CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This reply brief has been prepared in proportionally spaced typeface using Word Perfect, Font size 14, Times New Roman. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) does not exceed 30 pages.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 30th day of October, 2014.

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Docket 65916 Document 2014-36376

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLO THOMAS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

S.C. Case No. 65916

Electronically Filed
Nov 04 2014 08:01 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

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JURISDICTIONAL STATEMENT

A. BASIS FOR APPELLATE JURISDICTION

NRAP (4)(b) ; NRS 177.015(3)

B. FILING DATES ESTABLISHING TIMELINESS OF APPEAL

05-30-2014: FINDING OF FACT AND CONCLUSION OF LAW FILED

06-19-2014: NOTICE OF APPEAL FILED

C. ASSERTION OF FINAL ORDER OR JUDGMENT

THIS APPEAL IS FROM AN ORDER DENYING A PETITION FOR POST-CONVICTION RELIEF.

STATEMENT OF THE ISSUES

ISSUE I: Whether District Court erred in denying Appellant's request for an evidentiary hearing on Appellant's Petition for Post-Conviction Relief, based on ineffective of assistance of counsel, where evidence shows Mr. Thomas to be borderline mentally retarded, and where that evidence was not sufficiently investigated or presented at sentencing by prior counsel.

ISSUE II: Whether the District Court erred in not holding an evidentiary hearing on whether Appellant is mentally retarded on the alternative grounds outlined in N.R.S. 175.554(5).

STATEMENT OF THE CASE

Marlo Thomas was convicted of two counts of First Degree Murder and sentenced to death in 1997. A.A. Vol. 1, pg. 0001. In 2004, this Court upheld the conviction but reversed Mr. Thomas's sentence, and remanded his case for a new sentencing hearing. A.A. vol. 1, pg. 0002.

The Attorney who successfully appealed to this Court for a new sentencing hearing was David Schieck. *See Thomas v. State* 122 Nev. 1361 (2006). Despite levying a successful appeal, this Court chastised Mr. Schieck for failing to properly provide this Court with documents he cited:

> "As a preliminary matter, we note that Thomas's counsel did not adequately cite to the record in his briefs or provide this court with an adequate record. In support of factual assertions, counsel simply cites the supplemental habeas petition filed below. This is improper. Additionally, counsel failed to include many necessary parts of the record in the Appellant's Appendix. We are able to address the merits of a number of claims only because the State provided a seven-volume appendix that includes necessary parts of the record." *Thomas,* 122 Nev at 43.

In the new sentencing hearing, Mr. Thomas was represented again by Mr. Schieck. A.A. Vol. 1, pg. 0002. Mr. Thomas was again sentenced to death. *Id.* The case was appealed, and this Court affirmed the conviction. *Thomas,* 122 Nev. 37.

On January 7, 2009, current counsel Bret O. Whipple was appointed to represent Appellant in post-conviction proceedings. A.A. Vol. 1, pg. 0002. Appellant then filed a supplemental Petition for Writ of Habeas Corpus on July 10, 2010, alleging that he had received ineffective assistance of counsel from Mr. Schieck at his sentencing hearing. *Id*. Argument was heard in the District Court on April 14, 2014. *Id*.

The District Court found that Appellant could not show ineffective assistance of counsel, even if his factual allegations were true. *Id* at 0003-0004. The District Court did not find it necessary to hold any evidentiary hearing on any of the matters raised. *Id* at 0003-0004. It is from these findings and order that Appellant now appeals.

STATEMENT OF RELEVANT FACTS

Marlo Thomas had a troubled childhood. Marlo Thomas's mother became "extremely intoxicated" on vodka and wine often when she was pregnant with Marlo Thomas. Exhibit A *Dr. Mack's Report* Pg. 5 of 37. She was frequently abused by Marlo's (eventually absent) father, who kicked and punched Mrs. Thomas in her stomach while she was pregnant with Marlo. *Id*. Marlo had a tough childhood where he experienced continual bladder incontinence and was bullied. *Id*. Eventually, he made friends that found acceptance through drug use. *Id*. Mrs. Thomas beat her son frequently, stating that she was prone to "whipping his

behind" *Id* at pg. 6. Mr. Thomas was dropped on his head as a baby by a babysitter and received no medical attention. *Id* at pg. 12. In another incident, a friend of Mr. Thomas's father gave the infant Marlo an unknown amount of vodka. *Id*.

