck's
17 Supplemental Petition addressed several errors committed by Mr. Thomas' trial counsel leading
18 up to and during trial. After an evidentiary hearing, and additional briefing by both sides, the
19 District Court denied Mr. Thomas' petition.
20

21 On September 18, 2002, Mr. Thomas appealed the District Court's denial of his petition
22 to the Nevada Supreme Court. The Supreme Court found that Mr. Thomas' trial counsel was
23 ineffective for failing to object to certain penalty phase jury instructions. The Court remanded
24 the case back to District Court to conduct a new penalty hearing. Mr. Schieck, along with
25 Daniel Albregts represented Mr. Thomas during his second penalty hearing. As witnesses for
26
27
28

1 the defense, counsel called several of Mr. Thomas' family members and persons who have
2 associated with Mr. Thomas in prison to testify as to Mr. Thomas' character. However, defense
3 counsel did not hire or call to the stand a psychologist to testify as to any of Mr. Thomas'
4 mental health issues, or present to the jury other necessary mitigation evidence to argue against
5 the death penalty. Again, a jury sentenced Marlo Thomas to death.

6
7 Subsequently, Mr. Thomas filed another Petition for Writ of Habeas Corpus (Post
8 Conviction) to raise issues of ineffective assistance of counsel on behalf of Mr. Schieck and Mr.
9 Albregts at his second Penalty Hearing. This honorable court appointed undersigned counsel
10 pursuant to Supreme Court Rule 250. A review of the case history made it immediately apparent
11 that a Neuropsychological and Psychological evaluation of Mr. Thomas was necessary to
12 determine whether additional mitigating evidence existed that should have been presented by
13 defense counsel at Mr. Thomas' second penalty hearing. This court approved funds to hire
14 Jonathan H. Mack, Psy.D, to review Mr. Thomas' records and complete the evaluations. This
15 Supplement now follows.

16 II.

17 ARGUMENT

18
19
20 The Sixth Amendment of the United States Constitution guarantees that an accused
21 person shall "have the Assistance of Counsel for his defense." The United States Supreme Court
22 has clearly defined when the assistance of counsel becomes ineffective and an accused person is
23 denied this right. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court established a two-
24 prong test for determining ineffective assistance of counsel at trial. See also *Porter v.*
25 *McCollum*, 130 S.Ct. 447, 175 L. Ed. 2d 398 (2009). To prevail under *Strickland*, a defendant
26 must demonstrate both that his "counsel's performance was deficient" and "that the deficient
27
28

1 performance prejudiced the defense.” *Id.* at 687. To satisfy the second prong of *Strickland*, a
2 defendant must show that his trial counsel’s performance prejudiced his defense such that he
3 suffered actual prejudice and that “there is a reasonable probability that, but for counsel’s
4 unprofessional errors, the result of the proceeding would have been different. A reasonable
5 probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466
6 U.S. at 694. This test has also been adopted in Nevada *See Hurd v. State*, 114 Nev. 182, 953
7 P.2d 270 (1998). Further, Trial counsels’ actions must be based on reasonable strategic
8 decisions. *Strickland*, 466 U.S. at 691.

9
10 In this case, Mr. Thomas’ trial counsel, Mr. Schieck and Mr. Albrechts made a series of
11 errors that so undermined the proper functioning of the adversarial process that the outcome of
12 Mr. Thomas’ proceedings cannot be relied upon as having produced a just result. It is readily
13 apparent from consulting with Mr. Thomas, and reviewing his records, that he suffers from
14 several neuropsychological impairments. This evidence should have been presented as
15 mitigating evidence at Mr. Thomas’ second penalty hearing.

16
17 **A. Penalty hearing counsel was ineffective for failure to investigate and present**
18 **evidence at the penalty hearing that Mr. Thomas is Mentally Retarded, and**
19 **therefore, may not be sentenced to death as it would be a violation of the 8th**
20 **amendment’s prohibition against cruel and unusual punishment.**

21 In 2002, the United States Supreme Court determined that it was cruel and unusual
22 punishment to execute someone who is mentally retarded. *Atkins v. Virginia*, 536 U.S. 304
23 (2002). However, the Court did not define mental retardation themselves, but left it up to the
24 States to develop their own ways to enforce this constitutional restriction. *Id.* at 317. In Nevada,
25 the legislature enacted NRS 174.098 to set forth the procedure for raising issues of mental
26 retardation in a capital case. *Ybarra v. State*, 247 P.3d 269, 273 (2011). Under NRS 174.098(7),
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mentally retarded is defined as "significant sub-average general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period."

Here, Dr. Mack found substantial evidence that Mr. Thomas falls into the category of mental retardation. In coming to such a conclusion, Dr. Mack completed a thorough evaluation, See Exhibit A, including a review of Mr. Thomas' records and administering a barrage of tests. The following is a list of the records reviewed and the tests completed:

Tests administered:

Beck Anxiety Inventory
Beck Depression Inventory- II
Beck Hopelessness Scale
Boston Diagnostic Aphasia Screening Examination, Complex Ideational Material Subtest
Conners' Adult ADHD Rating Scales-Long Version Self-Report
Controlled Oral Word Association Test/Animal Naming
Grooved Pegboard
Halstead-Reitan Neuropsychological Test Battery
Aphasia Screening Test
The Booklet Category Test-II
Grip Strength Test
Lateral Dominance Examination with Right/Left Orientation
Manual Finger Tapping Test
Reitan-Klove Sensory Perceptual Examination with Visual Field Screening
Seashore Rhythm Test
Speech Sounds Perception Test
Tactual Performance Test
Trail Making Tests, A and B
Ruff Figural Fluency Test
Stroop Color and Word Test
Test of Memory Malingering
Wechsler Adult Intelligence Scale-IV
Wide Range Achievement Test-4
Wisconsin Card Sorting Test

Records Reviewed:

Confidential Psychological Evaluation 11/13/1972
by Eric Smith, Ph.D.

