IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLO THOMAS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 65916

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RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUES

1. Whether the district court properly denied Appellant's Petition for Writ of Habeas Corpus (Post-Conviction) without holding an evidentiary hearing
2. Whether the district court erred in not holding an evidentiary hearing pursuant to NRS 175.554(5)

STATEMENT OF THE CASE

Appellant Marlo Thomas was convicted of two counts of First Degree Murder and sentenced to 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. At the first penalty hearing, the jury found six aggravating circumstances, no mitigating circumstances, and sentenced Thomas to death. This Court affirmed Thomas' conviction and sentences of death in 1998. Thomas v. State, 114 Nev.

1127, 967 P.2d 1111 (1998), cert denied Thomas v. Nevada, 528 U.S. 830, 120 S.Ct. 85 (1999). Remittitur issued on October 26, 1999.

Following post-conviction proceedings in 2002, in which trial counsel Lee McMahon and Pete LaPorta both testified, this Court affirmed the convictions but reversed the death sentences for counsel's failure to object to an incorrect instruction on commutation. Thomas v. State, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004). In 2004, David Schieck was appointed for the new penalty hearing at which the jury found the existence of four aggravating circumstances and again sentenced Thomas to death. This Court affirmed on direct appeal. Thomas v. State, 122 Nev. 1361, 148 P.3d 727 (2006). Remittitur issued on January 28, 2008.

On March 6, 2008, Thomas initiated the present post-conviction proceedings by filing a proper person Petition for Writ of Habeas Corpus and Motion to Appoint Counsel. 1 RA 1. Present counsel was appointed on January 7, 2009, and filed a supplemental petition on July 12, 2010. 1 RA 138. The State responded on November 4, 2010. 1 RA 157. On March 31, 2014, Thomas filed a Supplemental Petition, to which the State responded to on April 14, 2014. 1 AA 22; 1 RA 179. On April 28, 2014, the post-conviction court denied Thomas' Petition for Writ of Habeas Corpus. 1 AA 20. The post-conviction court's findings were filed on May 30, 2014. 1 AA 1. Thomas filed a Notice of Appeal on June 19, 2014.

On November 4, 2014, Thomas filed the instant Opening Brief. The State hereby responds as follows, and respectfully requests this Court to affirm the judgment of the district court.

STATEMENT OF THE FACTS [1]

Thomas and his brother-in-law Kenya Hall were charged with two counts of First-Degree Murder With the Use of a Deadly Weapon as a result of their early-morning robbery of the Lone Star Steakhouse and the stabbing deaths of two employees who were present during the robbery. Vince Oddo, the kitchen manager, who was also present during the robbery, called 911 after his escape, and when police responded to the scene, Oddo identified Thomas as one of the perpetrators. Thomas, Hall, and Thomas' wife Angela Love were arrested later that day.

After their arrest, Hall was interviewed by Nevada Highway Patrol Officer David Bailey. Hall confessed to his role in the crimes and implicated Thomas. He agreed to plead guilty to lesser charges in exchange for testifying against Thomas. He testified at Thomas' preliminary hearing but then refused to testify any further and sought to withdraw his guilty plea. His preliminary hearing testimony was read into the record at Thomas' trial. A jury convicted Thomas of two counts of First-Degree Murder With the Use of a Deadly Weapon, Conspiracy To Commit Murder

[1] These facts are adapted from Thomas v. State, 122 Nev. 1361, 148 P.3d 727 (2006), unless otherwise stated.

And/Or Robbery, Robbery With the Use of a Deadly Weapon, Burglary While In Possession of a Firearm, and First-Degree Kidnapping With the Use of a Deadly Weapon.

On remand for the new penalty hearing in 2005, the district court ordered it to be bifurcated into an eligibility phase and a selection phase. The State alleged four aggravators: (1) Thomas had a prior conviction for a felony involving violence or the threat of violence; (2) he had a second such conviction; (3) the murder was committed to avoid or prevent a lawful arrest; and (4) Thomas was convicted in the instant proceeding of more than one murder.

In the eligibility phase, the State read Hall's preliminary hearing testimony into the record. Other witnesses testified as to the facts of the crimes and the investigation. The State admitted the Judgment of Conviction for Thomas' 1990 conviction for Attempted Robbery, and the arresting officer from that incident testified that the victim told him Thomas and a cohort had robbed him at knifepoint but he did not know which assailant had the knife. The State also admitted a Judgment of Conviction for Thomas' 1996 conviction for Battery With Substantial Bodily Harm, and the victim testified that Thomas had beaten her with a gun and stomped on her chest. Officer Bailey testified about Hall's statements during questioning.