In the Second Grade, Mr. Thomas was given a psychological evaluation. He scored in the 1st percentile for reading and the 2nd percentile for spelling (where 100% would be best and 0% would be worst). He was then placed in a special class for children who are learning disabled. *Id* at pg. 13. As a teenager, he was placed in a program for Specialized Emotional Handicapped children. *Id*. He was eventually kicked out of that program. *Id*. Mr. Thomas continued to experience numerous problems at school and with law enforcement agencies. *Id. See* pgs. 12-16 generally. He ended up in and out of correctional facilities and treatment facilities from his teenage years onward. *Id.*

At about 7:30 a.m. on April 15, 1996, Thomas drove with his wife Angela and Angela's fifteen-year-old brother, Kenya Hall, to the Lone Star Steakhouse in Las Vegas. *Thomas v. State*, 120 Nev. 37, 41-42, 83 P.3d 818, 821-22 (2004). The month before, Thomas had lost his job as a dishwasher at the restaurant. *Id*. Angela waited in the car while Thomas and Hall went to the back door. *Id* Thomas and Hall went to the office of the manager, Vincent Oddo. *Id*. Thomas pulled out a .32–caliber revolver, pointed it at Oddo, and ordered him to open the safe and give

them money. *Id*. Thomas handed the gun to Hall and told him to take the money from Oddo. *Id*. Thomas left the office, obtained a meat-carving knife, and encountered employees Gianakis and Carl Dixon. *Id*. Thomas stabbed Dixon to death in the bathroom. *Id*. He then encountered Gianakis and stabbed him twice. *Id*. Marlo Thomas was convicted of the early-morning robbery of the Lone Star Steakhouse and the stabbing deaths of Matthew Gianakis and Carl Dixon. *Thomas v. State*, 122 Nev. 1361, 1365, 148 P.3d 727, 730 (2006).

Marlo Thomas was sentenced to death in 1997. A.A. Vol. 1, pg. 0001. In 2004, this Court upheld the conviction but reversed Mr. Thomas's sentence, and remanded his case for a new sentencing hearing. A.A. vol. 1, pg. 0002. The Attorney who successfully appealed to this Court for a new sentencing hearing was David Schieck. *See Thomas v. State* 122 Nev. 1361 (2006). Mr. Schieck went on to represent Mr. Thomas in the second sentencing hearing. Mr. Schieck presented a defense of Mr. Thomas that involved calling several family members and fellow inmates of Mr. Thomas, but did not present any evidence or expert testimony which might demonstrate that Mr. Thomas is mentally retarded.

Mr. Thomas appealed the second sentencing for ineffective assistance of counsel. His current and appointed counsel, Justice Law Center, obtained a psychological analysis of Mr. Thomas from Dr. Jonathon H. Mack. A.A. Vol. 1. 0025.

Dr. Mack performed numerous tests on Marlo Thomas.[1] Dr. Mack found that Marlo suffered from moderate impairment of neuropsychological functioning and had an IQ of 72. A.A. Vol. 1. 0066. Dr. Mack indicated that the neurological testing was indicative of "diffuse brain damage" localized to the anterior frontal cortex; producing a T-Score of less than 13 or less than the 0.02 percentile rank, one of "the worst scores" Dr. Mack had ever seen. *Id*. Mr. Mack found that Marlo's IQ of 72 was in the 3rd percentile rank, a mere two points above the definition of mental retardation by DSM-IV-TR. *Id* at pg. 0068. Ultimately, Dr. Mack concluded that "it is difficult to diagnose Mr. Thomas with mild mental retardation" because his IQ scores prior to the age of 18 were above the threshold defined by DSM-IV-TR. *Id* at pg. 0069.