Clark County School District Special 11/12/1981
Student Services Psychological Report
by Jerry Swan School Psychologist

Clark County School District Special 2/2/1984
Student Services Psychological Report
by Jerry Swan, School Psychologist

Neuropsychological Assessment by 1997
Thomas F. Kinsora, Ph. D.

Chronological Life History of Marlo 10/26/2011
Thomas

Marlo Thomas Psycho-Medical-Social 11/04/2011
History Synopsis

Investigative Memorandum, Regarding 11/08/2011
Social History Report and Narrative by
Tena S. Francis

In Nevada, the Supreme Court found three concepts particularly influential in finding mental retardation: "(1) significant limitations in intellectual functioning, (2) significant limitations in adaptive functioning, and (3) age of onset." *Ybarra*, 247 P.3d at 273-274.

1. Mr. Thomas should be considered as an individual with significant limitations in intellectual functioning because he was found to have an IQ of 72.

The first concept considered by the Court in determining mental retardation is generally measured by intelligence (IQ) tests. *Id* at 274. The Court found that persons with IQ scores between 70 and 75 are considered in the category of sub-average intellectual functioning. *Id*.

1 Here, Dr. Mack administered the Wechsler Adult Intelligence Scale-IV (WAIS-IV),
2 which tested and scored Mr. Thomas in six categories: Verbal Comprehension, Perceptual
3 Reasoning, Working Memory, Processing Speed, Full Scale, and General Ability. (See Exhibit
4 A, page 24). The WAIS-IV is a reliable and valid measure of intellectual functioning. Mr.
5 Thomas' Full Scale IQ score was found to be 72. *Id.* This puts Mr. Thomas' impairment in the
6 3rd percentile rank. *Id.* Because he is in the 70-75 range contemplated under *Ybarra*, Mr.
7 Thomas is considered to be an individual with significant limitations in intellectual functioning.
8

9 2. *Mr. Thomas should be considered as an individual with a significant deficit in*
10 *adaptive behavior.*

11 The Supreme Court found that "adaptive behavior is critical to a mental retardation
12 diagnosis." *Ybarra* 247 P.3d at 274. A significant deficit in adaptive behavior may be
13 established when the individual has been shown to have had a difficulty adjusting to ordinary
14 demands in daily life due to a lack of conceptual, social, and practical skills. *Id.*
15

16 As a child, Mr. Thomas had chronic enuresis, the inability to control ones urination. Due
17 to this problem, Mr. Thomas was routinely teased by his peers and called "stinky." *See* Exhibit
18 A, Page 34. He has had a long history of academic learning difficulties, emotional and
19 behavioral dyscontrol, dysregulation of aggression, and anger starting at an early age. *Id.* Dr.
20 Mack found that Mr. Thomas' history supports the fact that "Mr. Thomas had
21 neurodevelopmental brain damage with borderline intellectual functions, severe learning
22 disabilities, and communication deficits documented at an early age." *Id.* Mr. Mack suggests
23 Mr. Thomas' bladder control issues may have been an indication of childhood anxiety. *Id.* Also,
24 Dr. Mack found that Mr. Thomas' 113 errors on the Halstead Category Test is in the range of
25 neurocognitive deficits that impair activities of daily life to a significant extent. (*Id.* at 35).
26
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1 In sum, for Mr. Thomas, adjusting to the ordinary demands in everyday life was nearly
2 impossible due to his numerous impairments which caused a lack of conceptual, social and
3 practical skills.

4 3. *The results of Mr. Thomas' evaluations substantiate the presence of chronic,*
5 *predominantly neurodevelopmental, impairment, which indicates the onset of retardation prior*
6 *to Mr. Thomas becoming 18 years old.*

7 The Court in *Ybarra* determined that it was relevant that the individual was under the
8 age of 18 at the time of the onset of the mental retardation, to ensure mental retardation rather
9 than another mental impairment that occurred later in life, and that the person is not feigning
10 mental retardation to avoid capital punishment. *Ybarra*, 247 P.3d at 275. This concept is not
11 intended to "exclude some people with intellectual disabilities from the mental retardation
12 category, but rather to differentiate between individuals with mental retardation and individuals
13 with other mental deficits caused by injuries or diseases that occurred during adulthood." *Id.*

14 Here, Mr. Mack determined that the neuropsychological testing that he completed did
15 "absolutely substantiate the presence of a chronic, likely predominantly neurodevelopmental,
16 encephalopathy in the moderate brain damage range." (*See Exhibit A, Page 36*). Additionally,
17 under the Test of Memory Malingering (TOMM), Mr. Thomas' performance, along with his
18 observable level of cooperation and motivation, showed that the results are considered valid and
19 reliable estimates of his current psychological and neuropsychological functioning. *Id at 23*. Mr.
20 Thomas truthful and honest participation in the barrage of tests administered by Dr. Mack, give
21 reliability to Dr. Mack's results. Therefore, Mr. Thomas should be considered by this court as
22 an individual who falls into the category of mentally retarded prior to the age of 18.
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1 Due to the fact that Mr. Thomas falls into all three concepts the Nevada Supreme Court
2 has established for determining whether an individual is mentally retarded, and therefore, may
3 not be sentenced to the death penalty, this Court must find that prior counsel was ineffective for
4 failing to investigate and present this issue to the jury at Mr. Thomas' second penalty hearing.

