

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MARLO THOMAS,  
Appellant,

v.  
THE STATE OF NEVADA,  
Respondent.

Electronically Filed  
Feb 02 2015 02:36 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court  
Case No. 65916

**RESPONDENT'S APPENDIX  
VOL. I**

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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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BY /s/ E.Davis  
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SSO/William Rowles/ed

27

FILED

MAR 6 3 35 PM '08

CR. [Signature]  
CLERK OF THE COURT

0014  
MARLO THOMAS  
INMATE NO. 50682  
Ely State Prison  
P.O. Box 1989  
Ely NV 89301

PETITIONER IN PROPER PERSON

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

MARLO THOMAS,	)	CASE NO. C 136862
	)	DEPT. NO. XV
Petitioner,	)	
	)	
vs.	)	PETITION FOR WRIT OF
	)	HABEAS CORPUS (POST-
WARDEN OF ELY STATE PRISON,	)	CONVICTION) AND MOTION FOR
and THE STATE OF NEVADA,	)	APPOINTMENT OF COUNSEL
	)	
Respondent.	)	DATE: _____
	)	TIME: _____

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: ELY STATE PRISON, WHITE PINE COUNTY, ELY, NEVADA

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, LAS VEGAS NV

3. Date of judgement of conviction: NOVEMBER 28, 2005

4. Case number: C 136862

5. (a) Length of sentence: 2 SENTENCES OF DEATH

(b) If sentence is death, state any date upon which execution is scheduled:

STAYED

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes XX No \_\_\_\_\_

If "yes", list crime, case number and sentence being served at this time:

OTHER CHARGES RELATED TO THIS CASE WHICH WERE AFFIRMED AND NOT

CLERK OF THE COURT  
MAR 3 2008

1 REMANDED FOR A NEW PENALTY HEARING

2 7. Nature of offense involved in conviction being challenged: 2 COUNTS OF  
3 MURDER WITH USE OF A DEADLY WEAPON

4 8. What was your plea? (Check one)

5 (a) Not guilty XX

6 (b) Guilty \_\_\_\_\_

7 (c) Guilty but mentally ill \_\_\_\_\_

8 (d) Nolo contendere \_\_\_\_\_

9 9. If you entered a plea of guilty or guilty but mentally ill to one count of an  
10 indictment or information, and a plea of not guilty to another count of an indictment or  
11 information, or if a plea of guilty or guilty but mentally ill was negotiated, give details:

12 N/A

13 10. If you were found guilty after a plea of not guilty, was the finding made by:  
14 (check one)

15 (a) Jury XX

16 (b) Judge without a jury \_\_\_\_\_

17 11. Did you testify at the trial? Yes \_\_\_\_\_ No XX

18 12. Did you appeal from the judgement of conviction? Yes XX No \_\_\_\_\_

19 I APPEALED THE SENTENCE OF DEATH FOLLOWING A SECOND PENALTY  
20 HEARING AFTER REMAND

21 13. If you did appeal, answer the following:

22 (a) Name of court: NEVADA SUPREME COURT

23 (b) Case number or citation: 46509

24 (c) Result: AFFIRMED

25 (d) Date of result: 12-28-06

26 14. If you did not appeal, explain briefly why you did not: N/A

27 15. Other than a direct appeal from the judgement of conviction and sentence,  
28 have you previously filed any petitions, applications or motions with respect to this

judgement in any court, state or federal? Yes XX No \_\_\_\_

16. If your answer to No. 15 was "yes," give the following information:

(a) as to any first petition, application or motion:

(1) Name of court: UNITED STATES SUPREME COURT

(2) Nature of proceeding: PETITION FOR WRIT OF CERTIORARI

(3) Grounds raised: DENIAL OF RIGHT OF CONFRONTATION

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes \_\_\_\_ No X

(5) Result: CERTIORARI DENIED

(6) Date of result: OCTOBER 4, 1999

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: UNKNOWN

(b) as to any second petition, application or motion, give the same information:

(1) Name of court: EIGHTH JUDICIAL DISTRICT COURT

(2) Nature of proceeding: STATE HABEAS CORPUS

(3) Grounds raised: SEE ATTACHED

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes XX No \_\_\_\_

(5) Result: PETITION DENIED

(6) Date of result: SEPTEMBER 6, 2002

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: NOTICE OF ENTRY OF ORDER FILED SEPTEMBER 10, 2002

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes \_\_\_\_ No XX

Citation or date of decision: \_\_\_\_\_



1 which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five  
2 handwritten or typewritten pages in length.) \_\_\_\_\_

3 20. Do you have any petition or appeal now pending in any court, either state or  
4 federal, as to the judgement under attack? Yes \_\_\_\_\_ No XX

5 If yes, state what court and the case number: \_\_\_\_\_

6 21. Give the name of each attorney who represented you in the proceeding  
7 resulting in your conviction and on direct appeal:

8 TRIAL ATTORNEY: PETE LAPORTA AND LEE McMAHON

9 DIRECT APPEAL: MARK BAILUS AND LEE McMAHON

10 POST CONVICTION PROCEEDINGS: DAVID SCHIECK

11 APPEAL FROM DENIAL OF POST CONVICTION PROCEEDINGS: DAVID  
12 SCHIECK

13 REMANDED PENALTY HEARING: DAVID SCHIECK AND CLARK PATRICK

14 APPEAL FROM DENIAL OF REMANDED PENALTY HEARING: DAVID  
15 SCHIECK

16 22. Do you have any future sentences to serve after you complete the sentence  
17 imposed by the judgement under attack? SENTENCED TO DEATH

18 Yes \_\_\_\_\_ No \_\_\_\_\_ If yes, specify where and when it is to be served, if you  
19 know: \_\_\_\_\_

20 23. State concisely every ground on which you claim that you are being held  
21 unlawfully. Summarize briefly the facts supporting each ground. If necessary you may  
22 attach pages stating additional grounds and facts supporting same.

23 (a) Ground one: DENIED RIGHTS UNDER SIXTH AND FOURTEENTH  
24 AMENDMENTS AS I DID NOT RECEIVE DUE PROCESS OF LAW OR EFFECTIVE  
25 ASSISTANCE OF COUNSEL AT THE REMANDED PENALTY HEARING

26 Supporting FACTS (Tell your story briefly without citing cases or law.):

27 I AM INDIGENT AND DO NOT UNDERSTAND THE LAW AND NEED  
28 COUNSEL APPOINTED TO HELP ME FILE A SUPPLEMENTAL PETITION AND



1 POINTS AND AUTHORITIES IN SUPPORT OF THE PETITION

2 (b) Ground two: DENIED RIGHTS UNDER SIXTH AND FOURTEENTH  
3 AMENDMENTS AS I DID NOT RECEIVE DUE PROCESS OF LAW OR EFFECTIVE  
4 ASSISTANCE OF COUNSEL ON APPEAL FROM THE REMANDED PENALTY  
5 HEARING

6 Supporting FACTS (Tell your story briefly without citing cases or law.):

7 I AM INDIGENT AND DO NOT UNDERSTAND THE LAW AND NEED  
8 COUNSEL APPOINTED TO HELP ME FILE A SUPPLEMENTAL PETITION AND  
9 POINTS AND AUTHORITIES IN SUPPORT OF THE PETITION

10 WHEREFORE, Petitioner prays that the court grant Petitioner relief to which he  
11 may be entitled in this proceeding; and pursuant to NRS 34.820 moves this Court for an  
12 Order to appoint counsel to assist Petitioner in these proceedings.

13 SIGNED at ELY STATE PRISON on march 4, 2008.

14  
15 Marlo Thomas  
16 MARLO THOMAS, INMATE #50682

17 VERIFICATION

18 Under penalty of perjury, the undersigned declares that he is the Petitioner  
19 named in the foregoing petition and knows the contents thereof; that the pleading is  
20 true of his own knowledge, except as to those matters stated on information and belief,  
21 and as to such matters he believes them to be true.  
22

23  
24 Marlo Thomas  
25 MARLO THOMAS, INMATE #50682  
26  
27  
28

1 12 (continued)

2 Did you appeal from the judgement of conviction? Yes XX No       

3 I APPEALED FROM THE JUDGEMENT OF CONVICTION OF THE TRIAL AND  
4 THE FIRST PENALTY HEARING

5 13. (continued)

6 If you did appeal, answer the following:

- 7 (a) Name of court: NEVADA SUPREME COURT  
8 (b) Case number or citation: CASE NO. 31019  
9 (c) Result: CONVICTION AND SENTENCE AFFIRMED  
10 (d) Date of result: 11-25-1998

11 16 (continued)

12 (c) as to any third petition, application or motion:

- 13 (1) Name of court: UNITED STATES SUPREME COURT  
14 (2) Nature of proceeding: PETITION FOR WRIT OF CERTIORARI  
15 (3) Grounds raised: DENIAL OF RIGHT OF CONFRONTATION  
16 (4) Did you receive an evidentiary hearing on your petition, application or  
17 motion? Yes        No X  
18 (5) Result: CERTIORARI DENIED  
19 (6) Date of result: JANUARY 14, 2008  
20 (7) If known, citations of any written opinion or date of orders entered pursuant  
21 to such result: UNKNOWN  
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ISSUES RAISED ON DIRECT APPEAL (31019)

On direct appeal, THOMAS raised the following issues to the Nevada Supreme Court.

1. The trial court erred in declaring co-defendant, Kenya Hall, unavailable for the purpose of introducing preliminary hearing transcripts at trial.
2. The state committed prosecutorial misconduct by not offering to grant immunity to co-defendant, Kenya Hall, when he asserted he would not testify pursuant to his privilege against self-incrimination found in the fifth amendment.
3. The trial court violated the appellant's due process rights by allowing an unrecorded hearing outside the presence of the defendant.
4. The trial court erred in overruling appellant's objection to the state's peremptory challenge of the only African American juror.
5. The trial court erred in the admission of certain prejudicial autopsy photos.
6. The trial court erred in the admission of an enlarged diagram of data already in evidence.
7. The trial court erred in not declaring a mistrial after a witness testified at trial that the appellant had previously been in jail.
8. The evidence adduced at appellant's trial was insufficient to support appellant's convictions.
9. The trial court erred in allowing cumulative and otherwise inadmissible evidence of prior bad acts during the penalty phase of appellant's trial.
10. The trial court erred in admitting certain hearsay testimony into evidence during the penalty phase.

11. The statutory scheme adopted by Nevada fails to properly limit victim impact statements.

12. The prosecutor committed misconduct during the closing argument of the penalty phase of appellant's trial by appealing to the passions and prejudice of the jurors and by denigrating the proper consideration of mitigating factors.

13. The sentence of death was disproportionate to the evidence adduced during the two phases of appellant's trial.

14. The trial court erred in admitting a set of jury instructions during the guilt and penalty phases which violated the due process rights of the appellant.

15. The trial court committed constitutional error in allowing the jury to be death qualified.

16. Whether the cumulative error of improper conduct by the prosecutor, the reception of inadmissible evidence, and erroneous rulings of the court deprived appellant a fair trial.

ISSUES RAISED ON STATE HABEAS CORPUS (C136862)

1. Trial counsel failed to make contemporaneous objections on valid issues thereby precluding meaningful appellate review of the case in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

2. Trial counsel failed to make contemporaneous objections on valid issues during trial and appellate counsel failed to raise these issues on direct appeal, both failures being in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

3. Trial counsel was not prepared for critical stages of the proceedings and failed to

conduct proper investigation prior to trial in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

4. Trial counsel failed to adequately represent THOMAS during the course of the trial proceedings by failing to properly prepare jury instructions, cross-examine witnesses, and present evidence at both the trial and penalty stages of the proceedings in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

5. Appellate counsel failed to file a complete record on appeal as required by Supreme Court Rule 250 and failed to raise meritorious issues on direct appeal in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

6. THOMAS' conviction and sentence are invalid under the State and Federal Constitutional guarantee of due process, equal protection of the laws, and reliable sentence due to the failure of the Nevada Supreme Court to conduct fair and adequate appellate review. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

7. THOMAS' conviction and sentence is invalid under the State and Federal Constitutional guarantees of due process, equal protection, impartial jury from cross-section of the community, and reliable determination due to the trial, conviction and sentence being imposed by a jury from which African Americans and other minorities were systematically excluded and under-represented. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

ISSUES RAISED ON APPEAL FROM DENIAL OF STATE HABEAS CORPUS (40248)

1. Thomas received ineffective assistance of counsel
2. It was an abuse of discretion to deny Thomas a full evidentiary hearing on his petition for post conviction habeas corpus.