Nevertheless, Dr. Mack ultimately diagnosed Mr. Thomas with eight different clinical brain disorders, borderline intellectual functioning, and Fetal Alcohol Spectrum Disorder. *Id* pg. 0069-0070.

The District Court refused to hold an evidentiary hearing on ineffective assistance of counsel and denied Appellant's Petition. A.A. Vol. 1. 0020. The District Court found Mr. Schieck's refusal to investigate Mr. Thomas's mental abilities or to call an expert a "reasonable strategic decision." A.A. Vol. 1. 0004.

[1] A.A. Vol. 1. Pg. 0034-0035. "Tests Administered: Beck Anxiety Inventory, Beck Depression Inventory-II, Beck Hopelessness Scale, Boston Diagnostic Aphasia Screening Examination, Conners' Adult ADHD Rating Scales, Controlled Oral Word Association Test, Grooved Pegboard, Halstead-Reitan Neuropsychological Test Battery…" etc.

The District Court indicated that it believed the decision to be reasonable because Mr. Schieck represented Appellant earlier, and was likely aware of a prior psychological evaluation by Dr. Kinsora that was used in the first penalty hearing and was unsuccessful in saving Mr. Thomas from the death penalty. A.A. vol. 1. Pg. 0016-0017. The District Court relied on *Cullen v. Pinholster* for its decision. *Id*.

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO HOLD AN EVIDENTIARY HEARING ON APPELLANT'S PETITION FOR POST-TRIAL RELIEF.

To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

A review of ineffective assistance of counsel presents a mixed question of law and fact, and is subject to independent review. *Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001). To establish ineffective assistance of counsel, a claimant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Id.*

Deficient performance is representation that falls below an objective standard of reasonableness. *Id*. To show prejudice, the claimant must show a

reasonable probability that but for counsel's errors the result of the trial would have been different. *Id*. Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy. *Id*. The reviewing court must try to avoid the distorting effects of hindsight and evaluate the conduct under the circumstances and from counsel's perspective at the time. *Id*.

One of the primary issues at Appellant's post-conviction hearing was whether the allegations made by Appellant, taken as true, could plausibly entitle him to relief. If they could, the case law of this State controls and dictates that Appellant was entitled to an evidentiary hearing. The District Court erred in refusing to hold that evidentiary hearing.

a. Factual and Legal Allegations Raised by Appellant.

In Appellant's supplemental brief, Appellant contended that he received ineffective assistance of counsel because Mr. Schieck failed to investigate and produce evidence that Mr. Thomas was borderline mentally retarded and suffered from numerous other neurological problems. Appellant alleged that not only would such information have been helpful to his cause, but that it very likely could have barred the State of Nevada from executing him pursuant to *Atkins v. Virginia*.

Justice Stephens, writing for the Court in *Atkins* opened as follows:

> "Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided *Penry* v. *Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989), the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution."

Atkins v. Virginia, 536 U.S. 304, 306-07, 122 S.Ct. 2242, 2244 (2002).

Ultimately, Justice Stephens concluded:

> "We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender."

Id at 536 U.S. 304, 321, 122 S.Ct. 2242, 2252, citing *Ford*, 477 U.S. 399, at 405, 91 L. Ed. 2d 335, 106 S. Ct. 2595.

In light of the above, Appellant argued that he received ineffective assistance of counsel because Mr. Schieck failed to produce evidence of Marlo's mental limitations and potential mental retardation at sentencing.

In support of this argument, Appellant obtained medical and neurological analysis performed by Dr. Jonathon Mack. Dr. Mack found that Marlo suffered from moderate impairment of neuropsychological functioning and had an IQ of 72. A.A. Vol. 1. Pg. 0066. Dr. Mack indicated that the neurological testing was indicative of "diffuse brain damage" localized to the anterior frontal cortex; producing a T-Score of less than 13 or less than the 0.02 percentile rank, one of "the worst scores" Dr. Mack had ever seen. *Id*. Mr. Mack found that Marlo's IQ of 72 was in the 3rd percentile rank, a mere two points above the definition of mental retardation by DSM-IV-TR. *Id* at pg. 0068. Ultimately, Dr. Mack concluded that "it is difficult to diagnose Mr. Thomas with mild mental retardation" because his IQ scores prior to the age of 18 were above the threshold defined by DSM-IV-TR. *Id* at pg. 0069. Nevertheless, Dr. Mack ultimately diagnosed Mr. Thomas with eight different clinical brain disorders, borderline intellectual functioning, and Fetal Alcohol Spectrum Disorder. *Id* pg. 0069-0070.