5 **B. Penalty hearing counsel was ineffective for failure to investigate and present**
6 **evidence at the penalty hearing that Mr. Thomas suffered neurological impairment**
7 **due to Fetal Alcohol Syndrome, and other mitigating evidence from Appellant's**
8 **childhood.**

9 Dr. Mack found that Mr. Thomas was severely exposed to alcohol on a daily basis while
10 in the womb of his mother Georgia. *See* Exhibit A, Page 34. Mr. Thomas' neuropsychological
11 profile and behavioral characteristics are highly consistent with the known chronic effects of
12 Fetal alcohol Spectrum Disorder. *Id.* In addition, Dr. Mack found evidence that Mr. Thomas
13 was abused as a child and infant, as his father would repeatedly kick Georgia in the stomach
14 when she was pregnant with Mr. Thomas, and Mr. Thomas' father exposed him to vodka. All of
15 this information that came about through Dr. Mack's research should have been brought forth to
16 the jury as mitigation evidence during Mr. Thomas' second penalty hearing. Therefore, prior
17 counsel was ineffective, and a new penalty hearing is warranted.

18 III.

19 CONCLUSION

20
21 Based on the Points and Authorities herein contained, it is respectfully requested that
22 Marlo Thomas' Petition be granted and the sentence of death be set aside, or in the alternative,
23 that an evidentiary hearing be granted in order to further flush out the issues presented in his
24 Petition.
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VERIFICATION

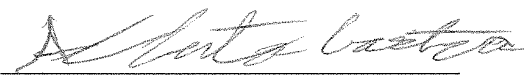
STATE OF NEVADA)
) SS
COUNTY OF CLARK)

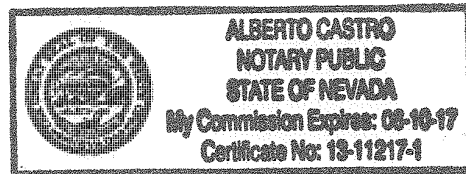
BRET O. WHIPPLE, being first duly sworn, deposes and says:

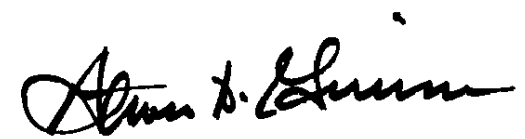
That he is the attorney of record for Petitioner in the above entitled matter; that he has read the foregoing Petition, knows the contents thereof, and that the same is true of his own knowledge, except for those matters therein stated on information and belief, and as to those matters, he believes them to be true; that Petitioner, Marlo Thomas personally authorizes him to commence this Writ of Habeas Corpus action.


BRET O. WHIPPLE, ESQ.

SUBSCRIBED and SWORN to before me
this 31 day of March, 2014.


NOTARY PUBLIC in and for said
County and State





CLERK OF THE COURT

1 **TRAN**

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

4
5 **THE STATE OF NEVADA,**

6 **Plaintiff,**

7 **vs.**

8 **MARLO THOMAS,**

9 **Defendant.**

CASE NO. C136862-1

DEPT. NO. XXIII

10
11 **BEFORE THE HONORABLE STEFANY A. MILEY**

12 **MONDAY, APRIL 28, 2014**

13
14 **RECORDER'S TRANSCRIPT OF PROCEEDINGS RE:**

15 **DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS**
16 **(POST-CONVICTION)**

17
18 **APPEARANCES:**

19 **For the State:**

STEVEN S. OWENS, ESQ.
Chief Deputy District Attorney

20
21 **For the Defendant:**

BRET O. WHIPPLE, ESQ.

22
23
24
25 **RECORDED BY: MARIA L. GARIBAY, COURT RECORDER**

1 MONDAY, APRIL 28, 2014, 11:03 A.M.

2
3 THE MARSHAL: Page 17, C136862-1, Thomas.

4 THE COURT: Marlo. Hi, Mr. Whipple.

5 MR. WHIPPLE: Good morning, Your Honor.

6 THE COURT: Hi. Good morning, counsel.

7 MR. OWENS: Good morning.

8 THE COURT: All right. So this is Defendant's petition for writ of habeas
9 corpus and the State's opposition thereto; also, response to supplemental petition.

10 So, counsel.

11 MR. WHIPPLE: Your Honor, first of all, I want to thank the Court for allowing
12 me the opportunity to have Dr. Mack do additional work that I provided to this Court.
13 I think it's very insightful and needed in this case. Obviously, when a person is
14 sitting on death row and we have law that dictates if they have an IQ of 70 that
15 they're no longer eligible and that's so close, I think it's important to have this
16 additional information.

17 I'm going to ask, Your Honor, I'm not going into belabored point or
18 argument, but I'm going to ask for an evidentiary hearing. I think it's appropriate in
19 order to fulfill and fill out the record to have trial counsel, that would be Mr. Schieck,
20 and also doctor -- potentially, Dr. Kinsora testify under oath as to why they did
21 different things and made different decisions in this case. Obviously, we would be
22 able to use potentially the document that Dr. Mack prepared to provide to them
23 ahead of time so that they could review that to make the determination if that
24 would've been relevant to them at the time of trial. But I think in order to get a full
25 record we need to have an evidentiary hearing. And I would not spend any more

1 money on Dr. Mack. I would simply utilize the report. But I would with the Court's
2 permission, obviously like to call Mr. Schieck, who's the trial attorney, and potentially
3 Dr. Kinsora as well.