**REVERSED FOR SECOND PENALTY HEARING**

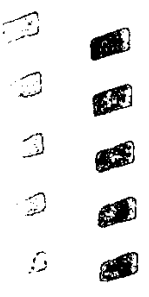
ISSUES RAISED ON APPEAL FROM REMANDED PENALTY HEARING (46509)

1. The court erred in admitting evidence in violation of Thomas' rights under the Sixth Amendment to confront witnesses against him.
2. The court improperly limited the mitigation and instructions on mitigation offered by Thomas.
3. The court erred by not limiting penalty hearing evidence to avoid violation of the eighth amendment and due process right to a fundamentally fair penalty hearing.
4. The sentence of death must be reversed because Nevada's death penalty scheme is unconstitutional.
5. The state violated the order of the court bifurcating the evidence at the penalty hearing

50682#

MARLO THOMAS  
PO BOX 1989  
LAS VEGAS NV 89301  
ELY, NV 89301

MAR 5 2008



5

ORIGINAL

FILED IN OPEN COURT

*November 9, 2009*

STEVEN D. GRIERSON  
CLERK OF THE COURT

BY *Larry Snyder* DEPUTY

Larry Snyder

1 **RQST**

2 BRET O. WHIPPLE

3 Nevada Bar No. 6168

4 BRET WHIPPLE, ATTORNEY AT LAW

5 1100 S. Tenth St.

6 Las Vegas, NV 89104

(702) 257-9500

7 STEPHANIE B. KICE

8 Nevada Bar No. 10105

9 Attorneys for Defendant

MARLO THOMAS

DISTRICT COURT

CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA, )

11 Plaintiff, )

12 vs. )

CASE NO.: C136862C

DEPT NO.: XXIII

13 MARLO THOMAS, )

14 Defendant. )

15 **REQUEST FOR FUNDS FOR INVESTIGATIVE ASSISTANCE**

16 COMES NOW, the Defendant, MARLO THOMAS, by and through his  
17 attorney, BRET O. WHIPPLE, and hereby requests this Honorable Court  
18 to PROVIDE FUNDS FOR INVESTIGATIVE ASSISTANCE SUFFICIENT TO  
19 ADEQUATELY PREPARE MR. THOMAS' STATE POST CONVICTION PETITION.

20 //

21 //

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RA 000013



1 This Request is made and based upon the Memorandum of Points and  
2 Authorities attached hereto, and any oral argument adduced at the  
3 time of hearing on this matter.

4 DATED this 9 day of November, 2009.

---

6  
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Attorneys for Defendant  
11 MARLO THOMAS  
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PLEASE TAKE NOTICE that the undersigned will bring the foregoing REQUEST FOR FUNDS FOR INVESTIGATIVE ASSISTANCE on for hearing before the above-entitled Court on the \_\_\_\_\_ day of November, 2009, at the hour of \_\_\_\_\_ a.m./p.m., or as soon thereafter as counsel may be heard on this matter.

DATED this \_\_\_\_\_ day of November, 2009.

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1 first sentencing proceeding was overturned by the Nevada Supreme  
2 Court. As a result, the State had to present its case for death  
3 before another jury. The second penalty jury sentenced Mr. Thomas  
4 to death. However, they did so without the benefit of a wealth of  
5 mitigation evidence that counsel failed to prepare and present.

6 Current counsel's believe that such evidence exists comes in  
7 large part from the testimony of Dr. Thomas Kinsora. Dr. Kinsora  
8 is a neuropsychologist who was hired to test Mr. Thomas. Dr.  
9 Kinsora testified in the first penalty trial. The jury in the  
10 second penalty trial was denied the benefit of his observations.  
11 Dr. Kinsora identified several areas that current counsel must  
12 investigate in order to assure that both Mr. Thomas' constitutional  
13 Due Process rights under the Fourteenth Amendment and his rights  
14 to effective assistance of counsel under the Sixth Amendment are  
15 protected.

16 **I. DR. KINSORA TESTIFIED THAT MR. THOMAS HAD LOW INTELLECTUAL**  
17 **FUNCTIONING**

18 Dr. Kinsora gave Mr. Thomas a series of neuropsychological  
19 tests that yielded over thirty different measurements of Mr.  
20 Thomas' neurocognitive functioning. (Exhibit A, II-19-20). Mr.  
21 Thomas' full scale IQ fell in the eighth (8<sup>th</sup>) percentile. Id. at  
22 II-22. Dr. Kinsora testified that someone in this range would be  
23 considered to have borderline intellectual functioning. Dr. Kinsora  
24 also determined that Mr. Thomas' reading skills were in the fourth  
25 (4<sup>th</sup>) percentile range, and Dr. Kinsora testified that 96% of the  
26 population can read better than Mr. Thomas. Mr. Thomas' spelling  
27 and math ability were both in the first (1<sup>st</sup>) percentile. Overall,  
28 Mr. Thomas' full scale IQ was in the eighth percentile. Dr. Kinsora  
described this as "very, very poor. That's considered borderline

1 intellectual functioning". (II-22).

2 In 2002, the United States Supreme Court determined that it  
3 was cruel and unusual punishment to execute someone who is mentally  
4 retarded. Atkins v. Virginia, 536 U.S. 304 (2002). Dr. Kinsora  
5 testified that the mentally retarded range begins at a full scale  
6 IQ of 69.<sup>1</sup> Using the AAIDD standard *infra*, Mr. Thomas was  
7 approximately four (4) points off or from the mentally retarded  
8 range. This is critical testimony and central to Mr. Thomas'  
9 defense. Even though the IQ score of 79 puts Mr. Thomas out of the  
10 mentally retarded range, the "Flynn Effect" must be considered when  
11 calculating Mr. Thomas' full scale IQ. The Flynn Effect is the  
12 principle that after an IQ test has been normed, people's scores  
13 start to creep upward over time. For the general population, the  
14 score creep is accepted at 0.33 points per year. For the mentally  
15 retarded population, the score creep is closer to 0.45 points per  
16 year.

17 Dr. Kinsora administered the WAISS-R IQ test which was last  
18 normed in 1974. As such, Mr. Thomas full scale IQ could be off  
19 anywhere from seven<sup>2</sup> (7) to over ten<sup>3</sup> (10) points **lower** than the  
20 score of 79 Dr. Kinsora reached.<sup>4</sup> Even using the more conservative  
21 score creep, decline in Mr. Thomas' IQ puts him well within the 70-  
22

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23 <sup>1</sup> Dr. Kinsora is mistaken in this statement. According to the  
24 American Association on Intellectual and Developmental Disabilities  
25 (AAIDD), the upper level range of persons who are considered  
mentally retarded is an IQ between 70-75.

26 <sup>2</sup> 7.26 points exactly using 22 years. 7.59 using 23 years.

27 <sup>3</sup> 9.90 points exactly. 10.35 years using 23 years.

28 <sup>4</sup> Dr. Kinsora examined Mr. Thomas five times between 1996 and  
1997. The Flynn Effect calculation would be 22 (years) multiplied  
by 0.33 and 0.45 respectively.

1 75 range accepted as mentally retarded by the AAIDD.<sup>5</sup> In order to  
2 get a much more accurate picture of Mr. Thomas' full scale IQ, it  
3 would be necessary to hire a neuropsychologist to travel to Ely,  
4 Nevada and conduct a minimum of two days of testing.

5 An individual's IQ is only one element that has to be proven  
6 for Mr. Thomas to qualify for relief under Atkins. To be found  
7 mentally retarded, counsel must show that Mr. Thomas suffers from  
8 significant adaptive deficits, and that those adaptive deficits  
9 existed prior to his eighteenth birthday. Id.

10 Dr. Kinsora provides insight into the possibility that Mr.  
11 Thomas meets both the second and the third prong of the Atkins  
12 requirements. He testified that an evaluation of Mr. Thomas'  
13 psychological records from his childhood revealed that he had  
14 "significant learning problems" (II-13). Mr. Thomas also "qualified  
15 as learning disabled very early on [and] [h]e was way behind in  
16 school".

17 One significant thing to point out is that Mr. Thomas had been  
18 tested prior to his eighteenth birthday (1981 and 1984) according  
19 to Dr. Kinsora. Dr. Kinsora notes that his findings were "pretty  
20 much consistent with where he was when [Mr. Thomas] was in the  
21 program for emotionally and behaviorally disturbed kids and for  
22 learning disabilities". (II-23).

23 Without the benefit of a more accurate evaluation of Mr.  
24 Thomas' neurocognitive functioning and an investigation into any  
25 adaptive deficits he had prior to the age of eighteen, post-

---

26  
27 <sup>5</sup> According to Dr. Kinsora, Mr. Thomas' IQ was 79. With the  
28 correction of seven (7) points for the Flynn Effect, this places  
Mr. Thomas' IQ at 72. If you use the more likely correction of 9.90  
points, this now places Mr. Thomas' full scale IQ below 70.

1 conviction counsel will not be able to perform in accordance with  
2 the rigors demanded by the Constitution and set forth in  
3 Strickland.

4 **II. MR. THOMAS MAY SUFFER FROM FETAL ALCOHOL SPECTRUM DISORDER**  
5 **(FASD)**

6 Although Mr. Thomas does not currently display the physical  
7 characteristics associated with individuals who have FASD, there  
8 is evidence to support this diagnosis. There is no one test that  
9 can definitively declare that Mr. Thomas has FASD; however, by  
10 reconstructing his social history and performing neurocognitive  
11 tests, a diagnosis of FASD can be hypothesized. Some of the  
12 hallmarks of FASD include: deficits in cognition or intellect,  
13 reasoning, memory, or concentration. (II-17).

14 Mr. Thomas' mother admitted that during the time she was  
15 pregnant with him, she drank wine or vodka every day "until she was  
16 extremely drunk". (II-14). This occurred throughout her pregnancy  
17 with Mr. Thomas. This level of alcohol consumption would be  
18 consistent with a diagnosis of FASD.

19 One of the cognitive deficits seen in individuals with FASD  
20 is a difficulty with concentration. One of the tests administered  
21 to Mr. Thomas measured his concentration skills. According to Dr.  
22 Kinsora, "Mr. Thomas had a very, very-a very, very hard time with  
23 this test and performed at the less than one percentile on the  
24 first trial and at the one percentile on the second trial". (II-  
25 24). In fact the test was so difficult for Mr. Thomas to perform  
26 that Dr. Kinsora did not force him to attempt a third or a fourth  
27 scoring.

28 Mr. Thomas also struggled with problem solving or reasoning

1 tasks. On one test, Mr. Thomas scored below the sixteenth  
2 percentile and fell in the "impaired range". Dr. Kinsora estimated  
3 that Mr. Thomas performed at the level of a 13-14 year-old in his  
4 ability to solve problems. (II-26).

5 Counsel requests the necessary funds to do a comprehensive and  
6 adequate investigation into Mr. Thomas social history to determine  
7 whether or not he suffers from FASD. Without this investigation,  
8 counsel cannot prepare a defense for Mr. Thomas that satisfies the  
9 demands of the Constitution.

10  
11 **III. MR. THOMAS' MOTHER VIRTUALLY ABANDONED HIM AT A YOUNG AGE, HE**  
12 **SUFFERED FROM PHYSICAL ABUSE, AND AN IMPOVERISHED UPBRINGING**  
13 **AND, AS A RESULT, MR. THOMAS DEVELOPED SEVERE BEHAVIORAL**  
14 **PROBLEMS**

15 Mr. Thomas' physical abuse started before he was born. His  
16 mother reported that she was frequently physically abused by  
17 Marlo's father and that the "punched and kicked [her] in the  
18 stomach many times while she was pregnant". (II-14-15). Mr. Thomas'  
19 mother admitted that she continued to physically abuse him when he  
20 was a child.

21 The environment in which Mr. Thomas was raised was less than  
22 ideal:

23 His early childhood was apparently not particularly  
24 conducive to good-to being raised as a -you know, with  
25 normal development. He had his father who was  
26 incarcerated when he was rather young, he-his mother  
27 apparently did quite a bit of physical whipping him  
28 (sic) and things like that. His brother was apparently  
the main person who raised him because his mother worked  
quite a bit. (II-15).

29 Mr. Thomas suffered from behavioral issues from an early age. He  
30 spent time in Children's Behavioral Services, and was later placed  
31 in Miley Achievement Center, which is an achievement center for  
32 severely emotionally disturbed kids. (II-15)



1 Mr. Thomas felt an acute sense of abandonment from his mother.  
2 Dr. Kinsora testified that Mr. Thomas' felt his mother loved his  
3 other brothers more than him. He also suffered from very poor peer  
4 relations and had a hard time getting along with anyone that was  
5 his age. He frequently felt picked on by his peers. (II-16).

6 All of these elements of Mr. Thomas' social history are  
7 important and need to be fully investigated. Mr. Thomas has a right  
8 to have this generally mitigating information presented to a finder  
9 of fact. Wiggins v. Smith, 539 U.S. 510 (2003). Counsel would be  
10 per se ineffective for making any strategic decisions about Mr.  
11 Thomas' case in the absence of a comprehensive investigation into  
12 his social history.

### 13 CONCLUSION

14 In order for counsel to perform up to the standards set forth  
15 in Strickland, it is necessary to request from this honorable court  
16 funds to hire both a neuropsychologist and a qualified investigator  
17 to prepare Mr. Thomas post conviction petition. Counsel estimates  
18 the cost for both the appropriate psychological testing and  
19 investigating will cost \$20,000 dollars (\$10,000 for  
20 neuropsychological testing and \$10,000 for investigative expenses).