In mitigation, Thomas called family members who described his father's denial that Thomas was his son, his mother's beatings and harsh treatment, his counseling of family members not to take his path, his scholastic and psychological problems as a child, Angela Love's bad influence on him, and his recent mellowing of temper and conversion to Christianity. After deliberating on death eligibility, the jury found all four aggravators. The jurors found seven mitigators, in that Thomas had: (1) accepted responsibility for the crimes; (2) "cooperated with the investigation but diverted the truth"; (3) demonstrated remorse; (4) counseled others against criminal acts; (5) suffered learning and emotional disabilities; (6) found religion; and (7) been denied by his father. The jurors determined that the aggravators outweighed the mitigators, and the hearing proceeded to the selection phase.

At the selection phase, the State called Patricia Smith, a Division of Parole and Probation records supervisor, who authenticated a set of 25 juvenile court petitions charging 11- to 17-year-old Thomas with crimes including Vandalism, Car Theft, Battery, and Robbery. Smith also authenticated a juvenile court order listing Thomas' entire juvenile history and certifying 17-year-old Thomas as an adult in the 1990 robbery case, in which Thomas eventually pled guilty to Attempted Robbery.

Another division employee, John Springgate, authenticated two Presentence Investigation Reports prepared for Thomas' convictions in 1990 of Attempted Robbery and in 1996 of Battery With Substantial Bodily Harm. Two victims of

Thomas' prior crimes testified about those incidents. The State called ten corrections officers to testify about Thomas' behavior while in prison. Some of the officers authenticated prison discipline documents. Finally, the fathers of Carl Dixon and Matthew Gianakis gave victim-impact testimony.

Thomas called five fellow inmates. They collectively testified that Thomas avoided problems in prison, counseled others to avoid problems, and gave them good advice. One testified that verbal abuse is mutual between inmates and prison staff and that some staff provoke disciplinary infractions. Thomas also called the warden of his present institution, who testified that Thomas was always respectful and polite to him and that inmates can mellow with time and maturity. Thomas final witness was his mother. Thomas gave a statement in allocution, in which he expressed remorse and asked for forgiveness for "[stealing] two precious lives." After deliberations, the jury returned two verdicts of death.

SUMMARY OF THE ARGUMENT

First, Thomas was not entitled to an evidentiary hearing. Even accepting all of Thomas' allegations as true, no evidentiary hearing is warranted. Second, Thomas' claim regarding NRS 175.554(5) is not properly before this Court.

ARGUMENT

I

APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL WERE PROPERLY DENIED WITHOUT AN EVIDENTIARY HEARING

On appeal, Thomas contends that he received ineffective assistance of counsel during his second sentencing hearing because Mr. Schieck failed to investigate and produce evidence of his purported intellectual disability and that the post-conviction court improperly denied his petition without first conducting an evidentiary hearing to allow him to fully develop his claims. AOB at 10. Nonetheless, presenting evidence of Thomas' mental health and other mitigating circumstances through the testimony of family members was a sound, reasonable strategy, and no evidentiary hearing was warranted. Moreover, even accepting all of Thomas' allegations as true, he was not entitled to an evidentiary hearing.

To prove ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. at 668, 104 S.Ct. 2052 (1984); see Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697. This Court gives deference to the district court's factual findings regarding ineffective assistance of counsel, but reviews the court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

There are "countless ways to provide effective assistance in any given case [and] [e]ven the best criminal defense attorneys would not defend a particular client in the same way." Harrington v. Richter, 131 U.S. 770, 131 S.Ct. 770, 788-89 (2011). Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. Id. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

A defendant who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). In order to demonstrate a reasonable probability that, but for counsel's failure to investigate, the result would have been different, it must be clear from the "record what it was about the defense case that a more adequate investigation would have uncovered." Id. Moreover, a defendant is entitled to an evidentiary hearing only if his petition is supported by specific factual allegations, which, if true, would entitle him to relief. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). "The judge or justice, upon review of the return, answer, and all supporting documents which are filed, shall determine whether an evidentiary hearing is required." NRS 34.770(1).