4 THE COURT: Okay. So what are you going to ask Mr. Schieck, whether it
5 was -- why he chose --

6 MR. WHIPPLE: Yes.

7 THE COURT: -- not to call that doctor or any doctor to testify in the second
8 penalty phase?

9 MR. WHIPPLE: Correct, correct.

10 THE COURT: All right.

11 MR. WHIPPLE: And if he had known how close that this gentleman is with
12 regards to being retarded, even if it's mildly retarded, if that would've made a
13 difference in his opinion. I think those are relevant questions.

14 THE COURT: Okay.

15 MR. OWENS: Your Honor, Steve Owens for the State. I'm opposed to an
16 evidentiary hearing for the purpose of filling out the record or because this is a
17 capital case and we like to err on the side of caution. Those are not valid reasons to
18 have an evidentiary hearing. I've set forth the standard in my brief. And that is if
19 they have to allege allegations, which if true, would entitle the Defendant to relief.
20 That is not a problem here because I accept as true, for purposes of the argument
21 here today, everything that they have alleged in their brief.

22 My response is based on accepting the truthfulness of their
23 representations. So there's no dispute of fact that needs to be resolved. I have said
24 from day one that they lose on the facts as they have alleged. They haven't even
25 made out a claim that if they were to prove it up at an evidentiary hearing would

1 entitle them to relief. I'd say that their claims, even if true, still fail. We don't need to
2 hear from David Schieck at an evidentiary hearing for a few different reasons.

3 Number one, there is a presumption that counsel was effective. We
4 overlooked that presumption way too often. We are to defer to counsel. We can
5 decide things as a matter of law that there was a strategic reason behind a
6 counsel's decision. Frankly, David Schieck's subjective belief and subjective
7 reasoning why he did it and did not do certain things is really irrelevant because it
8 has to be an objectiveness standard. Objectively, we can look at the record and
9 look and we can see why an attorney would or would not do certain things in a trial.
10 There's presumption in his favor that he did not call any expert witnesses as a
11 reasonable strategic decision.

12 Additionally, we don't need an evidentiary hearing because David
13 Schieck told us why he did not call any expert witnesses.

14 THE COURT: Told us, meaning he told the State or told the Court?

15 MR. OWENS: He told the jury.

16 THE COURT: Okay.

17 MR. OWENS: Again, I put that in my brief. Often times we have this where
18 the attorney says something on the record in the trial either to the judge or the jury.
19 Here, he told the jury that he wanted to humanize the Defendant, that he was going
20 to put on the Defendant's family members to elicit the types of information that they
21 would need in mitigation. And then he proceeded to do that. He called a number.
22 We can look at the record and see what he did. And he called all these family
23 members. It was 7 or 8. And he elicited from them the very sorts of information that
24 Mr. Whipple thinks that should've been elicited through some sort of expert witness.

25 And we're talking about David Schieck here. He's the attorney that

1 handled the appeal that won the redo of the penalty hearing. In the course of that
2 appeal, he was very familiar with the trial court record from the first penalty hearing.

3 He knew that there was a Dr. Kinsora. He knew that they had put
4 forward this psychological defense in the first penalty hearing and that it had failed.
5 The jury was not impressed with the psychological problems that the Defendant had.
6 The jury still voted for death. Reasonable counsel in doing a redo of the penalty
7 hearing is not going to stick to the exact same strategy that failed the first time
8 around. They need to shift things up a little bit. They need to change things, alter
9 their strategy. And you can see in the record that that's exactly what David Schieck
10 did. He employed a slightly different strategy than what was used the first time
11 around.

12 And in the case I've cited in my brief, *Cullen v. Pinholster*, the Nevada --
13 or the United States Supreme Court in reviewing a claim of ineffective assistance of
14 counsel in a penalty hearing addressed this question of whether there is one right
15 way that you have to call an expert witness. And I laid it out in *Cullen v. Pinholster*.
16 That Defendant had brain damage and the attorney did not use an expert to elicit
17 that, but only called the mother. That was the sole witness in mitigation was the
18 mother. And through the mother he elicited many of the Defendant's shortcomings
19 mentally. She wasn't an expert, but she could explain to the jury in a real layman's
20 term, in a close family connection sort of way explain her son's problems
21 emotionally, mentally, intellectually, socially. And she did that for the jury.

22 And our Supreme -- U.S. Supreme Court said that is fine. We don't
23 need an evidentiary hearing to ask the attorney. There was no evidentiary hearing
24 on that case. They didn't put the attorney on the stand and ask them well, why
25 didn't you call an expert that could've talked all about brain damage, that could've

1 brought this legal expertise or scientific expertise to explain the Defendant's
2 psychological problems? They said it's abundantly clear from the record that you
3 can employ a one witness family sympathy defense by calling the mother. And that
4 is not ineffective on the phase penalty. And so we got even more than what this
5 was not a one witness family sympathy defense that David Schieck did. He called
6 numerous family witnesses. He put on lots of evidence. He elicited the very same
7 types of information that Mr. Whipple thinks should've been testified to by and
8 expert.

9 Frankly, there's many damaging things that an expert brings into a
10 case. And I pointed out a lot of those things. Especially in Dr. Mack's report, there's
11 some unfavorable things. Kinsora's report was even worse for the defense. And
12 Kinsora was prepared to say the guy was a borderline sociopath. Dr. Mack doesn't
13 quite have that strong of language, but there's all sorts of things in there that the
14 defense could have used -- or the prosecution, I'm sorry, could have used to
15 undermine the defense mitigation case and point out things that are aggravating
16 about the Defendant's past.