21 //

22 //

23 //

24 //


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28 //

1 Hand-in-hand with the request for funds is the request for more  
2 time to complete the investigation and ultimately to draft a  
3 petition that meets the rigors demanded of the Sixth Amendment.  
4  
5  
6  
7

8   
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5 Attorney for Defendant

MARLO THOMAS

7 DISTRICT COURT

8 CLARK COUNTY, NEVADA

9  
10 THE STATE OF NEVADA, )

11 Plaintiff, )

12 vs. )

CASE NO.: C136862C

DEPT NO.: XXIII

13 MARLO THOMAS, )

14 Defendant. )

15 RECEIPT OF COPY

16 RECEIPT of the above named defendant's REQUEST FOR FUNDS FOR  
17 INVESTIGATIVE ASSISTANCE is hereby acknowledged this \_\_\_\_ day of  
18 November, 2009.

19  
20  
21 By: \_\_\_\_\_

22 CLARK COUNTY DISTRICT ATTORNEY

# **EXHIBIT A**

1 very sorry that they died, but I can't do nothin'. I wish I  
2 can bring 'em back, 'cause I feel for them, I sit there and  
3 watch 'em, but I can't. That's all I would like to say to the  
4 Court and to the jury, that I express my remorse to their  
5 families and also my family that sit there.

6 THE COURT: All right, thank you, Mr. Thomas.  
7 Your next witness, please?

8 MS. McMAHON: Thank you, Your Honor. We would call  
9 Dr. Thomas Kinsora

10 THE COURT: Dr. Thomas Kinsora?

11 MS. McMAHON: Pardon me, Your Honor.

12 (Pause in the proceeding)

13 THE COURT: Sir, please remain standing up over  
14 there. Remain standing up over there and raise your right  
15 hand and be sworn.

16 THOMAS KINSORA, DEFENDANT'S WITNESS, IS SWORN

17 THE CLERK: Thank you. Please be seated.

18 THE COURT: Please state your name and spell your  
19 last name for the record.

20 THE WITNESS: It's Thomas Francis Kinsora. It's  
21 K-I-N-S-O-R-A.

22 THE COURT: Ms. McMahon?

23 MS. McMAHON: Thank you, Your Honor.

24 //

25 //

II-5

KINSORA - DIRECT

DIRECT EXAMINATION

1

2 BY MS. McMAHON:

3 Q Good morning, Dr. Kinsora.

4 A Good morning.

5 Q The title of doctor, does that represent a doctorate  
6 degree?

7 A Yes, it does.

8 Q And can you tell me what your doctorate degree is  
9 in?

10 A I have a doctorate degree in clinical psychology  
11 with a specialty in clinical neuropsychology.

12 Q Dr. Kinsora, could you explain to us in lay terms  
13 what a clinical psychologist is and what neuropsychology is,  
14 and if there's a distinguishing --

15 A Sure, there is. A clinical psychologist is trained  
16 first in personality theory in assessing individuals, as well  
17 as psychotherapy in helping individuals with personal  
18 problems. A clinical neuropsychologist differs in the fact  
19 that they typically require more education, there is more of  
20 an emphasis in neurological functioning, brain functioning,  
21 and assessing levels of cognitive disorders and brain  
22 disorders. So, it's a little bit -- little bit more training,  
23 little bit more specialty.

24 Q Dr. Kinsora, how are you currently employed?

25 A Currently I'm in private practice here in Las Vegas.

II-6

KINSORA - DIRECT

1 Q And in your private practice are there areas or  
2 fields that you work in?

3 A Yes, there are. There are. I do work -- a lot of  
4 my work has to do with the brain injured population,  
5 individuals who have sustained brain injuries of one sort or  
6 another, individuals who've developmentally not acquired  
7 cognitive -- cognitive functioning that allows them to live in  
8 society. Or -- and as well as those who have acquired mild  
9 cognitive problems, learning disabilities, and things like  
10 that.

11 Q Included in your practice, do you do forensic work?

12 A Yes, I do.

13 Q Okay. And could you explain to the ladies and  
14 gentlemen of the jury what that involves?

15 A I do work with regard to both civil  
16 neuropsychological assessment. And in those cases I'm  
17 typically assessing the level of brain functioning in an  
18 individual who might have had a brain injury, and determining  
19 how it might affect their life. In some cases I'm called in  
20 to assess whether in fact a brain injury actually occurred.  
21 There's a -- there's a lot of lawsuits in which someone's  
22 claiming to have a brain injury, but in fact is malingering or  
23 faking to have a brain injury in order to seek some kind of a  
24 monetary reward. I also do criminal cases, such as these.

25 Q Can you tell the ladies and gentlemen of the jury

II-7

KINSORA - DIRECT

1 about your background, starting with your education?

2 A Sure. I did my undergraduate work at Wayne State  
3 University in Detroit, Michigan. My graduate work was done at  
4 the California School in Fresno, California, and that's a  
5 private graduate school that was started by the California  
6 State Psychological Association.

7 From there, in addition to the course work, of course,  
8 for the doctoral degree, I also did several different  
9 practicums. If you'd like me -- I'd be more than happy to go  
10 through those.

11 Q Okay. Could you explain to us what a practicum is?

12 A Okay. Practicums are basically internships where  
13 you go to a certain setting and you begin to work with  
14 patients, and you're heavily supervised, and basically you are  
15 watched over to make sure that the quality of your work is  
16 satisfactory and what it needs to be to be a doctoral student.

17 And my first -- my first practicum was with the  
18 Fresno Unified School District, where I was doing intellectual  
19 and projective testing with kids.

20 And from '85 to '86 I was working at a place called  
21 Ham's [phonetic] Downtown School, which was a private school  
22 for children with severe emotional and behavioral disorders.

23 And from '85 to '86 also I was working at the  
24 California Mens Colony, which was a protective custody --  
25 well, it was a prison, basically, that was for both protective

II-8



KINSORA - DIRECT

1 custody inmates, as well as those who require psychiatric  
2 care. And that was from '85 to '86.

3 From '86 to '87 I worked at Fresno Treatment Center.  
4 That was also a practicum where I was working with adolescents  
5 who had emotional and behavioral disorders.

6 I then went to my pre-doctoral internship at the  
7 Veterans Administration Medical Center in Elm Park, Michigan,  
8 where I worked part time on the neurology ward working with  
9 neurological patients and part time in the outpatient clinic  
10 doing psychotherapy and psychological assessment.

11 I did my post-doctoral training at the Rehab  
12 Institute of Michigan, where I was the lead neuropsychologist  
13 on the traumatic brain injury unit. And from there, went on  
14 to -- went basically into the work force, working at Community  
15 Rehab Services, where I was the director of brain injury  
16 services there, and then I went into private practice from  
17 there.

18 Q In the period of time that you did these internships  
19 or practicum, can you estimate the number of hours you had in  
20 training outside of your classroom work?

21 A I've added it up to be somewhere over ten thousand  
22 hours of supervised training.

23 Q Okay. During the years that you were getting your  
24 education and doing your training, were you the recipient of  
25 any grants or federal programs?

II-9

KINSORA - DIRECT

1           A     Yes. I was involved in research. This was -- I  
2 actually had two grants amounting to somewhere in the  
3 neighborhood of twenty-five or thirty thousand dollars to  
4 study various types of memory processing. And I helped  
5 develop a memory test and memory measure to look at a new type  
6 of theory related to memory processing in the human system.

7           Q     Okay. In your practice and in your internship, have  
8 you done presentations or done speaking in front of groups  
9 about the various areas of your practice?

10          A     Yes. And I've got a long list, actually, of quite a  
11 few different -- I don't know if you want me to go through 'em  
12 all, but I've done quite a few different talks, both with --  
13 related to brain injury, related to -- I sat on the board for  
14 the National Multiple Sclerosis Society, and I've given quite  
15 a few presentations there. I've given presentations on  
16 behavioral interventions with severely aggressive patients  
17 after brain injury, things like that.

18          Q     Have you published in your field?

19          A     I've -- I published an abstract on a research  
20 article where I was differentiating early Alzheimers patient's  
21 memory disorders from those who have Parkinsons disease, who  
22 also have memory problems.

23          Q     As a neuropsychologist, do you belong to  
24 professional societies or organizations?

25          A     Yes, I do. I belong to the National Academy of

II-10

KINSORA - DIRECT

1 Neuropsychology, the International Neuropsychological Society,  
2 as well as the American Psychological Association. And I'm  
3 currently secretary with the Nevada State Psychological  
4 Association.

5 Q Okay. In your profession, is it necessary to have  
6 licensing to practice here in the state of Nevada?

7 A Yes, it is.

8 Q Okay. In fact, you are licensed?

9 A Yes, I am.

10 Q Okay. In your work in your field and in the  
11 community, do you serve on any boards?

12 A Yes. I'm on a variety of boards right now.  
13 Currently I'm with -- I'm the president of the Operating Board  
14 of Nevada Childrens' Center, and I also consult there once a  
15 week. And that's a not-for-profit organization that's devoted  
16 to severely behaviorally disturbed kids and emotionally  
17 disturbed kids.

18 I work with the National Multiple Sclerosis Society.  
19 I'm also involved in several other groups related to traumatic  
20 brain injury, as well as the Nevada State Psychological  
21 Association.

22 Q Dr. Kinsora, have you testified in court before as  
23 an expert witness?

24 A Yes, I have.

25 Q And that was in the field of forensic medical work?

II-11

KINSORA - DIRECT

1 A Correct.

2 Q Okay. Have you testified here in this district in  
3 this court system as an expert?

4 A Yes, I have.

5 Q Do you have an idea of how frequently you've done  
6 that?

7 A I believe there were somewhere in the order of four  
8 or five capital murder trials and then several other civil  
9 trials.

10 Q Okay.

11 MS. McMAHON: Your Honor, I would move the Court to  
12 qualify Dr. Kinsora as an expert in forensic medical.

13 MR. SCHWARTZ: We'd submit it, Your Honor.

14 THE COURT: All right, he'll be qualified in that  
15 field. You can proceed.

16 MS. McMAHON: Thank you, Your Honor.

17 BY MS. McMAHON:

18 Q Dr. Kinsora, it's correct, isn't it, that Mr.  
19 LaPorta contacted you to do neuropsychological and personality  
20 assessments on Marlo Thomas?

21 A Yes, ma'am.

22 Q Okay. When you're approached by an attorney, such  
23 as Mr. LaPorta or myself in a criminal case, do you take every  
24 case that you're approached on?

25 A No, I don't. I look at various aspects of the case

II-12

KINSORA - DIRECT

1 and determine whether it's valuable for me to be a part, you  
2 know, of the assessment.

3 Q Okay. In determining that, what kinds of factors do  
4 you take into consideration?

5 A Well, if there -- if there are factors that I can  
6 see right at the beginning are going to involve areas that I'm  
7 not trained in, don't have experience with or don't feel  
8 comfortable testifying about, because of my training, I would  
9 -- I would decline those.

10 And, I mean, other factors include just my schedule  
11 and whether I'm going to be able to devote the time to it,  
12 'cause these are pretty time-consuming assessments.

13 Q So, in fact, you accept some cases and you turn some  
14 down?

15 A Yes.

16 Q Obviously you made a decision to do an assessment of  
17 Mr. Thomas. Can you tell us some of the issues that were  
18 involved in your decision to do that assessment?

19 A Well, after reviewing his past history of persistent  
20 problems as a child with behavior, with learning. He -- you  
21 know, there were quite a few psychological reports that were  
22 available. He's been placed in multiple centers as a child  
23 for being severely emotionally disturbed, as well as having  
24 significant learning problems. I felt that I could -- I could  
25 offer something to the case anyway.

II-13

KINSORA - DIRECT

1 Q In doing your assessment of Mr. Thomas, can you tell  
2 us what kind of information that you had to work with,  
3 separate and apart from the time that you spent with Mr.  
4 Thomas?

5 A I reviewed fairly detailed information related to  
6 his education. He had available I think four or five  
7 different psychological reports. Several of them included  
8 intellectual assessments and academic assessments. I received  
9 information related to his past -- his pash -- I'm sorry --  
10 his past problems with the law and the legal system as a  
11 juvenile.

12 I also interviewed his mother, to talk with her  
13 about his early development and things like that.

14 Q Can you tell us, if you would, some of the factors  
15 in his early development that you learned from your interviews  
16 and from reviewing that you felt were of importance?

17 A Yes. Starting from -- if I can start just at --  
18 before childhood, actually. I was informed by his mother that  
19 while she was pregnant with Marlo she drank, and I'll -- if  
20 it's written right here. She drank wine, she said Strawberry  
21 Hill wine, or vodka every day until she was extremely  
22 intoxicated. And this apparently went on throughout her  
23 childhood, or throughout his -- her pregnancy with him.

24 In addition, she reported that she was frequently  
25 physically abused by Marlo's father, and punched and kicked in

II-14

KINSORA - DIRECT

1 the stomach many times while she was pregnant with Marlo.  
2 That started very early on there.