To the extent Thomas claims the district court erred in denying his request for an evidentiary hearing in order to develop his claim that counsel failed to properly investigate and present evidence related to his purported mental retardation,[2] his claim is without merit. Evidence related to Thomas' "possible" mental retardation was readily available from Dr. Kinsora's original testimony.[3]

In 2002, the Supreme Court held that executions of the mentally retarded would violate the 8th Amendment's prohibition against cruel and unusual punishment. Atkins v. Virginia, 56 U.S. 304, 122 S.Ct. 2242 (2002). In Nevada, an intellectual disability means "significant subaverage general intellectual functioning [that] exists concurrently with deficits in adaptive behavior and manifested during the developmental period." NRS 174.098(7). As noted by the United States Supreme Court, a "mild" intellectual disability is typically used to describe people with an IQ level of 50-55 to approximately 70. Atkins, 536 U.S. at 309 n.3 (internal citations omitted). "It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." Id. at

[2] The Nevada Legislature now euphemistically refers to mental retardation as "intellectual disability." NRS 174.098.

[3] Dr. Kinsora testified at the first penalty hearing, but was not called as a witness in the 2005 penalty hearing. 4 RA 569-70.

n.5. "Mental retardation is a relatively rare thing. It's about one percent of the population." Id.

Dr. Kinsora testified in 1997 that Thomas' full scale IQ of 79 fell in the 8th percentile which was considered borderline intellectual functioning. 3 RA 428-79. Specifically, Dr. Kinsora stated that Thomas was not mentally retarded:

> His full scale IQ, which is what we call your person's IQ, basically, fell at the eighth percentile, which again is very, very poor. That's considered borderline intellectual function.
> The mentally retarded range occurs at 69, so he was approximately ten points off or six percentile points off from that.
> …
> Q On page 5 of your report, you state that the defendant has an IQ of 79, which is ten points away from being considered retarded?
> A That's true.
> …
> Q Okay. In your summary you state "The defendant is not mentally deficient or retarded," is that correct?
> A He's not considered mentally retarded, no.

3 RA 444-45, 464, 466-67. Dr. Kinsora was not just relying on his own test scores taken in 1997, but on those from Thomas' school years which would be the most relevant for determining onset or manifestation during the developmental years:

> I reviewed fairly detailed information related to his education. He had available I think four or five different psychological reports. Several of them included intellectual assessments and academic assessments.
> …

> We have previous testings of all these right here back from 1981, 1984 and so on, and he didn't perform any better then than he's doing right now. He's pretty must consistent with where he was when in the program for emotionally and behaviorally disturbed kids and for learning disabilities.

3 RA 436, 445. Thomas failed to demonstrate how Dr. Kinsora's prior evaluation of Thomas' intellectual capability was deficient or how circumstances have changed in such a way that required Mr. Schieck to seek out another evaluation. As in 1997, the facts remained that Thomas' IQ was low, but clearly above that required for a diagnosis of mental retardation. Because Dr. Kinsora could not diagnose Thomas as mentally retarded, the failure to present such testimony did not deprive Thomas of any valuable defense to the death penalty. See Atkins, 536 U.S. at 304, 122 S.Ct. at 2242 (mentally retarded persons are not eligible for the death penalty). Even if adjusted down by 7 to 9 points to account for the purported "Flynn" effect, this would still be inadequate to place Thomas in the necessary range. 1 AA 68.

Moreover, Thomas has failed to demonstrate that counsel was ineffective in not re-calling Dr. Kinsora in the new penalty hearing. Notably, Dr. Kinsora' testimony failed to persuade the first jury not to sentence Thomas to death. 3 RA 559-62. Indeed, at the beginning of the 2005 penalty hearing, Schieck explained to the jury that his strategy in presenting evidence to them would be to humanize Thomas through members of his family who would relate his personal history:

> We're talking about a human being, and what we're going to try to do during our presentation is present Marlo to you through members of his family and other witnesses so that you come to understand why we are here. There's a big leap from when Marlo was a child until April of 1996, and you need to understand Marlo and his family and what transpired during that period of time that caused us to be here.

6 RA 1017.

Consistent with the stated strategy, counsel presented evidence of Thomas' mental disabilities and personal history through family members in lieu of an expert witness. Thomas' brother Darrell Thomas testified that he observed Thomas to have mental problems:

> Q Did you ever tell your mother that you thought Marlow had mental problems?
> A I used to say that, but that was my opinion, that wasn't their opinion. But that was when I got older I would just tell her that I thought he had some problems. Whether it was mental, I just said he was crazy, but that was just a family kind of thing there.