17 This particular Defendant was acting up with behavioral problems for
18 early on. In reading Dr. Mack's report, I learned more about the Defendant's
19 behavioral problems of violence towards others than I did in reading the penalty
20 hearing and the testimony that the State actually elicited. So calling Dr. Mack
21 would've given the State more ammunition and aggravation to point out to the jury
22 that this is just a bad guy. From day one he's been violent. He's been acting out.
23 He's been causing harm to other people. And that's what the U.S. Supreme Court
24 said in *Cullen v. Pinholster* that these expert witnesses are a two-edge sword. It's
25 certainly a permissible strategy, but certainly not superior to that of calling lay

1 witnesses.

2 And so there's no evidentiary hearing needed here. David Schieck saw
3 what Kinsora did and what Kinsora did not do for the defense the first time around.
4 Certainly, he wasn't able to go out and get a second psycho -- neuropsychological
5 evaluation because now with Dr. Mack, I can now call Dr. Kinsora and impeach the
6 heck out of Dr. Mack and say Dr. Kinsora, you were the last expert called by the
7 defense. In fact, you testified in the first trial that Marlo Thomas does not have Fetal
8 Alcohol Syndrome and now Dr. Mack says that he does. And so you get the
9 defense's expert here contradicting each other and totally undermining the experts.

10 The cat's out of the bag on the expert witness defense. That part was
11 played. It was time to shift to a new strategy. David Schieck did that. Now
12 reviewing David Schieck's actions some 8 years later, we shouldn't go back and say
13 well, you should've re-employed the very first offense that was used. It wouldn't
14 have gotten them anywhere. It would certainly not have resulted in a different
15 outcome. They have to show deficient performance under *Strickland* which, you
16 know, I opposed appointing any second neuropsychologist because that really only
17 goes to the prejudice prong.

18 I argued in my brief and to this Court that there was ample evidence
19 from which this Court could say that it was not deficient for counsel to hire a
20 second -- you don't get a second opinion. They already had a neuropsychologist,
21 psychological evaluation. Reasonable counsel would not go out and get a second
22 one because the second one can undermine the first. We know about the first. We
23 have that testimony. You can't get a second one that says something different. So
24 a reasonable counsel would not have done that, so no deficient performance. They
25 would've and should've lost on that prong alone.

1 Now, they've gotten a second evaluation report. So now we can also
2 look at prejudice. And here we see that there was no prejudice. When I read his
3 supplemental, I thought that Dr. Mack had somehow found the guy was mentally
4 retarded. And it wasn't until I read this report that I find no, Dr. Mack does not opine
5 that Marlo Thomas was mentally retarded. He finds, as Dr. Kinsora did, as I
6 predicted ahead of time, that Marlo Thomas will never meet the definition of mental
7 retardation or intellectual disability as they're calling it now, because they can't prove
8 the onset before age 18.

9 I don't care how bad, how mentally the range he is right now. What his
10 mental capabilities are right now is only one; a step. They're supposed to show that
11 onset that that occurred prior to age 18. And here, because of his behavioral
12 problems, Marlo Thomas was being looked at by school psychologists all the way
13 along. And his IQ scores are in the mid '80's. So he's a slow learner. Yes, he's
14 always been intellectually slow, but well above that which would diagnose him,
15 above that which is needed to diagnose him with mental retardation. So with those
16 childhood's scores that aren't going to change, they're never going to be able find an
17 expert to come in and say he's mentally retarded.

18 So there's no need for an evidentiary hearing on that. They've spent
19 much of their time on the present intellectual abilities and the behavioral issues he
20 has now. Things he can't do functional wise. But they've spent very little time on
21 the one prong of mental retardation which they cannot prove, and that's onset
22 before age 18. Absent a proffer of how they're going to prove that up, it would be a
23 waste of time to have elicit facts on the other two prongs 'cause they're never going
24 to be able to show that.

25 We do have a disagreement on Fetal Alcohol Syndrome, one expert

1 versus another. What's the point in calling David Schieck to the stand to have him
2 simply repeat what he already told the jury that he forewent, which we can
3 reasonable discern from the record that he forewent calling an expert because he
4 wanted just to use the family sympathy defense. He thought a change of strategy
5 would be necessary. We know that's what he's going to testify to. We can
6 reasonably discern that from the record. Even if he was to say something like, you
7 know, I didn't call an expert because I dropped the ball; I made a mistake.
8 Subjectively, even if he didn't even recognize an issue, it doesn't matter 'cause
9 we're looking at it objectively.

10 If there was an objectively reasonable basis for doing or not doing
11 something, that's what we go with, not the attorney's subjective reasons. So there's
12 nothing that David Schieck can add here that's going to show that he was deficient
13 in any way or that will show that the outcome of the proceeding would've been any
14 different.

15 THE COURT: All right. Anything else, Mr. Whipple?

16 MR. WHIPPLE: Your Honor, the State accepts the fact that my client has an
17 IQ of 72. They accept the fact that the Flynn effect applies and that that would
18 potentially reduce the IQ. If he sits on death row right now, if he had an IQ of 70, he
19 wouldn't be eligible for that. How could those things not be relevant? How could
20 those things not be things that the jury would have to review it and would like to
21 have the opportunity to review? I mean what I think those statements support my
22 position is that there is a disagreement and there is discretion. But those are issues
23 that are, you know, fleshed out by the trier of fact. And that's the reason why these
24 issues should go to the finder of fact.

25 And all I'm asking is the opportunity to complete the record by calling

1 Mr. Schieck and asking him some real simple questions that won't take much time
2 and put it on the record because you can try to infer what he said to the jurors, but
3 that's clearly, I mean he's not going to give away his theory of defense in opening
4 statements or closing statements. And that's what we're trying to get to.