3 His early childhood was apparently not particularly  
4 conducive to good -- to being raised as a -- you know, with  
5 normal development. He had his father who was incarcerated  
6 when he was rather young, he -- his mother apparently did  
7 quite a bit of physical whipping him and things like that.  
8 His brother was apparently the main person who raised him,  
9 because his mother worked quite a bit. And he was apparently  
10 -- oh, he was described as a strict authoritarian. But Marlo  
11 also attributed him to keeping him out of some of the trouble  
12 that he might have gotten in, had he not been there.

13 He was, very early on, seemed to be problemated with a  
14 lot of -- with a lot of behavior -- behavioral issues. He was  
15 brought to Childrens' Behavioral Services, which is one of the  
16 state programs. He was later also placed in Miley  
17 Achievement Center, which is an achievement center for  
18 severely emotionally disturbed kids. He qualified as a  
19 severely emotionally disturbed child very early on.

20 He also qualified as a learning disabled very early  
21 on. He was way behind in school. And these factors were  
22 apparently not particularly related to just his social  
23 upbringing, they were -- they were things that seemed to have  
24 been just part of Marlo's neurological functioning as he grew  
25 up.

II-15

KINSORA - DIRECT

1           He had persistent problems with bladder control. My  
2 understanding was that he was called -- his mother told me  
3 that his peers called him "Stinky," because he frequently  
4 smelled of urine when he was going to school. He apparently  
5 had this problem until he was about 12 years old.

6           His peer relations were very, very poor. He had a  
7 hard time getting along with anyone that was his age. He was  
8 frequently feeling -- he was frequently feeling as if he was  
9 picked on, and probably frequently was picked on.

10          His mother told me that he always seemed to feel  
11 that his -- that she loved the other brothers more than him.  
12 And, you know, as he moved into adolescence he began getting  
13 in more and more physical fights. He had a great deal of  
14 difficulty with authority, and was eventually picked up  
15 basically by the juvenile court system in his juvenile years.

16          Q     The first factor that you mentioned, and apparently  
17 gave importance to was that the mother drank heavily during  
18 the pregnancy. Can you tell us, Dr. Kinsora, what literature  
19 or what your area of expertise -- what's known about this?  
20 What impact does that have?

21          A     Well, there is a syndrome called fetal alcohol  
22 syndrome, which -- which is -- which has distinct physical  
23 characteristics when an individual is born that is clearly  
24 fetal alcohol, okay. And that includes, for example, a  
25 smaller -- a smaller last finger, the lip is created -- is



KINSORA - DIRECT

1 created a little bit differently, and there are epicanthal  
2 folds in the eyelids that would not typically appear in most  
3 individuals, unless you are from Asian descent. That's normal  
4 for an Asian descent individual.

5 But Mr. Thomas does not have those characteristics;  
6 however, we know from research that there are a lot of effects  
7 that alcohol causes, especially extreme levels of alcohol  
8 during pregnancy, that may not show up in physical  
9 characteristics, but clearly show up in neurocognitive  
10 functioning. There are -- there are no present tests that we  
11 can give him to say, yes, you are definitely fetal alcohol  
12 syndrome, but he definitely shows neurocognitive deficits that  
13 are consistent with that.

14 Q Okay. What is a neurocognitive deficit, Dr.  
15 Kinsora?

16 A Basically those are deficits in cognition or  
17 intellect, or reasoning, or memory, or concentration, or  
18 learning, that are caused by neurological functioning, the  
19 functioning of the brain, the functioning of the way the brain  
20 works in order to produce thought. And that's primarily what  
21 a neurocognitive functioning is.

22 Q Now, you mentioned that in your information  
23 gathering and conversations with the mother, that she told you  
24 that she was physically abusive to Marlo when he was a child?

25 A Yes, when he was very young.

II-17

KINSORA - DIRECT

1 Q Can you tell us what is known in your field about  
2 how this affects children as they go into adolescence and  
3 adulthood?

4 A Well, we know that children who grow up in  
5 impoverished environments and environments where there's a lot  
6 of physical abuse, we know that these children tend to be more  
7 violent than other children, they tend to have more  
8 aggression, more problems with anger management and things  
9 like that. And I think that that -- in Mr. Thomas's case, I  
10 think that that was a partial -- I think that was a partial  
11 factor in what happened. But, again, I think there's multiple  
12 factors going on with Marlo that are at play here.

13 Q After interviewing the family and reviewing the  
14 documentation, you interviewed Marlo, is that correct?

15 A Yes, I did.

16 Q Can you tell us approximately how many times you met  
17 with him or how much time you spent with Marlo?

18 A Sure. I met with him on five different occasions,  
19 beginning in December of 1996, lasting -- and through June  
20 9th, 1997. I met with him approximately ten hours.

21 Q And during these meetings with Marlo did you, in  
22 fact, administer various tests to Marlo?

23 A Yes, I did.

24 Q And the purpose of this testing was?

25 A Basically to assess his neuropsychological

II-18

KINSORA - DIRECT

1 functioning, his ability to concentrate, his ability to  
2 remember things, his intellectual skills, his learning and  
3 academic skills, his motor functioning, his problem solving  
4 and reasoning, as well as his personality functioning.

5 Q Dr. Kinsora, I'm going to show you what's previously  
6 been marked as Defense Exhibit A.

7 (Off-record colloquy)

8 BY MS. McMAHON:

9 Q Dr. Kinsora, this has been marked as Defense Exhibit  
10 A. Are you familiar with this chart?

11 A Yes, I am.

12 Q And, in fact, you prepared this chart at my request,  
13 is that correct?

14 A Yes, I did.

15 Q Does this chart list the information and results of  
16 your testing?

17 A Of most of them, yes.

18 Q Okay. Dr. Kinsora, I'm going to place it up here so  
19 that the jury can see it, and I'm going to ask you, if you  
20 would, please come down here and -- you've got your own?  
21 Okay. and I'd like you, with the assistance of this chart, to  
22 explain to the ladies and gentlemen of the jury the tests that  
23 you gave to Marlo Thomas and how the information on this chart  
24 reflects those tests?

25 A Okay. Now, as I stated before, I ran Mr. Thomas

II-19

KINSORA - DIRECT

1 through quite a few tests, and I think there were over thirty  
2 different measures that I administered to him. The most  
3 pertinent of those are up here. There were some more, but I  
4 really couldn't fit 'em on there, and they weren't quite as  
5 pertinent.

6           And what you see in front of you are percentile  
7 rates right here. This is the one hundred percentile rate.  
8 This goes all the way down to the zero percentile rate. And  
9 percentile rates have to do with a person's performance  
10 compared to other people their age, their education, and so  
11 on.

12           The average person -- I mean, most people are around  
13 the fiftieth percentile. That means you're right in the  
14 middle. And if you wanted to capture -- if you wanted to  
15 capture quite a few of the people, if you looked at anywhere  
16 from about sixteen percent, which is considered the first  
17 standard deviation, all the way over to about the eighty-  
18 fourth percent, you've got -- you've got -- most people's  
19 performance fall right in this range right here. This is all  
20 considered pretty much the normal range.

21           However, whenever I see an individual who falls  
22 probably below the thirtieth percentile I begin to get a  
23 little bit concerned, because that's an individual whose  
24 performance is beat by seventy percent of the population. And  
25 when I say the population, I mean all individuals including

II-20

KINSORA - DIRECT

1 those who are severely -- severely mentally retarded, who are  
2 in institutions, who do very, very poorly. And a certain  
3 percentage of the population are in that category, those who  
4 fall in the very low percentile rates.

5           The first area of what we call impairment occurs at  
6 the sixteenth percentile. Anyone who performs below the  
7 sixteenth percentile on a given measure is considered what we  
8 call impaired, okay. Those who fall between thirty and  
9 sixteen percent, they're on the borderline low average range.  
10 Those are ranges that -- where there's -- they're a lot worse  
11 than most other people, but it may not be a functional problem  
12 for them.

13           Now, for Mr. Thomas, when I administered the  
14 intellectual assessment, his verbal IQ of 82 was at the  
15 twelfth percentile. That means basically that eighty-eight  
16 percent of the general population performed better than him,  
17 in terms of verbal reasoning skills.

18           His performance -- and let me kind of go through  
19 some of the tests with the verbal IQ. These are tests related  
20 to your information about the world, how much you know about  
21 the world, your ability to repeat numbers forward and numbers  
22 backwards, for example, your vocabulary level, your ability to  
23 comprehend why things are in the world. For example, why does  
24 the state require that we have a marriage license before we  
25 get married. Very common sense kind of things.

II-21

KINSORA - DIRECT

1           In similarities, the very last test here is related  
2 to how well he can conceptualize two words as being part of  
3 the same category. For example, how is a dog and a lion alike  
4 or the same. Well, they're both animals. Mr. Thomas had a  
5 hard time on that test as well. On these tests together he  
6 performed in the twelfth percentile range. That's very, very  
7 poor. And that is, again, beyond the marker right here where  
8 we begin to get very concerned.

9           His performance IQ, and performance relates to his  
10 ability to, for example, find missing pieces in pictures, his  
11 ability to put a series of pictures together that tell a  
12 story, you know, under a time constraint. For example, he  
13 gets sixty minutes and he has to do it as quickly as possible.  
14 His ability to put blocks together to form different geometric  
15 designs, and his ability to put different puzzles together.  
16 These are the kind of visual reasoning, what we call right  
17 brain kind of activity, and stuff like that. Again, he did  
18 very poorly on that and performed in the seven percentile,  
19 which is extremely poor. And, again, we're talking ninety-  
20 three percent of the general population performs better than  
21 him at that.

22           His full scale IQ, which is what we call your  
23 person's IQ, basically, fell at the eighth percentile, which  
24 again is very, very poor. That's considered borderline  
25 intellectual functioning.

II-22

KINSORA - DIRECT

1           The mentally retarded range occurs at 69, so he was  
2 approximately ten points off or six percentile points off from  
3 that.

4           His reading skills are at the four percentile range,  
5 which again is very, very poor. We're talking about ninety-  
6 six percent of the population his age can read better than  
7 him. His spelling is at the one percentile, his math is at  
8 the one percentile.

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

15           And the one thing I want to point out real quickly  
16 here is that you can have deficits in reading, spelling, or  
17 math, yet perform way over here intellectually. I have tested  
18 multiple people who have had learning disabilities, whether it  
19 be reading, spelling or math, and they can be individual, who  
20 in fact are in the superior or genius range on intellectual  
21 functioning. These are separate functionings. But when they  
22 occur together, when you see low intellect and you see major  
23 problems in reading that look like dyslexia and other problems  
24 like that, when they occur together you're talking about many  
25 more problems with that individual than the average person who

II-23

KINSORA - DIRECT

1 might just have an isolated problem here or there. They  
2 become insurmountable when you don't have the intellectual  
3 skills to overcome them.

4 Other areas that I looked at are attention and  
5 concentration. On these tests he performed in a fairly  
6 mediocre manner. His ability to say numbers forward and say  
7 numbers in reverse, which involves mental tracking, the  
8 ability to manipulate information in their mind, that was at  
9 about the sixteenth percentile. Not real good, kind of on  
10 that borderline range.

11 His ability to -- let's see, his ability to rapidly  
12 transcribe information using symbols was at the ninth  
13 percentile, which is fairly poor. These last two tests right  
14 here, they're called the Paced Auditory Serial Edition Test,  
15 and that's a test of concentration and mental -- and what we  
16 call mental tracking, your ability to keep information -- one  
17 piece of information in your mind while you're working on  
18 another piece of information.

19 Most of us, we know from -- you know, most of us  
20 perform at the fiftieth percentile again, or at least within  
21 this range. Mr. Thomas had very, very -- a very, very hard  
22 time with this test and performed at the less than one  
23 percentile on the first trial and at the one percentile on a  
24 second trial. I didn't even give him the third and fourth  
25 trial, because it was -- it was just way too difficult for

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KINSORA - DIRECT

1 him.

2           So, we see, you know -- so here we see an individual  
3 that doesn't have good attention skills, doesn't have good  
4 concentration skills, together with low -- you know, low  
5 intellect as well as very, very poor academic skills.

6           His memory skills are fine. He seemed to do fairly  
7 well on the list learning task, where I gave him long lists of  
8 words and repeated that same list over multiple occasions,  
9 multiple trials. He did fairly well on that. His delayed  
10 recall was within the average range.

11           His immediate recall of stories, that's where I read  
12 him a story and he has to remember as much as he can of the  
13 story, that was at the seventeenth percentile. He was a  
14 little bit low on that.

15           This last test is a recognition test, which I  
16 actually throw in there as both a test of recognition memory,  
17 but it's also a test of what we call malingering. It's a test  
18 that seems very difficult, but in fact is fairly easy. And  
19 people who are trying to fake that they have a major problem  
20 often do very, very poorly on that, and poorer than what even  
21 severe brain injured patients do. And usually if I see that,  
22 a flag goes up in terms of suspecting that they're trying to  
23 pull one over on me.

24           On this case he performed at the ninetieth  
25 percentile, which is way above average. He got almost every

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KINSORA - DIRECT

1 single word. I think he missed one, which is quite a bit  
2 above average. And this is a good example of how many  
3 different skills can be very, very low, but one can be very,  
4 very high in isolation. Just as we've seen in the literature,  
5 a lot of individuals who may be in the severely retarded range  
6 or in the mentally retarded range and can't read and can't  
7 write very well, yet have mathematical abilities that are way  
8 beyond the average person. Those are what we call the idiot  
9 savants. I don't know if you've heard of that. That's --  
10 often you see that in autistic kids and adults.