4 RA 776-77. Thomas' mother Georgia Thomas testified how Thomas needed mental help and was placed in special education:

> A …[W]hen Marlow was in grade school, he began to act out some… He was like, angry. He was fighting and when they would call me and tell me about it, I just push it away. I didn't want to believe it and I just pushed it away. And when they told me that he needed help, I didn't accept it. I argued with them, and I just didn't accept that.
> Q Who told you he needed help?
> A Walter Braken School.
> Q What kind of help did they tell you he needed?

> A Actually they told me he needed mental help.
> …
> A They put him in - - they used to call it Molly Achievement. It was a mental school.

4 RA797-98. Eliciting such information through family members rather than a hired expert had the effect of humanizing Thomas for the jury. Whereas counsel in the first penalty hearing had called only three family members (Linda McGilbra, Georgia Thomas, and Darrell Thomas), Schieck emphasized the family connections by calling at least seven family members to the stand to talk about their perspectives and unique experiences with Thomas: David Hudson, Eliza Bousley, Shirley Nash, Charles Nash, Darrell Thomas, Paul Hardwick, Georgia Thomas. 4 RA 707-08.

While perhaps Dr. Kinsora could have offered additional details and expert opinion on Thomas' mental ability, his testimony was a two-edged sword that included arguable evidence in aggravation. For instance, Dr. Kinsora described Thomas as an individual who experiences significant feelings of grandiosity and is very paranoid at times with impulse control problems and a great deal of difficulty with authority. 3 RA 448-53. He was also described Thomas as a hypomanic, meaning Thomas was very impulsive and would get angry very easily while having a hard time controlling himself. 3 RA 449-53. Thomas' test scores also showed he has an antisocial personality disorder almost bordering on being a sociopath. 3 RA 454.

The prosecutor's cross-examination of Dr. Kinsora in 1997 further demonstrates the problems with re-using such testimony in the new penalty hearing. The prosecutor pointed out that Dr. Kinsora was not a medical doctor and that subjective psychological opinions may be wrong. 3 AA 460-62. Indeed, Thomas was not on any medication, had no significant neuro-medical conditions, no early childhood injuries, and had no illnesses or head injuries. 3 RA 464. Importantly, Dr. Kinsora was forced to admit that having a low IQ was not the reason Thomas committed the violent murders in this case and that millions of people have IQ's less than Thomas and still lead productive lives. 3 RA 464-65. The prosecutor also elicited that Thomas' routine response to difficulties is anger and physical threats which was expected to continue to get him in trouble in society. 3 RA 467.

The cross-examination of Dr. Kinsora in 1997 also gave the prosecutor another chance to review and remind the jury of Thomas' violent criminal history and the plight of the numerous victims. 3 RA 468-69. The prosecutor was also able to undermine Dr. Kinsora's testimony by referring to "The Abuse Excuse" and the famous "twinkie" defense. 3 RA 474-75. Dr. Kinsora also opined that Thomas "explodes and someone invariably gets hurt." 3 RA 476. The doctor's opinion that Thomas would likely function well in prison was severely undermined by reference to the inordinate number of criminal and disciplinary violations Thomas had committed in prison. 3 RA 477-78. Dr. Kinsora was also effectively impeached by

prior testimony that he was "uncertain about everything as a psychologist." 3 RA 479. Under these circumstances, with Dr. Kinsora's testimony cutting both ways in terms of mitigation and aggravation, and not having saved Thomas from the death penalty in the first hearing, it was not ineffective for new counsel to forego calling Dr. Kinsora and rely primarily on family members to humanize Thomas and provide his mitigating circumstances.

There are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Harrington, 131 S.Ct. at 788-89. In a capital case, there are any number of hypothetical experts—specialists in psychiatry, psychology, ballistics, fingerprints, tire treads, physiology, or numerous other disciplines and subdisciplines—whose insight might possibly have been useful. Id. But counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. Id. Even if an expert theoretically could support a client's defense theory, a competent attorney may strategically exclude it, consistent with effective assistance, if such expert may be fruitless or harmful to the defense. Id. at 789-90. Given that expert testimony on Thomas' mental deficiencies and a psychological defense did not convince the jury to spare Thomas' life in the first trial, counsel re-doing the penalty hearing reasonably shifted strategies to a family sympathy defense.