5 THE COURT: Okay. I am going to deny the supplemental petition. Well, the
6 petition, the supplemental petition finding that Defendant has not established
7 ineffective assistance under *Strickland versus Washington*. First of all, the Court
8 finds that review of the record indicates that counsel Mr. Schieck's performance was
9 not deficient in the second penalty phase. Rather, the record seems to indicate that
10 decisions made by Mr. Schieck as far as who to call and the choice not to call an
11 expert were strategic decisions. As the State did correctly point out, Mr. Schieck
12 represented the Defendant on his direct appeal. Mr. Schieck did have the benefit of
13 the transcripts from the first trial and was aware that an expert was retained by the
14 Defendant -- was retained on the Defendant's behalf at the first trial and that the
15 testimony by the expert was not fruitful given the jury's finding that the Defendant
16 was guilty and eligible for the death penalty.

17 The Court does find that, again, it's a strategic decision that
18 Mr. Schieck, and it's also indicated in the record, that Mr. Schieck decided to
19 present a different type of defense by calling the family members to testify regarding
20 the mental condition and personality et cetera of the Defendant. And that is not an
21 improper defense, given the U.S. Supreme Court case of *Cullen versus Pinholster*.

22 Even though I don't have to go to the second prong of *Strickland*, I am
23 going to mention it. As far as this prong, it could not be satisfied either because the
24 second report by Dr. Mack doesn't help the Defendant any more than the original
25 report by Mister -- or by Dr. Kinsora. So the Defendant cannot show based upon

1 even Dr. Mack's new report that there's a reasonable probability that but for
2 counsel's unprofessional errors the result in the proceeding would be different.

3 So it's denied under both prongs even though it really only needs to be
4 denied under the first prong. I am going to ask that we receive an order, please.

5 MR. OWENS: Yes, I'll prepare findings of fact.

6 THE COURT: And we'll need to have -- absolutely, because of the nature of
7 the case. Thank you.

8 MR. OWENS: I'll send it to Mr. Whipple before sending it down to the Court.

9 THE COURT: Correct.

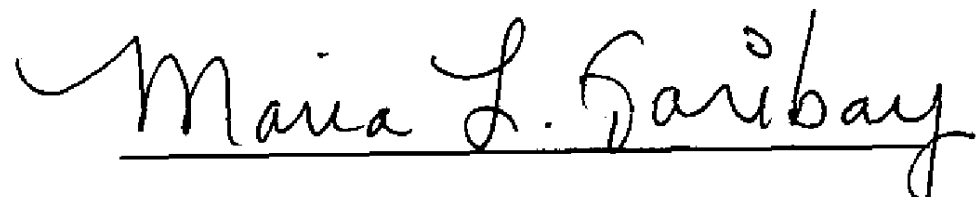
10 MR. WHIPPLE: That's fine, Your Honor. Thank you.

11 THE COURT: Thank you.

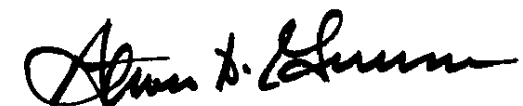
12 PROCEEDING CONCLUDED AT 11:19 A.M.

13 * * * * *

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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/visual recording in the above-entitled case to the best of my ability.

23 
24

25 MARIA L. GARIBAY
Court Recorder/Transcriber



CLERK OF THE COURT

1 **FFCL**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 STEVEN S. OWENS
6 Chief Deputy District Attorney
7 Nevada Bar #004352
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

CASE NO: 96C136862-1

12 MARLO THOMAS,
13 #1060797

DEPT NO: XXIII

14 Defendant.

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

17 DATE OF HEARING: 4/28/14
18 TIME OF HEARING: 11:00 AM

19 THIS CAUSE having come on for hearing before the Honorable STEFANY A.
20 MILEY, District Judge, on the 28th day of April, 2014, the Petitioner not being present,
21 represented by BRET O. WHIPPLE, ESQ., the Respondent being represented by STEVEN
22 B. WOLFSON, Clark County District Attorney, by and through STEVEN S. OWENS, Chief
23 Deputy District Attorney, and the Court having considered the matter, including briefs,
24 transcripts, arguments of counsel, and documents on file herein, now therefore, the Court
25 makes the following findings of fact and conclusions of law:

26 **FINDINGS OF FACT**

27 Marlo Thomas was convicted of two counts of First Degree Murder and sentenced to
28 death in 1997 for the early-morning robbery at the Lone Star Steakhouse and the stabbing
deaths of two employees who were present during the robbery, Matthew Gianakis and Carl

1 Dixon. At the first penalty hearing, the jury found six aggravating circumstances and no
2 mitigating circumstances and sentenced Defendant to death for both murder counts. The
3 Nevada Supreme Court affirmed Defendant's convictions and sentences of death. Thomas v.
4 State, 114 Nev. 1127, 967 P.2d 1111 (1998). A Petition for Writ of Certiorari was denied on
5 October 4, 1999. Thomas v. Nevada, 528 U.S. 830, 120 S.Ct. 85 (1999). Remittitur issued
6 on October 26, 1999.

7 Following post-conviction proceedings in 2002 at which trial counsel Lee McMahon
8 and Mark Bailus both testified, the Supreme Court affirmed the convictions but reversed the
9 death sentences for counsel's failure to object to an incorrect instruction on commutation.
10 Thomas v. State, 120 Nev. 37, 83 P.3d 818 (2004). In 2004, David Schieck was appointed
11 for the new penalty hearing at which the jury found the existence of four aggravating
12 circumstances and again sentenced Defendant to death. The Supreme Court affirmed on the
13 direct appeal. Thomas v. State, 122 Nev. 1361, 148 P.3d 727 (2006). Remittitur issued on
14 January 28, 2008.