11 His problem solving skills are fairly poor as well.  
12 I think the major ones here, he did adequately on some of  
13 them. On one of the tests it's called Test of Problem  
14 Solving, that's a test where he's read various stories, and I  
15 ask him various questions that pull for his ability to solve  
16 the social problem that's in that particular story. Mr.  
17 Thomas had a great deal of difficulty with that. I don't know  
18 the exact percentile, but I know it's below the sixteenth  
19 percentile. It's in what we call the impaired range. And  
20 looking at that, he performed at a rate of what you'd expect  
21 for a 14-year-old adolescent, 13, 14-year-old.

22 His motor functioning is fine. His motor speed  
23 seems to be within normal limits for both his right and left  
24 hand. His right's a little bit worse than his left. His fine  
25 motor coordination, again his right's a little bit worse than

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KINSORA - DIRECT

1 his left, which is not what you typically see. Typically you  
2 see the right being much better than the left.

3 And that's pretty much what we see in terms of  
4 neurocognitive functioning. And I can go into the personality  
5 evaluation after this if you'd like.

6 Q Okay. Why don't you return to your seat? Thank  
7 you, Doctor.

8 (Off-record colloquy)

9 BY MS. McMAHON:

10 Q Now, the testing and the results that you've just  
11 explained to us with the use of the chart had to do with  
12 cognitive ability with his intellectual functioning.

13 A Correct.

14 Q Okay. Did you also administer tests to Mr. Thomas  
15 to assess personality or emotional functioning?

16 A Yes, I did.

17 Q Okay. And can you tell us, Dr. Kinsora, a little  
18 bit about those tests, what they are and what they measured?

19 A The first measure that I administered is called the  
20 Minnesota Multiphasic Personality Inventory, and this is  
21 Version II. It's probably the most widely used and widely  
22 respected and definitely most researched personality  
23 assessment that's available right now. It consists of 567  
24 true and false statements. And Mr. Thomas was asked to either  
25 endorse them or not endorse them. In other words, is this

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KINSORA - DIRECT

1 particular statement true or not true for you. There is a  
2 variety of what we call validity scales on this measure that  
3 detect whether an individual is being -- is being protective  
4 about any personal problems and hiding them, whether they're  
5 exaggerating personal problems. There's also measures on  
6 there to determine whether the person is just randomly  
7 responding. And these tend to be pretty -- pretty good  
8 indicators of whether in fact the profile that you got is a  
9 valid profile or it's one of an individual who's trying to  
10 create an impression of one type or another.

11           And on this -- on this particular measure he -- if  
12 you look straight at -- if you look just at the interpretation  
13 that's out of the -- out of the textbooks, related to this  
14 particular profile, it's consistent with an individual who  
15 experiences significant hypomanic episodes, where he has  
16 excessive energies, energy, feelings of imperturbability or  
17 grandiosity. He also seems to be very paranoid at times,  
18 seems that -- feels that other people are out to persecute him  
19 and out to hurt him. He also admits to some bizarre sensory  
20 experiences and intrusive thoughts.

21           And also individuals with a similar profile have  
22 impulse control problems. He feels often dejected and  
23 alienated from others and doesn't have a good grasp of who he  
24 is and what his place is in society. Those with a similar  
25 profile also have a great deal of difficulty with authority.

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KINSORA - DIRECT

1 That was that particular one.

2 There was also another one I --

3 Q Before we have you tell us about the other test,  
4 some of the language that you used, can you explain to us what  
5 a hypomanic episode is, what happens to an individual when  
6 they experience that?

7 A This is -- and I wouldn't -- hypomanic refers to  
8 someone who feels as if they have an incredible amount of  
9 energy. They tend to be people who are very impulsive, may  
10 talk quickly, may get excited very easily over things, whether  
11 it be anger or excited over good things even, and have a hard  
12 time controlling that sense of energy that they have. And  
13 this is real consistent with him as a child, he was fairly  
14 hyperactive, he was a hard -- it was hard controlling him, he  
15 had to be placed in special centers because of his inability  
16 to control his arousal when he gets kind of -- in a real over  
17 energized state. Whereas most of us can calm ourselves down  
18 quickly when we need to, when the situation changes and we  
19 need to change our demeanor, we're able to do that fairly  
20 quickly, Mr. Thomas has more difficulty with that. He had  
21 great difficulty as a child. He still has significant  
22 difficulty with that.

23 Q One of the other terms you used was paranoid or  
24 paranoia. How does that affect an individual if they have  
25 those feelings, what are they feeling?

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KINSORA - DIRECT

1           A     Well, I think in -- at least in Mr. Thomas's case, I  
2 think he feels -- and I think he's felt this way since he's  
3 been young, he's felt that his mother didn't love him as much  
4 as the other kids, the other -- the other -- peers, for  
5 example, were picking on him constantly. He has never felt  
6 that anyone has really understood him, so as a result he  
7 begins to not trust other people. And he has a difficult time  
8 problem solving in that respect, to learn how to trust people  
9 and to understand that some people may work on his behalf.  
10 And he may find that when people work on his behalf and things  
11 don't go his way, he may get very angry and feel that they  
12 turned against him somehow during the process, which may not  
13 even be true.

14           Q     You also mentioned intrusive thoughts, and I have  
15 two questions about that for you, Dr. Kinsora. One is what  
16 are intrusive thoughts, and how, if at all, do they affect  
17 behavior?

18           A     Okay. Now, we know from research with severely  
19 emotionally disturbed children, and other kids who fit the  
20 profile of Mr. Thomas when he was a young kid, in particular,  
21 we know that these kids have a harder time organizing and  
22 controlling their thoughts and their mind than most others in  
23 society. And that means that all of us have, for example,  
24 when we see someone that we don't like or something, we may  
25 have an initial thought about not liking them. He may have

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KINSORA - DIRECT

1 problems editing that thought and pushing it out of his mind,  
2 because we as -- most of us know that it's inappropriate to  
3 think something bad of someone, or to say something  
4 inappropriate. Mr. Thomas may know that it's wrong, but his  
5 ability to impose any kind of control over that thought and  
6 often resultingly the action of impulsively saying something  
7 or doing something is defective. He's not able to do it.

8 Q Thank you.

9 A And again, that's a more of a -- that's a  
10 neurological kind of thing. The way that he's wired is  
11 differently than you or I.

12 Q Now, you gave another or other test to Mr. Thomas,  
13 in terms of personality assessment, a Minnesota Multiphasic?

14 A Yes, I did. I gave him what is called the Hehr  
15 [phonetic] Psychopathy Checklist, which is basically a  
16 checklist that was developed through -- on many thousands of  
17 inmates and forensic patients. And it's probably -- again,  
18 it's one of the most widely respected used measures of  
19 antisocial personality and sociopathic personality that's  
20 available.

21 And there's two different factors that go into the  
22 score and into the checklist. One of them has to do with you  
23 rate the person in terms of different -- on a bunch of  
24 different scales related to callousness or remorseless use of  
25 other people. And then the other -- the other factor is

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KINSORA - DIRECT

1 related to chronically unstable and antisocial lifestyles.

2 And on that particular checklist he performed, on  
3 factor one his score was seven and the cutoff is actually  
4 sixteen for what we call a sociopath. The factor two was  
5 scored at sixteen, which is right on the border of -- in terms  
6 of his unstable and chronic problems with authority and things  
7 like that.

8 And what this tells me basically is that he may --  
9 he's kind of an antisocial personality. He has a great deal  
10 of difficulty with authority. He's had a very hard life  
11 growing up, he's gotten into multiple brushes with the law.  
12 He has difficulty controlling his behavior. But he differs  
13 qualitatively or in several different ways from what we call  
14 the cold sociopath, the person who may glibly go about or  
15 happily go about using people and hurting people, you know,  
16 throughout their lifetime.

17 Q One of the factors that you mentioned that that test  
18 measured was remorse. Is that capacity for remorse?

19 A Capacity for remorse, correct.

20 Q And what did Marlo's score on that portion of the  
21 inventory indicate to you?

22 A Well --

23 Q If you can isolate it from the other --

24 A -- yeah. I mean, it --

25 Q -- portions of the test?

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KINSORA - DIRECT

1           A     -- there's quite a few things that went into that  
2 whole particular factor. You know, I think in Mr. Thomas's  
3 case, his capacity for remorse is there; from his history as a  
4 child, his capacity for remorse was there. The difficulty  
5 that arises, though, with Mr. Thomas is that typically when he  
6 gets involved in situations where someone gets hurt, he feels  
7 -- he feels justified for some reason. He -- his social  
8 problem solving is defective in that he seems to feel that his  
9 actions were justified. So, it's not a matter of remorse or  
10 not remorse, if you feel that something was self defense, you  
11 don't feel as much remorse.

12                 And that differs from someone who, for example, when  
13 I was working in the prison system, who would kill people for  
14 the fun of it, mutilate bodies and do things that are just --  
15 just very, very cold, and they would have no emotion  
16 whatsoever. Mr. Thomas is someone who's grown up from a very  
17 young child with too many emotions and a great deal of  
18 difficulty maintaining and handling those emotions. So,  
19 that's --

20           Q     Okay. Dr. --

21           A     -- the difference there.

22           Q     Okay. Dr. Kinsora, you stated earlier that Marlo  
23 was subject to paranoid ideation, a feeling of being  
24 persecuted. Would this feeling of justification for actions  
25 be a result of the initial perception that he's being

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KINSORA - DIRECT

1 persecuted and his responses were justified by that  
2 persecution? Is that one of the equations that's going on?

3 A I think so. I think -- I think when he's in the  
4 midst of whatever anger outburst he's involved in, and he's  
5 had many, he feels justified at those moments. I mean, you  
6 know, just looking at some of his stuff that occurred just  
7 prior, just within the month prior, at one point he came into  
8 the house and accused everybody of doing something. I don't  
9 even know if it was clear from his mother's standpoint. And  
10 he came in and he basically destroyed part of the house and  
11 wanted to beat everybody up, and no one could figure out why.  
12 It was just an act -- he lost his temper and he felt justified  
13 in that moments afterwards, but looking back on it I don't  
14 think anyone could really determine what the big deal was over  
15 -- over his behavior. So --

16 Q If I understand your testimony then, it is your  
17 opinion that with some qualification or some limitations, that  
18 Marlo exhibited what you would classify as an antisocial  
19 personality disorder?

20 A I think in part, yes, in addition to, you know, his  
21 severe emotional disturbances, yes.

22 Q Based on the time that you spent with Marlo, and the  
23 tests that you administered, and your observations and your  
24 interaction with him, did you arrive at a diagnosis of Marlo  
25 Thomas?

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KINSORA - DIRECT

1           A     Yes, I did.

2           Q     And can you tell us what that diagnosis includes and  
3 explain to us what it means?

4           A     Sure. I -- you know, and again, I -- if I were to  
5 -- if he were to come into a clinic and I were to do the  
6 assessment, and to give a full diagnosis of him, this is what  
7 -- this is what it would include.

8                     Number one would be an attention deficit hyper-  
9 activity disorder, predominantly what we call hyperactive  
10 impulsive type. And this is according to his history as well  
11 as some of his problems now.

12                    I would also diagnose him with a reading disorder.  
13 His -- his reading is very clearly what we see in dyslexic  
14 individuals, a disorder of written language, or written  
15 expression; his spelling is also very, very consistent with  
16 what you see in dyslexia.

17                    A mathematics disorder. He's -- his mathematics  
18 tend to be fraught with multiple problems, and not just -- and  
19 -- well, I don't think it was caused just by a lack of  
20 education, it was caused also by a problem with the way that  
21 he actually processes numerical operations.

22                    And then what we call a learning disorder not  
23 otherwise specified, which I think was -- is related to what  
24 we call borderline intellectual functioning, because he  
25 definitely falls in that -- in that range.

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KINSORA - DIRECT

1           And then personality-wise, I would -- I would  
2 consider him an anti-social personality disorder individual.

3           He also probably has an intermittent explosive  
4 disorder. This is an individual who is -- who tends to be  
5 very impulsive, and his "buttons" basically, if I can use that  
6 kind of language, his buttons get pushed very easily, and once  
7 pushed he explodes, and typically someone get hurt -- gets  
8 hurt. As well as an impulse control disorder. He has had a  
9 great deal of difficulty with his impulses throughout his  
10 lifetime.

11          Q     Okay. As part of your expertise, Dr. Kinsora,  
12 taking the results of your testing and the diagnosis that you  
13 have, what can you tell us about how Marlo in this diagnosis  
14 would behave in the future? Is this going to be a continual  
15 pattern the way it is, or do changes come with age and with  
16 growth and experience?