Indeed, in Cullen v. Pinholster, the United States Supreme Court discussed the Strickland standard for effective assistance of counsel in the context of a capital penalty hearing. Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388 (2011). In Pinholster's penalty hearing, trial counsel called only one witness, Pinholster's mother, who gave an account of his troubled childhood and adolescent years, his siblings, and described Pinholster as "a perfect gentleman at home." Id. at 1396. Although trial counsel had consulted a psychiatrist, no expert was called during the penalty hearing. Id. In post-conviction, Pinholster argued that counsel should have investigated and presented additional evidence from a psychiatrist who subsequently diagnosed petitioner with bipolar mood disorder and seizure disorders that were not presented at trial. Id. Nonetheless, his post-conviction petition was denied because the new evidence largely duplicated the mitigation evidence at trial, and some of the new evidence would likely have undercut the mitigating value of the testimony by the petitioner's mother. Id. at 1409-1410. The Court reasoned that a one-witness "family sympathy" defense was reasonable under the circumstances, and the failure to present a psychiatric defense with evidence of brain damage and psychiatric diagnosis was a "two-edged sword" with questionable mitigating value. Id.

Here, all that Thomas has done is propose an alternative strategy and theory of defense, which, in hindsight, he speculates might have resulted in a non-death sentence. Nonetheless, the role of a court in considering allegations of ineffective

assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977). Any hindsight criticism of counsel's effectiveness during the penalty phase must begin with an honest assessment of what counsel did do under the circumstances at the time. As noted *supra*, the record shows that Thomas' counsel employed a family sympathy defense much like that in Pinholster. Importantly, Thomas' trial counsel went far beyond the defense in Pinholster by calling numerous family members to testify to Thomas' mental health and other mitigating circumstances. 4 RA 707-08. The question is not whether a different defense or investigation would have been more successful or even whether counsel could have done a better job. In Strickland, the Supreme Court made it clear that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation ... [but] simply to ensure that criminal defendants receive a fair trial." 466 U.S. at 689, 104 S.Ct. 2052. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S.Ct. 2052.

Moreover, Thomas cannot demonstrate prejudice. To be found intellectually disabled, a defendant must demonstrate a certain number of factors. The first concept is significant limitations in intellectual functioning. Ybarra v. State, 127 Nev. Adv. Op. 4, 247 P.3d 269, 274 (2011). Generally, this concept has been measured in large part by intelligence (IQ) tests. Id. Additionally, the defendant must show significant deficits in adaptive behavior developed during a specific period. Id. Indeed, the age of onset is a crucial element in finding a defendant intellectually disabled. Id. at 275; NRS 174.098(7). This requirement ensures that the disability developed during the developmental period, as opposed to forms of brain damage that occur later in life. Ybarra, 247 P.3d at 275. Focusing on the period before a person reaches 18 years of age ensures that the person suffers from an intellectual disability, instead of some other impairment. Id. at 276.

Despite the State's objection, the post-conviction court granted funding for a neuropsychological examination at the taxpayers response, which resulted in an evaluation by Dr. Jonathan Mack. 1 AA 34. Notably, Thomas' claim of intellectual disability is raised and framed solely as an ineffective assistance of counsel claim rather than substantively under the procedures provided for in NRS 175.554(5). Thus, as noted *supra*, because counsel had already obtained a neuropsychological evaluation from Dr. Kinsora, who had opined that Thomas was not mentally retarded, 4 RA 467, counsel's failure to seek and obtain a second evaluation did not

fall below an objective standard of reasonableness. Indeed, notwithstanding the court's erroneous funding of a second expert during the post-conviction process, had counsel requested funds, it surely would have been denied. See 1 RA 87. Thomas was not entitled to a second examination at the public's expense when school records and testing during the formative years established an IQ well above that required for mental retardation. 1 RA 111-20. Even accounting for the "Flynn" effect, and, assuming *arguendo*, Thomas' IQ was modified down to 70, this did not manifest during the developmental period prior to age 18. At that time, as noted *supra*, Thomas' IQ was 84 and 85, which would foreclose a diagnosis of mental retardation. No decline in intellectual functioning as an adult can equate to mental retardation. Indeed, by definition, mental retardation must have occurred during the formative years. Ybarra, 247 P.3d at 275. Thus, Thomas was not entitled to a second examination at the taxpayer's expense.