For the purposes of the following *Strickland* analysis, under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), these allegations must be taken as true to determine whether Mr. Thomas should have been granted a preliminary hearing on these issues by the District Court.

b. Strickland Analysis of Appellant's Allegations.

Under the *Strickland* test, two elements must be established by a defendant claiming ineffective assistance of counsel: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Dawson v. State,* 108 Nev. 112, 115, 825 P.2d 593, 595 (1992), *cert. denied,* 507 U.S. 921, 113 S.Ct. 1286, 122 L.Ed.2d 678 (1993). A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

"Deficient" assistance of counsel is representation that falls below an objective standard of reasonableness. *Dawson,* 108 Nev. at 115, 825 P.2d at 595. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065; *accord Dawson,* 108 Nev. at 115, 825 P.2d at 595.

In meeting the "prejudice" requirement, the defendant must show a reasonable probability that, if not for counsel's errors, the result of the trial would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068.

Thus, the two questions are: 1) Did the previous attorney, David Schieck, act unreasonably in failing to investigate and present evidence of Marlo's

potential mental retardation, and 2) Is it reasonably probable that, if not for counsel's errors, the sentencing result would have been different?

To determine whether the sentencing result would have been different, this Court must examine (and the lower court should have held an evidentiary hearing on) whether or not Mr. Thomas is mentally retarded. This is because if Mr. Thomas *is* mentally retarded, the sentencing jury could not have sentenced him to death. And alternatively, if he is merely *close to* mentally retarded but falls outside some objective threshold, such evidence of his borderline mental retardation would have severely diminished the probability that the jury would have sentenced Marlo to death given the opportunity.

In Nevada, the issue of whether a defendant is mentally retarded is determined by a three-pronged analysis. The Court will examine whether the Defendant has (1) significant limitations in intellectual functioning, (2) significant limitations in adaptive functioning, and (3) Defendant's age of onset. *Ybarra v. State*, 127 Nev. Adv. Op. 4, 247 P.3d 269, 273-74 (2011).

To determine whether a person suffers significant limitations in intellectual functioning, courts will often look to IQ tests. *Id* at 247 P.3d 274. The clinical definitions indicate that "individuals with IQs between 70 and 75" fall into the category of sub-average intellectual functioning. *Id* citing *State v. McManus*, 868

N.E.2d 778, 785 (Ind.2007); *State v. Vela,* 279 Neb. 94, 777 N.W.2d 266, 294 (2010); *Ex Parte Briseno,* 135 S.W.3d 1, 7 n. 24 (Tex.Crim.App.2004).

Furthermore, although the focus with this element of the definition often is on IQ scores, "*that is not to say that objective IQ testing is required to prove mental retardation*." *Ybarra v. State,* 127 Nev. Adv. Op. 4, 247 P.3d 269, 274 (2011) emphasis added. At the hearing below, the State argued that Mr. Thomas could not be retarded because his IQ score was above the threshold of 70 prior to the age of 18. A.A. Vol. 1 0015-0020. The State appears to have operated under an incorrect assumption regarding this point of law, again, that there is no objective IQ testing required to prove mental retardation under *Ybarra v. State*.

Other evidence may be used to demonstrate sub average intellectual functioning, including school records and any other relevant records. *Id citing McManus,* 868 N.E.2d at 787; *Com. v. Vandivner,* 599 Pa. 617, 962 A.2d 1170, 1187 (2009). Dr. Mack reported that Marlo's IQ is72, well within the range generally recognized by courts as sub-average intelligence. Even if Nevada were to adopt a lower range where Marlo would not fall within it, this Court has indicated a Defendant could rely on other records such as medical reports and school records to prove-up his mental retardation. *Id*.