17          A     Well, research suggests that those with anti-social  
18 personality disorder tend to, what they call "burn out." But  
19 it essentially means that the problems that are associated  
20 with that behavior tend to diminish greatly in the forties,  
21 you know, in the fourth decade sometime. And again, you know,  
22 this is looking at large populations of the prison population.  
23 There is obviously exceptions, but for the most part these  
24 individuals get into less trouble with their behavior in their  
25 forties and fifties and from then on than they do earlier.

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KINSORA - DIRECT

1 Q What, in your opinion -- or, let me rephrase that.

2 In your opinion, in the prison structure, in the  
3 structured system of the prison, given these factors that  
4 you've described to us, how do you believe that he would  
5 function?

6 A Well, in general, I think he would have more  
7 controls on his behavior than he would out in the free  
8 society. He's someone who I think does not do well in society  
9 and he's someone who sometimes needs to be protected from  
10 society because of his -- his problems. In a prison setting  
11 he'll probably do much better in that respect. I do  
12 understand he's been into some significant problems, even  
13 within the prison system, but again this gets back to his hot  
14 temper, his inability to control his impulses, his  
15 difficulties with social reasoning and problem solving. So I  
16 think -- I think the problems in terms of altercations will be  
17 reduced, but again, putting him in a prison setting, he's not  
18 going to be perfectly cured of all of his -- because he's  
19 still going to have difficulties and he's still going to have  
20 to be managed more carefully than maybe the other inmates.

21 Q One of the reasons that you're of that opinion is  
22 that there's a reduction in the social interaction where in  
23 fact he has problems processing information?

24 A You mean in the prison system, or?

25 Q Outside of the prison system.

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KINSORA - CROSS

1           A     Yeah. Well, outside of the prison system there's  
2 fewer -- let me think of -- there's fewer controls over his  
3 behavior and there's -- and there's -- there's fewer people  
4 that are impinging on him to behave appropriately. In a  
5 prison situation there are the guards, obviously, that are  
6 there, and in addition there's also other inmates, there's a  
7 lot of peer pressure by the other inmates to fall in line in  
8 certain respects; and there's also forces that pull away from  
9 that. But there -- there's -- there's a more immediate  
10 response in a prison system, whereas out in free society you  
11 can commit a crime and may never get caught. It's less likely  
12 in a prison system than out in society.

13           Q     Thank you, Dr. Kinsora.

14           MS. McMAHON: I have no further questions at this  
15 time --

16           THE COURT: All right.

17           MS. McMAHON: -- pass the witness.

18           THE COURT: Cross?

19           MR. SCHWARTZ: Yes. Thank you, Your Honor.

20                   CROSS-EXAMINATION

21 BY MR. SCHWARTZ:

22           Q     Good morning, sir.

23           A     Good morning.

24           Q     You don't hold a medical degree from any accredited  
25 medical school, do you?

KINSORA - CROSS

1 A I have -- no, I have a doctorate degree in --

2 Q So you're not a medical doctor?

3 A I'm not a medical doctor, no, sir.

4 Q You're not a neurologist?

5 A No.

6 Q Neurosurgeon?

7 A No.

8 Q Okay. You hold a degree much like the degree any  
9 lawyer practicing in the state of Nevada holds, a doctorate of  
10 jurisprudence, you're a doctorate of --

11 A Of psychology.

12 Q -- psychology?

13 Would it be fair to say that psychiatric diagnoses  
14 and assessments are subjective in nature?

15 A No, actually.

16 Q Okay. Speculative?

17 A I think that the -- using the qualitative methods  
18 that I use, they come as close to science as you probably  
19 possibly can get.

20 Q So you would argue with those who say that it's  
21 speculative?

22 A I -- it depends what kind of psychiatric assessments  
23 are being done. If you're using the Rorschach, which is the  
24 ink blot test, the traditional ink blot test, or if you're  
25 asking the person to draw a picture and then you're making

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KINSORA - CROSS

1 conclusions regarding their repressed memory of something,  
2 then I think that that's probably hogwash. But if you're  
3 using quali -- or quantitative methods that have -- are based  
4 in research and are based on individuals in large populations  
5 of people, it becomes much more scientific at that moment.

6 Q Okay. So you're familiar of course with the  
7 Rosenhand [phonetic] study where these people pretended to be  
8 mentally ill and psychiatrists, psychologists examined these  
9 individuals and diagnosed them as being mentally ill when they  
10 were 100 percent incorrect, because these people were faking?

11 A That's right. They -- they weren't -- they weren't  
12 given quantitative assessments though.

13 Q So because of the testing that you perform on this  
14 defendant, you cannot be fooled by this defendant?

15 A I -- of course I could be fooled; I think the  
16 chances are reduced, certainly.

17 Q Now on page 1 of your report you state that the  
18 defendant allegedly was connected to a robbery and a double  
19 murder at the Lone Star restaurant. Are you aware as you sit  
20 here today, Dr. Kinsora, that the defendant has been found  
21 guilty of two counts of first degree murder with use of a  
22 deadly weapon, first degree kidnapping with use of a deadly,  
23 robbery with use of a deadly weapon, and conspiracy to commit  
24 robbery?

25 A Yes, I am.

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KINSORA - CROSS

1 Q Now on page 1 of your report under "Social History"  
2 you write that "The defendant came from a lower middle-income  
3 family. He was well-provided for by his mother." Is that  
4 what you state on page 1?

5 A This is according to Mr. Thomas's reports, yes.

6 Q Okay. On page 2 of your report you state,  
7 "Emotional" -- quote, "Emotional support and nurturing  
8 provided by his mother and brother was very good." Is that  
9 correct, did you state that on page 2?

10 A That I was taking right off of Mr. Thomas's reports,  
11 yes.

12 Q Okay. On page 2 of your report you -- or the  
13 defendant told you he had never been abused as a child?

14 A That's correct.

15 Q On page -- again page 2 of your report, beginning  
16 with:

17 "When he was 13 years of age he was found guilty of  
18 a felony battery charge and was sent to Elko, Nevada  
19 for six months. The battery charge was related to  
20 the beating of an adult with a pool stick. During  
21 his juvenile years he picked up for" -- "he was  
22 picked up for over ten incidences involving battery,  
23 two incidents regarding trespassing, evading police  
24 officers, vagrancy and prowling, three incidences of  
25 grand larceny, possession of a stolen vehicle,

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KINSORA - CROSS

1 domestic violence, robbery with use of a deadly  
2 weapon, as well as a curfew violation."

3 Is that correct, sir?

4 A That's correct.

5 Q As far as you know, the defendant is on no  
6 medication, correct?

7 A That's correct.

8 Q There were no significant neuro-medical conditions,  
9 early childhood injuries or illnesses or head injuries that  
10 you were aware of?

11 A That's correct.

12 Q And that's based on conversations with the  
13 defendant, reading all these reports that were made available  
14 to you, and talking with his mom?

15 A Correct.

16 Q On page 4, did the defendant not tell you that he  
17 wasn't responsible for his criminal record, he felt that he  
18 was unjustly treated and wrongfully accused?

19 A Yes, he does feel like that.

20 Q On page 5 of your report, you state that the  
21 defendant has an IQ of 79, which is ten points away from being  
22 considered retarded?

23 A That's true.

24 Q Okay. Now you're not telling us that he goes out  
25 and does these crimes that he does and kills two innocent

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KINSORA - CROSS

1 people because he's got a low IQ, are you?

2 A No.

3 Q Many, many millions of people have IQs less than his  
4 and lead productive lives, don't they?

5 A That's correct.

6 Q And many people with higher IQs, much higher, in the  
7 perhaps genius range, go out and commit crimes as well, don't  
8 they?

9 A That's correct.

10 Q I believe on page 2 of your report, and you  
11 mentioned it on direct examination, that you determined that  
12 the defendant at one time, or perhaps now, suffers from  
13 dyslexia, is that correct?

14 A That's correct.

15 Q Now he didn't go out and kill these two innocent  
16 kids because he's dyslexic, did he?

17 A No.

18 Q Never had a neurologist look at the defendant, did  
19 you?

20 A No.

21 Q A neurologist would be able to determine whether or  
22 not there was any kind of physical damage to the brain, would  
23 he not, or she?

24 A Probably not, but he might be able to if it was  
25 severe. Yeah.

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KINSORA - CROSS

1 Q You say on page 9 that "The defendant has feelings  
2 of grandiosity." What do you mean by that term, sir?

3 A Those are feelings that he's on top of the world, he  
4 can do just about, you know, just about whatever he wants to  
5 do. I think he thinks -- you know, for example, during the  
6 assessment he felt that he was doing much better on the  
7 assessment than he was in fact doing. Those kind of things.

8 Q So would it be fair to say that the defendant will  
9 do whatever he wants to do whenever he wants to do it?

10 A Well, that's not -- that's not quite the same as  
11 grandiosity, but --

12 Q Close?

13 A No, not really. I think grandiosity is more of a  
14 feeling that you -- that you -- that you -- that you have a  
15 lot of ability that you perhaps don't. That doesn't  
16 necessarily mean that you think you can do whatever you want  
17 whenever you want; it's a little bit different, but.

18 Q On page 9 you state that "The defendant has great  
19 difficulty with authority." And what led you to make that  
20 statement?

21 A Just reviewing his history, his history as to  
22 brushes with the law, his chronic problems as a -- as a -- as  
23 a client with the -- with the Miley Achievement Center and the  
24 Children's Behavioral Services.

25 Q Okay. In your summary you state "The defendant is

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KINSORA - CROSS

1 not mentally deficient or retarded," is that correct?

2 A He's not considered mentally retarded, no.

3 Q Or mentally deficient?

4 A Well, mentally deficient is --

5 Q Well, is that what you --

6 A -- is the new term.

7 Q Did you not state that --

8 A I did state that.

9 Q -- in your report?

10 A Right.

11 Q On page 10 you state that "The defendant's routine  
12 response to difficulties is anger and physical threats," is  
13 that correct?

14 A That is correct.

15 Q And on page 10 you state, "His anger has and will  
16 continue to get him trouble in society for some time to come."

17 A That's correct.

18 Q Okay. And how long did you meet with the defendant  
19 prior to authoring this report?

20 A How many hours?

21 Q Yes.

22 A Somewhere in the neighborhood of ten hours.

23 Q Okay. Now, it would be fair to say that the  
24 majority of those hours, perhaps eight or nine of those hours  
25 involved his taking those tests that you've described?

II-45

KINSORA - CROSS

1           A     Probably about maybe eight of those hours involved  
2 various assessments, yes.

3           Q     So the other two hours, or whatever the difference  
4 would be, would be a clinical interview with the defendant?

5           A     Yes. And there were -- there were periods after  
6 each assessments where we talked about various questions I had  
7 related to history and such.

8           Q     Did the defendant talk about the double murder?

9           A     Somewhat, yes.

10          Q     Did you speak to Vince Oddo and Steve Hemmes  
11 regarding what had occurred on April the 15th, 1996?

12          A     No, I didn't.

13          Q     Do you know who they are?

14          A     No, I don't.

15          Q     Did the defendant tell you that just ten days before  
16 these two brutal murders he had pled guilty to battery with  
17 substantial bodily harm in this courthouse and was out on  
18 bail?

19          A     Yes, I'm aware of that.

20          Q     He told you that?

21          A     I'm aware of that, yes.

22          Q     Okay. And you didn't put any of that in the report,  
23 but --

24          A     No. No I didn't.

25          Q     Okay.

II-46

KINSORA - CROSS

1 A But I was aware of that.

2 Q Okay. Did you speak to a Ms. Loletha Jackson, who  
3 had her teeth knocked out with a handgun in the possession of  
4 this defendant?

5 A No.

6 Q Did you speak to Hanifa Alkareem, a robbery victim  
7 of this man who he claims attacked him, tried to crush his  
8 skull in with a -- with a boulder, did you speak --

9 A No.

10 Q -- with him? Did you speak with Wendy Cecil?

11 A No.

12 Q Do you know who she is?

13 A No, I don't. I imagine I read through some of the  
14 reports related to that, but.

15 Q But those names don't ring a bell?

16 A I -- some of them were mentioned in some of the  
17 reports related to his past charges, and I'm assuming that all  
18 these are related to his past charges --

19 Q And --

20 A -- past victims.

21 Q -- where would you have obtained these reports?

22 A Those probably would have been in his listing of  
23 different charges that he's had in the past.

24 Q Okay.

25 A A lot of 'em just list the charge, they don't

II-47

KINSORA - CROSS

1 necessarily list the victim involved.

2 Q Okay. So you didn't speak with a Mr. Belltrane who  
3 claimed to have been robbed at knifepoint by this defendant?

4 A No.

5 Q Now you state, sir, that the defendant will do much  
6 better in prison 'cause there's more controls on his behavior  
7 in a prison environment, is that correct?