Nonetheless, the post-conviction court granted funding. However, like Dr. Kinsora, Dr. Mack does not diagnose Thomas as intellectually disabled. 1 AA 69. Indeed, Dr. Mack states, "overall, it is difficult to diagnose Mr. Thomas with mild mental retardation due to his IQ scores before the age of 18." 1 AA 69. Simply put, Thomas was evaluated by two experts and neither were able to diagnose him as intellectually disabled before the age of 18, or at all. Thus, there was no reasonable probability that, but for counsel's errors, the result in the proceeding would have

been different. The fact of the matter is, Dr. Mack's evaluation was unnecessary, and did not change the fact that counsel strategically chose to forego expert testimony in lieu of humanizing Thomas for the jury by presenting mitigating evidence through family members.

At most, the investigation and allegedly new evidence detailed in Thomas' supplemental petition and Dr. Mack's evaluation represent an alternative theory of defense in hindsight, but not one consistent with the strategy trial counsel believed would be most persuasive at the time. Some of Dr. Mack's evaluation arguably is not even mitigating because it portrays Thomas in a poor light and would have been inconsistent with counsel's reasonable strategy of humanizing Thomas and making him likable to the jury. 1 AA 55. Much of the evidence was actually presented to the jury through family members and further details through an expert would have been purely cumulative, unnecessary, and, as noted *supra*, potentially damaging. Under the standard enunciated in Strickland, Pinholster, and Harrington, above, Thomas has failed to demonstrate ineffective assistance of counsel at the penalty hearing.

To the extent Thomas argues that evidence of "his borderline [intellectual disability] would have severely diminished the probability that the jury would have sentenced [Thomas] to death…," AOB at 14, said claim is without merit. First, mere assertions are not evidence. See Rudin v. State, 120 Nev. 121, 138, 86 P.3d 572,

583 (2004). Second, the jury was presented with much of the same evidence during the first hearing and sentenced Thomas to death. Indeed, they were presented with similar evidence through his family in the second hearing and still sentenced Thomas to death. There is no evidence to remotely suggest that a jury would have sentenced Thomas to anything but death.

Thus, an evidentiary hearing was irrelevant and unnecessary, and the district court properly denied Thomas' request. A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). However, "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984); citing Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981). Even if Thomas' factual allegations were all true and Dr. Mack testified in accord with his evaluation, Thomas still would not have been entitled to relief because denial of his petition did not depend in any way upon any factual dispute or the credibility of Dr. Mack. Instead, the facts, even as alleged, show no deficiency of counsel in not obtaining yet another neuropsychological evaluation and no prejudice under Strickland that would have resulted in a non-death sentence.

II
APPELLANT'S NRS 175.554(5) CLAIM IS NOT PROPERLY BEFORE THIS COURT

For the first time on appeal, Thomas asserts that the district court erred in failing to hold an evidentiary hearing on whether he was intellectually disabled pursuant to NRS 175.554(5). Notably, Thomas' claim of mental retardation is raised and framed solely as an ineffective assistance of counsel claim rather than substantively under the procedurals provided for in NRS 175.554(5). Thus, the instant matter is limited to claims of ineffective assistance of counsel during the second penalty hearing.

Moreover, NRS 175.554(5) provides, in pertinent part: "[i]f a sentence of death is imposed and a prior determination regarding intellectual disability has not been made…the defendant *may file a motion to set aside the penalty* on the grounds that the defendant is intellectually disabled…" NRS 175.554(5) (emphasis added). Here, no such motion was ever filed. Thus, to the extent Thomas claims the post-conviction court erred in failing to hold an evidentiary hearing pursuant to NRS 175.554(5), his claim is without merit.

Inasmuch as Thomas claims Mr. Schieck was ineffective for failing to file a motion per NRS 175.554(5), Thomas did not assert said challenge in the district court, and, thus, the issue is deemed waived. Ford v. Warden, 111 Nev. 872, 883, 901 P.2d 123, 129-30 (1995) (internal citations omitted). Further, Thomas cannot

establish deficient performance. As discussed *supra*, Schieck knew that Thomas was unable able to satisfy the factors required per the first evaluation, and, thus, any such motion would have been futile. Equally, and for the same reasons, Thomas cannot establish prejudice as Thomas cannot prove that he was intellectually disabled before the age of 18. Simply put, Thomas was not mentally retarded during the developmental period per Ybarra. Both of Thomas' evaluations show him to be clearly above the required cutoff during the age of onset.

CONCLUSION

Based on the aforementioned, this Court should affirm the judgment of the district court.

Dated this 2nd day of February, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 5,221 words and does not exceed 30 pages.
3. **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 NRAP 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 2nd day of February, 2015.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 2, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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