15 On March 6, 2008, Defendant initiated the present post-conviction proceedings by
16 filing a proper person Petition for Writ of Habeas Corpus and Motion to Appoint Counsel
17 with this Court. Cynthia Dustin was appointed and then withdrew. Bret O. Whipple was
18 appointed on January 7, 2009, and filed a supplemental petition on July 12, 2010. The State
19 filed its response on November 4, 2010, and the defense filed a reply on February 22, 2011.
20 After argument and additional investigation, Thomas filed another supplemental petition on
21 March 31, 2014, which the State responded to on April 14, 2014. Argument was heard and a
22 decision rendered on April 28, 2014.

23 This Court now finds that Thomas has failed to establish ineffective assistance under
24 Strickland v. Washington. First, the Court finds that review of the record indicates that
25 David Schieck's performance was not deficient in the second penalty hearing. Rather, the
26 record seems to indicate that decisions made by Mr. Schieck as far as who to call and the
27 choice not to call an expert were strategic decisions. As the State did correctly point out, Mr.
28 Schieck represented the Defendant on his direct appeal. Mr. Schieck did have the benefit of

1 the transcripts from the first trial and was aware that an expert was retained on the
2 Defendant's behalf at the first trial and that the testimony by the expert was not fruitful given
3 the jury's finding that the Defendant was guilty and eligible for the death penalty.

4 The Court does find, and the record shows, that it was a reasonable strategic decision
5 for Mr. Schieck to present a different type of defense by calling the family members to
6 testify regarding the mental condition and personality of the Defendant. And that is not an
7 improper defense, given the United States Supreme Court case of Cullen v. Pinholster.

8 Second, this Court finds that Thomas has failed to demonstrate prejudice pursuant to
9 the second prong of Strickland. The recent neuropsychological evaluation by Dr. Jonathan
10 Mack does not help the Defendant any more than the original report by Dr. Thomas Kinsora.
11 Even with Dr. Mack's new report, there is no reasonable probability that but for counsel's
12 alleged unprofessional errors the result in the proceeding would be different. So,
13 Defendant's claims of ineffective assistance of counsel at the second penalty hearing are
14 denied under both prongs of Strickland, notwithstanding that a failure under either prong
15 would be sufficient to deny relief.

16 Similarly, Thomas fails to demonstrate prejudice in the questioning of the two jury
17 venire persons since both were eventually excused and neither sat on the jury. The record
18 belies any claim that the judge failed to admonish jurors before a recess and Thomas failed to
19 demonstrate prejudice from any unrecorded bench conferences. The prosecutor's comments
20 in voir dire and closing argument were not objectionable and resulted in no prejudice.
21 Thomas fails to identify any favorable correctional officers who could have been called as
22 witnesses. Accordingly, under Strickland, counsel's performance was not deficient in any of
23 these matters and the outcome of the proceeding would not have been any different.

24 The remaining claims in the petition allege numerous errors of the trial court at the
25 second penalty hearing including the failure to record proceedings, failure to admonish
26 jurors, refusing to remove leg shackles, allowing testimonial hearsay, coaching of
27 prosecutor, and allowing impermissible argument. Trial court error is properly raised and
28 reviewed on direct appeal and is not properly raised for the first time in a post-conviction

1 petition absent a showing of cause and prejudice. Some of the claims were raised on appeal
2 and are now barred by law of the case. Thomas offers no good cause for the remaining
3 claims and they are therefore denied.

4 This Court finds that an evidentiary hearing is unnecessary to resolve these issues.
5 Even if Defendant's factual allegations were all true, Defendant still would not be entitled to
6 relief on this petition. The facts, even as alleged, show no deficiency of counsel and no
7 prejudice under Strickland that would have probably resulted in a different outcome.

8 CONCLUSIONS OF LAW

9 It has long been recognized that "the right to counsel is the right to the effective
10 assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063
11 (1984). A defendant making an ineffectiveness claim must show both that counsel's
12 performance was deficient, which means that "counsel's representation fell below an
13 objective standard of reasonableness," Strickland, 466 U.S. at 668, and that the deficient
14 performance prejudiced the defendant, which means that "there is a reasonable probability
15 that, but for counsel's unprofessional errors, the result of the proceeding would have been
16 different." Id. at 694; See Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683
17 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does
18 not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of
19 competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State
20 Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann, 397 U.S. 759, 771.

21 "There are countless ways to provide effective assistance in any given case. Even the
22 best criminal defense attorneys would not defend a particular client in the same way."
23 Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after
24 thoroughly investigating the plausible options are almost unchallengeable." Dawson v.
25 State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466 U.S. at 690, 104
26 S.Ct. at 2066; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

27 A defendant who contends that his attorney was ineffective because he did not
28 adequately investigate must show how a better investigation probably would have rendered a

1 more favorable outcome. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). In
2 order to demonstrate a reasonable probability that, but for counsel's failure to investigate, the
3 result would have been different, it must be clear from the "record what it was about the
4 defense case that a more adequate investigation would have uncovered." Id.

5 There are "countless ways to provide effective assistance in any given case. Even the
6 best criminal defense attorneys would not defend a particular client in the same
7 way." Harrington v. Richter, 131 U.S. 770, 131 S.Ct. 770, 788-89 (2011). Rare are the
8 situations in which the "wide latitude counsel must have in making tactical decisions" will be
9 limited to any one technique or approach. Id. In a capital case, there are any number of
10 hypothetical experts—specialists in psychiatry, psychology, ballistics, fingerprints, tire
11 treads, physiology, or numerous other disciplines and subdisciplines—whose insight might
12 possibly have been useful. Id. But counsel was entitled to formulate a strategy that was
13 reasonable at the time and to balance limited resources in accord with effective trial tactics
14 and strategies. Id. Even if an expert theoretically could support a client's defense theory, a
15 competent attorney may strategically exclude it, consistent with effective assistance, if such
16 expert may be fruitless or harmful to the defense. Id. at 789-90. Given that expert testimony
17 on Thomas' mental deficiencies and a psychological defense did not convince the jury to
18 spare Thomas' life in the first trial, counsel re-doing the penalty hearing reasonably shifted
19 strategies to a family sympathy type defense.