8 A That's correct.

9 Q Okay. In connection with that, did you speak to  
10 Correction Officer Drain [phonetic]?

11 A No.

12 Q Did you speak to Correction Officer Leavitt?

13 A No.

14 Q Did you speak to Correction Officer Cameron?

15 A Of course not.

16 Q How about Officer Kissel?

17 A No.

18 Q Officer Neagle?

19 A No.

20 Q Officer Johnson?

21 A No.

22 Q Officer Thompson?

23 A No.

24 Q Officer Edwards?

25 A No.

II-48



KINSORA - CROSS

1 Q Officer Boyter?

2 A No.

3 Q Officer Sedlacek?

4 A No.

5 Q Officer Wheelock?

6 A No. I spoke to no one else besides those.

7 Q Are you aware that all those individuals or their  
8 reports came before this Court in the last few days?

9 A I understand that a good portion of them were going  
10 to be coming here, yes.

11 Q Did you look at the photographs of the crime scene?

12 A No, I didn't.

13 Q Have you reviewed the preliminary hearing that took  
14 place in this case?

15 A No.

16 Q Have you reviewed the transcript of Kenya Hall, who  
17 was an accomplice in this case, as to what occurred on April  
18 the 15th?

19 A I believe I reviewed a summary of his statements.

20 Q Have you reviewed the daily transcript that's  
21 available to you as this trial proceeds each day?

22 A No.

23 Q So you talked to the defendant's mother, the  
24 defendant, and you read some reports and administered tests?

25 A That's correct.

KINSORA - CROSS

1 Q Those are the only people you talked to, those two?  
2 And perhaps the attorneys.

3 A That's correct.

4 Q Would it be fair to say that many people who are in  
5 a jam or in trouble have a tendency to lie to kind of help  
6 themselves, make themselves look better than they are?

7 A Certainly.

8 Q And much of your assessment is based upon what the  
9 defendant told you during those interviews?

10 A The history -- the history is according to the  
11 statements that were part of the information that was given to  
12 me, Mr. Thomas's statements and the statements of his mother.

13 Q Okay. So if Mr. Thomas lied to you, could that  
14 affect some of your conclusions?

15 A Given the preponderance of other reports and -- and  
16 history related to psychological care that he's gotten, the  
17 multiple problems he's had with behavior and -- and anger  
18 management and aggression, I don't think it would, no.

19 Q Okay. So you couldn't be wrong?

20 A Of course I could be wrong.

21 Q Are you aware of the fact that the defendant had  
22 worked at the Lone Star restaurant for some period of time?

23 A Yes, I am aware.

24 Q That he was capable of handling a job?

25 A Certainly.

II-50

KINSORA - CROSS

1 Q And on page 4 of your report do you not indicate, I  
2 believe starting with about the third line down, "In  
3 discussing his past convictions and run-ins with the law, Mr.  
4 Thomas seemed to provide a rationale for each of his actions,  
5 and in most cases felt that he was unjustly treated and  
6 falsely accused"?

7 A That's correct, yes.

8 Q Now you spoke with his mother, is that correct, sir?

9 A That is correct.

10 Q Would it be fair to say at the time you spoke with  
11 his mother she was aware of the possibility that her son, the  
12 defendant, could be sentenced to death?

13 A Yes, certainly.

14 Q Would a mother have any interest in assisting her  
15 son and extricating him from that type of a predicament?

16 A I would think so, but given what she told me she  
17 didn't seem to hold any punches, but.

18 Q She told you he was very dangerous, didn't she?

19 A Yes, she did.

20 Q Now you stated he had no characteristics of this  
21 fetal alcohol syndrome that you've discussed.

22 A No physical characteristics.

23 Q No --

24 A He seems to have no --

25 Q -- I'm sorry, no physical characteristics.

II-51

KINSORA - CROSS

1 Have you ever read the book called "The Abuse  
2 Excuse" by Alan Dershowitz?

3 A No.

4 Q Are you aware of what that book's about?

5 A I assume it's about people blaming their problems on  
6 their physical abuse when they were a child --

7 Q Well --

8 A -- or sexual abuse --

9 Q -- it could be physical abuse --

10 A -- or whatever.

11 Q -- sexual abuse, the fact that they were an only  
12 child, the fact that they were adopted --

13 A Right.

14 Q -- the fact that they ate Twinkies before they  
15 committed these crimes?

16 A Correct.

17 Q These are documented cases.

18 A Correct.

19 Q Now, you met the defendant for the first time  
20 December 1996, is that correct?

21 A That is correct.

22 Q So that'd be about eight months after these two  
23 murders occurred?

24 A Correct.

25 Q You'd never met him prior to that?

II-52

KINSORA - CROSS

1 A No. No.

2 Q Now you state, I believe one of your conclusions was  
3 that he had a good memory, or a decent memory, is that  
4 correct?

5 A He has a decent memory, certainly.

6 Q And as I look at that chart there, the majority of  
7 the dots are in the area that you say is normal, maybe  
8 borderline normal; the majority --

9 A I think --

10 Q -- more than half?

11 A I'm not sure I -- I seem to remember a good portion  
12 of them being in the impaired range, but haven't had a --

13 Q Okay. Well, I added up eleven that were really  
14 low --

15 A Right, mm-hmm.

16 Q -- like one or two percent, and about seventeen that  
17 were above that -- where you put that yellow line, that's  
18 thirty percent up.

19 A Oh, the thirty -- thirtieth percentile? Yeah, but  
20 that's not quite the proper way of looking at it; you can't  
21 just add 'em up and say half and half. It's a little bit  
22 different than that, but.

23 Q So he did well on some of the tests?

24 A Certainly.

25 Q And of course he's capable of fooling you, as is any

II-53

KINSORA - CROSS

1 patient?

2 A Probably, yes.

3 Q You said he had a hard life growing up, is that  
4 correct?

5 A That's correct.

6 Q Do you think it was as hard as Carl Dixon's or Matt  
7 Gianakis's? They're the victims in this case.

8 A I don't know their personal history, so.

9 Q Now you say he had math problems, is that a reason  
10 he went out and killed two people, because he had difficulty  
11 with solving math problems?

12 A Of course not.

13 Q You also state, "He explodes and someone invariably  
14 gets hurt."

15 A That's correct.

16 Q Has that changed?

17 A Probably not, no.

18 Q Now, you testified that you've only -- I'm -- you  
19 testified that you've only testified in criminal cases about  
20 four or five times?

21 A Something in that order, yes.

22 Q Now directing your attention to page 11 of your  
23 report, last three lines, "Mr. Thomas will likely function  
24 well within" --

25 "Mr. Thomas will likely function well within the

II-54

KINSORA - CROSS

1 structure provided by the correctional system, where  
2 there are fewer ambiguities and more immediate  
3 feedback regarding the appropriateness of his  
4 behavior than are found in society."

5 Is that correct, sir?

6 A That's correct.

7 MR. SCHWARTZ: Court's indulgence.

8 BY MR. SCHWARTZ:

9 Q Doctor, I'm showing you a series of exhibits that  
10 came in in this trial, beginning with I believe 85, and the  
11 last one perhaps 107. I'm not going to ask you to read all  
12 these, I'm just asking you if you've ever seen these documents  
13 before. And if so, if you could tell us which ones.

14 A I think it would take me quite a while to go through  
15 all of these, but I -- it looks like a good portion of these I  
16 probably have not seen. Some of these related to some of his  
17 criminal behavior I think I have seen.

18 Q Well, in fairness to you, Doctor, they're all  
19 records from the prison --

20 A Correct.

21 Q -- from prisons. And some of them you may have  
22 seen, but --

23 A And I know that I was -- I did discuss some of his  
24 behavior in the prison system with his attorneys, and I  
25 understand that he's had quite a bit of difficulty in terms of

II-55

KINSORA - CROSS

1 Q Would your conclusions be uncertain -- would it be  
2 fair to say that you are uncertain about your conclusions?

3 A I would say that -- I would say that my conclusions  
4 are reasonably certain from -- at least from a statistical  
5 standpoint and from the standpoint of my experience with  
6 individuals who have difficulties such as his.

7 Q Wouldn't you say that you're uncertain about  
8 everything because you're a psychologist?

9 A Well, as a scientist I don't believe very much. I  
10 -- I have to, you know, obviously I'm a scientist and I need  
11 to see absolute proof. So, yes, I'm skeptical of everything.

12 Q Now you once testified that you're uncertain about  
13 everything?

14 A A good portion of things, you know, I mean, we don't  
15 all automatically assume that water boils at 212 until we see  
16 it boil at 212.

17 Q But my question is, you have testified in the past  
18 that you as a scientist or a psychologist are uncertain about  
19 everything.

20 A Certainly.

21 Q Okay. Thank you.

22 MR. SCHWARTZ: Nothing further, Your Honor.

23 THE COURT: All right. Anything else?

24 MS. McMAHON: Yes, Your Honor.

25 //

II-57



KINSORA - REDIRECT

REDIRECT EXAMINATION

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BY MS. McMAHON:

Q Dr. Kinsora, in the testing that you did on Marlo,  
one of the tests that you referred to was the Minnesota Multi-  
phasic Personality Inventory.

A Correct.

Q Can you tell us about the development, or the  
history of usage of this particular --

THE COURT: Let's take a ten-minute recess.

Don't converse among yourselves or with anyone else  
on any subject connected with the trial, read, watch or listen  
to any report or commentary on the trial or any person  
connected with the trial by any medium of information,  
including, without limitation, newspapers, television, radio;  
don't form or express any opinion on any subject connected  
with the trial until the cause is finally submitted to you.

(Court recessed)

(Jury is not present)

THE COURT: -- instructions, this is the time for  
settlement of instructions outside the presence of the jury.

Does the State object to any of the instructions the  
Court has indicated will be given?

MR. ROGER: No, sir.

THE COURT: Does the defense object to any of the  
instructions the Court has indicated will be given?

II-58

1 MR. LaPORTA: No, Your Honor.

2 MS. McMAHON: No, Your Honor.

3 THE COURT: Does the State request the giving of any  
4 instructions in addition to those the Court has indicated will  
5 be given?

6 MR. ROGER: No, Your Honor.

7 THE COURT: Does the defendant request the giving of  
8 any instructions in addition to those the Court has indicated  
9 will be given?

10 MR. LaPORTA: No, Your Honor, our requested  
11 instructions were included.

12 THE COURT: All right. So counsel stipulate that we  
13 settled these instructions here in open court outside the  
14 presence of the jury and they should be given prior to  
15 argument?

16 MR. ROGER: Yes, Your Honor.

17 MR. LaPORTA: Yes, Judge.

18 MS. McMAHON: That's correct.

19 THE COURT: Is there anything else to come before  
20 the Court before we bring the jury in?

21 MS. McMAHON: Just briefly one matter. Yesterday,  
22 if the Court will recall, there was discussion regarding the  
23 testimony of Kenya Hall at the preliminary hearing which  
24 occurred on June 27th of '96. It was the position of the  
25 State that Kenya testified that Marlo Thomas told him in the

II-59

1 restaurant to shoot Vincent Oddo. It was the recall of the  
2 defense that that was not Mr. Hall's testimony.

3           The reason that I bring it up, Judge, is that  
4 clearly this impacts on closing arguments that are going to be  
5 made to the jury. I went back and reviewed the preliminary  
6 transcript, and I'm certain that Mr. Rogers has. The -- Mr.  
7 Harmon was the prosecutor that took Kenya Hall on direct  
8 examination, and he referenced a statement that Mr. Hall had  
9 given to the Highway Patrol officer. If I can refer to page  
10 119 of the transcript, Mr. Rogers. Mr. Harmon asked if "he,"  
11 meaning Mr. Thomas, "ever say anything about being concerned  
12 that there wouldn't be any witnesses?" The answer was, "Yes."  
13 The question then was, "When did he say that?" And the answer  
14 was, "In the car. He said if you commit a crime you're not  
15 supposed to leave any witnesses." Okay.

16           On cross-examination Mr. Hall stated that there was  
17 no conversation about robbing the place or anyone inside, and  
18 that's on page 120. That there was no conversation upon  
19 entering the Lone Star that robbery was intended.

20           On redirect by Mr. Harmon, and that's on page 131 of  
21 the transcript, Mr. Harmon asked Mr. Hall:

22           "Specifically, when you were inside the restaurant,  
23 were you ever told by Marlo Thomas to shoot the  
24 manager of the restaurant?"

25           Mr. Hall responded that, "Not that I remember."

II-60

1 Question then was, "Do you remember what it was that  
2 you told the police when you talked to them?"

3 Response: "Yes."

4 Question: "Did you give a recorded statement to the  
5 police?"

6 "Yes."

7 Mr. Harmon then proceeds to read from that statement  
8 to Mr. Hall. On page 134 Mr. Harmon then says:

9 "So you're saying that when Marlo Thomas told you  
10 that you were supposed to shoot the guy in the back  
11 of the head, that wasn't inside the restaurant?"

12 Answer: "It was in the car."

13 Question: "That happened out in the car after it  
14 happened?"

15 Answer: "Yes."

16 I believe the record indicates that it was not the  
17 testimony of the young man at the preliminary hearing that he  
18 was told either on the way into the restaurant or during the  
19 restaurant that he was to shoot Vincent Oddo.

20 THE COURT: So what is your motion?

21 MS. McMAHON: My motion is that the State be  
22 precluded in closing argument from arguing to the jury that in  
23 fact Marlo Thomas told the young man, Kenya Hall, to shoot  
24 Vince Oddo, or the manager, in the head after getting the  
25 money, because that's not what the record reflects, Judge.