The next prong asks whether Marlo Thomas suffered significant limitations in adaptive functioning. Adaptive functioning has been defined as

the "collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives," and thus, "limitations on adaptive behavior are reflected by difficulties adjusting to ordinary demands made in daily life." *Com. v. Miller*, 585 Pa. 144, 888 A.2d 624, 630 (2005); *see also In re Hawthorne,* 35 Cal.4th 40, 24 Cal.Rptr.3d 189, 105 P.3d 552, 557 (2005). Marlo suffered abuse which resulted in limitations in his functioning as a child. He suffered from bladder incontinence every other day until he was 12 years old. A.A. vol. 1. Pg. 0038. Other children made fun of Marlo and called him stinky because he could not control his bladder. *Id.* Marlo has "a long history of academic learning difficulties, emotional and behavioral dyscontrol, dysregulation of aggression, and anger starting at an early age. *Id* at 0067. "The history supports the idea that Mr. Thomas had neurodevelopmental brain damage with borderline intellectual functions, severe learning disabilities, and communication deficits at an early age." *Id.*

Appellant requested an opportunity to develop the record, and to inquire into other relevant evidence of Mr. Schieck's investigation into these possibilities or lack thereof during sentencing. The District Court improperly refused to hold an evidentiary hearing in which Mr. Thomas, who faces death at the hand of the

State, could have developed his appeal in accordance with the evidentiary standards of *Ybarra*. Where a man's life is on the line, where his execution is an irrevocable finality of the most serious kind, justice weighs heavily on the side of caution. An evidentiary hearing *might* delay justice for the victims of this case a slight while longer; refusing to hold that evidentiary *will* end the life of a man who might, according to new evidence and a proper construction of the case law of this Court, be mentally retarded and unfit for execution.

Appellant presented evidence of his mental retardation in the form of extensive mental analysis conducted by Dr. Mack. *Id* at 0029. The record shows that Mr. Schieck did not present this type of evidence at sentencing. For these reasons, taking the facts most favorably to Mr. Thomas, an evidentiary hearing was warranted in the court below. That evidentiary hearing was improperly denied.

II. The District Court erred in not holding an evidentiary hearing on whether Appellant is mentally retarded on the alternative grounds outlined in N.R.S. 175.554(5).

Pursuant to NRS 175.554(5):

> "If a sentence of death is imposed and a prior determination regarding intellectual disability has not been made pursuant to NRS 174.098, the defendant may file a motion to set aside the penalty on the grounds that the defendant is intellectually disabled. If such a motion is filed, the court shall conduct a hearing on that issue in the manner set forth in NRS 174.098. If the court determines pursuant to such a hearing that the defendant is intellectually disabled, it shall set aside the sentence of death and order a new penalty hearing to be

> conducted. Either party may appeal such a determination to the Supreme Court pursuant to NRS 177.015.
>
> Nev. Rev. Stat. Ann. § 175.554.

Mr. Thoms has a right to a hearing guaranteed by this statute, and by the Constitution of the United States. Mr. Schieck should have filed a motion pursuant to the above Statute subsequent to sentencing but prior to this Post-Conviction appeal. Mr. Schieck failed to do so. If a request *was* filed via Motion, this statute compels the Court to hold a hearing on the matter of mental retardation.

At the Post-Conviction level, it would have been proper for the Court to hold a 175.554(5) hearing once the subject matter of that appeal became apparent to the Court. By failing to hold a hearing at that time, the Court failed to protect Mr. Thomas's due process interests, constitutional interests, and statutory interests. For those reasons, the District Court abused its discretion by failing to take judicial notice and hold an evidentiary hearing on whether Mr. Thomas was mentally retarded or suffered from intellectual disability.

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CONCLUSION

For the aforementioned reasons, the District Court's Order should be overturned so that the matter may be remanded and an evidentiary hearing may be conducted.

Respectfully submitted,

Dated this 30th of October, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the:

OPENING BRIEF AND APPELLANT'S APPENDIX

by mailing a copy on 22nd day of October , 2014 via first class mail, postage thereon fully prepaid, to the following:

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