20 For example, in Cullen v. Pinholster, the United States Supreme Court discussed the
21 Strickland standard for effective assistance of counsel in the context of a capital penalty
22 hearing. Cullen v. Pinholster, ____ U.S. ____, 131 S.Ct. 1388 (2011). In Pinholster's penalty
23 hearing, trial counsel called only one witness, Pinholster's mother, who gave an account of
24 his troubled childhood and adolescent years, his siblings, and described Pinholster as "a
25 perfect gentleman at home." Id. at 1396. Although trial counsel had consulted a
26 psychiatrist, no expert was called in penalty hearing. Id. In post-conviction, Pinholster
27 argued that counsel should have investigated and presented additional evidence from a
28 psychiatrist who subsequently diagnosed petitioner with bipolar mood disorder and seizure

1 disorders that were not presented at trial. Id. However, his post-conviction petition was
2 denied because the new evidence largely duplicated the mitigation evidence at trial, and
3 some of the new evidence would likely have undercut the mitigating value of the testimony
4 by petitioner's mother. Id. at 1409-1410. The Court reasoned that a one-witness "family
5 sympathy" defense was reasonable under the circumstances, and the failure to present a
6 psychiatric defense with evidence of brain damage and psychiatric diagnosis was a "two-
7 edged sword" with questionable mitigating value. Id.

8 . A defendant is entitled to an evidentiary hearing if his petition is supported by
9 specific factual allegations, which, if true, would entitle him to relief, unless the factual
10 allegations are belied by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603,
11 605 (1994). However, "[a] defendant seeking post-conviction relief is not entitled to an
12 evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v.
13 State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984); *citing* Grondin v. State, 97 Nev. 454,
14 634 P.2d 456 (1981).

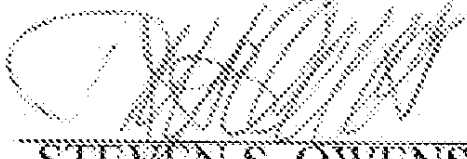
15 **ORDER**

16 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction
17 Relief shall be, and it is, hereby denied.

18 DATED this 22 day of May, 2014.

19
20 
21 DISTRICT JUDGE
JUDGE STEFANY A. MILEY

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

24 BY 
25 STEVEN S. OWENS
26 Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Findings of Fact, Conclusions of Law and Order, was made this 10th day of May, 2014, by facsimile transmission to:

BRET O. WHIPPLE, ESQ.
FAX # (702) 974-4008

Eileen Martin
Employee for the District Attorney's
Office

SSO/red

*** TX REPORT ***

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OFFICE OF THE DISTRICT ATTORNEY
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Fax No. (702) 382-5815
Telephone No. (702) 671-2750

TO: Bret O. Whipple FAX#: (702) 974-4008
FROM: Steven S. Owens
SUBJECT: Marlo Thomas, 96C136862-1, Findings
DATE: May 9, 2014

Mr. Whipple,
The following Findings will be submitted to Judge Miley on May 16, 2014.
Sincerely,
Steven S. Owens

Eileen Davis

From: Steven Owens
Sent: Monday, May 12, 2014 2:14 PM
To: Eileen Davis
Subject: FW: Marlo Thomas Order

From: Steven Owens
Sent: Monday, May 12, 2014 2:14 PM
To: 'Bret Whipple'
Subject: RE: Marlo Thomas Order

Thanks. I'll make the change and submit them to the judge.

Steven S. Owens
Clark County District Attorney's Office
Criminal Appeals Unit
Steven.Owens@clarkcountyda.com
(702) 671-2750

From: Bret Whipple [<mailto:bretwhipple@gmail.com>]
Sent: Monday, May 12, 2014 10:30 AM
To: Steven Owens
Subject: Marlo Thomas Order

I am in receipt of your findings and facts and conclusions of law to be submitted to Judge Miley. Everything seems accurate, however, it seems there was a typo as to the name of the Defendant. The Order refers to our client as "Hernandez." Other than that I think we're good.

Thanks,

Bret

*** TX REPORT ***

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DATE: May ¹²~~10~~, 2014

NO. OF PAGES, EXCLUDING COVER PAGE: 9

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1100 South Tenth Street, Las Vegas NV 89104
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IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Oct 22 2014 09:24 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

MARLO THOMAS)
)
Appellant,) Supreme Court Case No. 65916
)
vs.) District Court Case No. C136862
)
THE STATE OF NEVADA)
)
Respondent.)
_____)

APPELLANT'S APPENDIX

BRET O. WHIPPLE, ESQ. Nevada Bar No. 6168 JUSTICE LAW CENTER 1100 S. Tenth Street Las Vegas, Nevada 89104 (702) 731-0000 Fax (702) 974-400 Counsel for Appellant	STEVEN S. OWENS, DISTRICT ATTORNEY Clark Place-301 East Clark-8th Floor Las Vegas, Nevada 89155 CATHERINE CORTEZ-MASTO NEVADA ATTORNEY GENERAL 100 North Carson Street Carson City, Nevada 89701-4717 (775) 684-1100
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JUSTICE LAW CENTER

1100 South Tenth Street, Las Vegas NV 89104
Tel (702) 731-0000 Fax (702) 974-4008

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