II-61

1 THE COURT: Mr. Roger.  
2 MR. ROGER: Judge, I'm entitled to argue all  
3 inferences from the evidence, and what she did not read to you  
4 is a statement that is in the transcript where the -- where  
5 Kenya Hall told the highway patrolman at the time of his  
6 arrest, this is page 134, line 12, "And then he told the guy  
7 to open up the safe. He put the gun in my hand, he told me to  
8 get the money and shoot the guy in the back of the head when I  
9 leave, like that." Now that's what he told the Highway Patrol  
10 trooper. Now he --  
11 THE COURT: And that was in the transcript read to  
12 the jury?  
13 MR. ROGER: Yes, sir.  
14 THE COURT: Well, I don't want you to -- I don't  
15 want you to go into any quadruple murders, but maybe if you  
16 want to allude there could have been a triple murder but  
17 perhaps because of that reason.  
18 MR. ROGER: That'd be fine.  
19 THE COURT: That's the order of the Court. All  
20 right? Okay?  
21 MS. McMAHON: Thank you, Your Honor.  
22 MR. ROGER: Yes, Your Honor.  
23 THE COURT: All right, bring in the jury.  
24 (Jury reconvened)  
25 THE COURT: All right, counsel stipulate to the

II-62

KINSORA - REDIRECT

1 presence of the jury?

2 MR. ROGER: Yes, Your Honor.

3 MS. McMAHON: Yes, Your Honor.

4 THE COURT: All right. Let's finish up on the  
5 redirect. All right?

6 MS. McMAHON: Thank you.

7 REDIRECT EXAMINATION (Continued)

8 BY MS. McMAHON:

9 Q Dr. Kinsora, Mr. Schwartz asked you about a study  
10 wherein various individuals were able to convince  
11 psychiatrists, psychologists, of being mentally ill when in  
12 fact they were not.

13 A That is correct.

14 Q And you're familiar with that study?

15 A Yes, I am.

16 Q Is it correct that that study was done maybe twenty-  
17 five, thirty years ago?

18 A I believe so, it was done in the '60s sometime.

19 Q Okay. Is it also correct that that study was based  
20 only on interviews?

21 A I believe it was almost all interviews, basically  
22 coming in and saying, I'm hearing voices, I think people are  
23 after me. And the psychiatrists were -- and I believe there's  
24 some residents also were involved as the doctors there -- were  
25 admitting people into the psychiatric hospital on the basis of

II-63

KINSORA - RECROSS

1 much more complex in that he doesn't have the behavioral and  
2 impulse controls that you and I have, you know, he's  
3 neurologically wired a little bit differently. He's  
4 borderline intellectual functioning, he has a lot of problems  
5 understanding the world. He has very -- he has a very  
6 difficult time inhibiting his impulses and anger and managing  
7 his anger. And this has been going on since he's been very,  
8 very young, so.

9 Q So in effect, in social situations the emotional  
10 behavior, the emotional feelings take ascendancy over the  
11 reasoning process?

12 A Correct.

13 Q Thank you, Dr. Kinsora.

14 MR. SCHWARTZ: Very briefly, Your Honor.

15 RECROSS EXAMINATION

16 BY MR. SCHWARTZ:

17 Q Dr. Kinsora, you testified that the tests that you  
18 performed are a lot different than what happened in the  
19 Rosenhand study and that you have these safeguards that make  
20 them more valid than the Rosenhand study type of test.

21 A It protects them somewhat more from a -- from  
22 deception.

23 Q And these advanced tests that you administered and  
24 you testified about led you to conclude that "Marlo Thomas  
25 would function well within a prison setting." That was the

II-68

KINSORA - RECROSS

1 basis of your conclusion from these advanced tests with the  
2 proper safeguards?

3 A No, actually, that statement was drawn straight from  
4 the diagnosis of -- of antisocial personality disorder, from  
5 the research based on that. But he -- again, the problem is  
6 is he's not just a simple antisocial personality disorder,  
7 he's much more, and he's much more a problem than that.

8 Q And you realize today that this is a penalty phase,  
9 the defendant faces four possible punishments, one of which is  
10 the death penalty?

11 A That is correct.

12 Q You give a conclusion about how he'll behave in  
13 prison, in a prison environment, but you don't talk with any  
14 of the people in prison who have contact with this defendant.

15 A I --

16 Q You didn't think that was important?

17 A I don't think the State would pay for me to spend  
18 the time to -- to interview each one of them.

19 Q Did you ask?

20 A Of course not.

21 MR. SCHWARTZ: Nothing further.

22 THE COURT: Anything else?

23 MS. McMAHON: No, Your Honor.

24 THE COURT: All right. Thank you, you're excused.

25 Call your next witness.

II-69



1 MS. McMAHON: Thank you. Your Honor, the defense  
2 would call Linda Overby.  
3 THE COURT: Is that chart to be admitted?  
4 MS. McMAHON: No, Your Honor, it was simply for  
5 demonstrative purposes.  
6 THE COURT: Not marked?  
7 THE CLERK: It's marked.  
8 THE COURT: It's marked as A. Doctor, just a  
9 minute.  
10 THE WITNESS: Oh. Do I need to bring it back?  
11 Okay.  
12 THE COURT: Well, I don't know.  
13 THE WITNESS: That's fine then. You can --  
14 THE COURT: I mean, seems to me that the clerk  
15 marked it as A. Is that right?  
16 MS. McMAHON: That's correct, Your Honor. We had  
17 marked it --  
18 THE COURT: You don't have to admit it or not, I  
19 don't care.  
20 MS. McMAHON: We had it simply for demonstrative  
21 purposes.  
22 THE COURT: All right. Then just put it down there,  
23 give it to the clerk at a later time, or whoever you want to.  
24 Please stand up, raise your right hand and be sworn.  
25 LINDA OVERBY, DEFENDANT'S WITNESS, IS SWORN

II-70

ORIGINAL

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FILED  
DEC - 8 2009  
CLERK OF COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
  
Plaintiff,  
  
-vs-  
  
MARLO THOMAS,  
#1060797  
  
Defendant.

CASE NO: C136862  
DEPT NO: XXIII

**RESPONSE TO REQUEST FOR FUNDS FOR INVESTIGATIVE ASSISTANCE**

DATE OF HEARING: 12/9/09  
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in response to Defendant's Request For Funds For Investigative Assistance.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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## PROCEDURAL HISTORY

Marlo Thomas was convicted of two counts of First Degree Murder and sentenced to death in 1997 for the early-morning robbery of the Lone Star Steakhouse and the stabbing deaths of two employees who were present during the robbery, Matthew Gianakis and Carl Dixon. The convictions and death sentences were affirmed on direct appeal. Thomas v. State, 114 Nev. 1127, 967 P.2d 1111 (1998). Following post-conviction proceedings at which trial counsel Lee McMahon and Mark Bailus both testified, the Supreme 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, 83 P.3d 818 (2004). David Schieck was appointed for the new penalty hearing at which the jury found the existence of four aggravating circumstances and Thomas was again sentenced to death. The Supreme Court affirmed on the direct appeal. Thomas v. State, 122 Nev. 1361, 148 P.3d 727 (2006). Remittitur issued on January 28, 2008.

On March 6, 2008, Thomas filed a pro per post-conviction petition and request for appointment of counsel. On May 21, 2008, Cynthia Dustin was appointed to file a supplemental petition. Over objection and without good cause, Dustin was permitted to withdraw on December 29, 2008, based on Thomas's alleged refusal to meet or communicate with Dustin because he distrusted her loyalties. Despite no forthcoming supplemental petition during the seven months of her appointment, Dustin was awarded excess attorney's fees in the amount of \$7,031.25. Current counsel Brett Whipple was appointed on January 7, 2009. To date, Whipple has failed to file a supplemental petition so that Thomas's post-conviction proceedings can move forward. Instead, Whipple has partnered with the federal public defender and filed in open court on November 9, 2009, a Request for Funds for Investigative Assistance.

## POINTS AND AUTHORITIES

### Statement with Regard to Participation of Federal Public Defender

When appointed counsel appeared and filed in open court the instant Request for Funds on November 9, 2009, he was accompanied by a representative from the federal

1 public defender's office. Appointed counsel represented that he had consulted with the  
2 federal public defender and was pursuing their legal advice in filing the instant Request for  
3 Funds.

4 While appointed counsel is free to consult with whomever he chooses, the federal  
5 public defender's participation in these proceedings warrants mention in this pleading. By  
6 involving itself in these initial state post-conviction proceedings, the federal public defender  
7 arguably will be conflicted and unable to represent Thomas in subsequent federal habeas  
8 proceedings. The federal public defender can not argue its own ineffectiveness in advising  
9 appointed counsel how to proceed.

10 The State would also note that the federal public defender's involvement in first State  
11 post-conviction proceedings in other capital cases has tainted the record and seriously  
12 jeopardized those convictions. For example, in Charles Randolph C150872 (3:08-cv-00650)  
13 the federal public defender was conflicted off federal habeas proceedings due to their alleged  
14 interference with appointed counsel's representation in State Court. It is alleged that when  
15 appointed counsel and the federal public defender did not agree on a course of action in State  
16 Court that undue pressure and threats were made against appointed counsel and the federal  
17 public defender visited and turned the client against appointed counsel. The same is also  
18 true in Gregory Bolin C130899 (3:07-cv-00481) where a bar complaint also has been filed  
19 for alleged unethical conduct by the federal public defender for lying to the judge in State  
20 Court and attempting to micro-manage and unfairly influence appointed counsel in the  
21 performance of his duties. Likewise, in Gregory Leonard C126427, appointed counsel  
22 explained on the record that he felt compelled to brief all issues suggested by the federal  
23 public defender.

24 The State's interest is with the integrity of the current post-conviction proceedings  
25 and appointed counsel's ability to independently provide effective assistance without undue  
26 influence or coercion from the federal public defender. Although it is the federal public  
27 defender's practice in Federal Court to appoint experts and conduct expansive discovery and  
28 conduct investigation for years prior to the filing of any substantive claims with the court,

1 such does not comport with State post-conviction statutes as explained below.

2  
3 Mental Retardation

4 In the Request for Funds, the defense is seeking \$10,000 for neuropsychological  
5 testing, specifically for mental retardation. Notably, the appropriate procedure for making a  
6 claim of mental retardation is to bring a motion to set aside the death penalty pursuant to  
7 NRS 175.554(5). Such a post-trial motion is only appropriate if “a prior determination  
8 regarding mental retardation has not been made.” NRS 175.554(5). In 1996, Thomas asked  
9 for and obtained a neuropsychological examination wherein Dr. Thomas Kinsora established  
10 Thomas’s full scale IQ at 79 and in the 8<sup>th</sup> percentile, which was 10 points away from being  
11 considered mentally retarded. See Exhibit 1. Thomas, who was 24 years of age at the time,  
12 was diagnosed with “Antisocial Personality Disorder” but not mental retardation. Dr.  
13 Kinsora also noted that intellectual assessments during Thomas’s childhood “placed his  
14 verbal IQ at 85 and 81 respectively, his performance IQ at 86 and 92 respectively, and his  
15 full scale IQ at 84 and 85 respectively.” *Id.* at p. 2; see also Exhibit 2.

16 In Nevada, “mentally retarded” means “significant subaverage general intellectual  
17 functioning which exists concurrently with deficits in adaptive behavior and manifested  
18 during the developmental period.” NRS 174.098(7). As noted by the United States Supreme  
19 Court, “mild” mental retardation is typically used to describe people with an IQ level of 50-  
20 55 to approximately 70. *Atkins v. Virginia*, 536 U.S. 304, 309 n.3, 122 S.Ct. 2242 (2002),  
21 citing Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), pp. 42-43 (4<sup>th</sup> ed.  
22 2000). “It is estimated that between 1 and 3 percent of the population has an IQ between 70  
23 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual  
24 function prong of the mental retardation definition.” *Id.* at n.5. “Mental retardation is a  
25 relatively rare thing. It’s about one percent of the population.” *Id.*

26 Thomas is not entitled to a second neuropsychological examination at the public’s  
27 expense where school records and testing during the formative years established an IQ well  
28 above that required for mental retardation. Even if Dr. Kinsora’s score of 79 could somehow

1 be extrapolated or modified down to 70 by taking into account an alleged margin of error  
2 and a controversial "Flynn" effect, such was not manifested during the developmental period  
3 prior to age 18. At that time, Thomas's full scale IQ was 84 and 85 which would foreclose a  
4 diagnosis of mental retardation. As a matter of law, no decline in intellectual functioning as  
5 an adult can ever equate with mental retardation which definitionally must have had onset  
6 during the formative years.

7 Even if the current Request for Funds were construed as a motion raised pursuant to  
8 NRS 175.554(5), Thomas has failed to establish it is reasonably necessary to expend  
9 additional public monies on a second neuropsychologist in the hopes for a better or different  
10 result. The data and psychological evaluations from Thomas's childhood were available for  
11 trial and have not changed. While such records show that Thomas was a "slow learner" as a  
12 child with scores that fell below average, he was in nowise mentally retarded.

#### 13 14 Fetal Alcohol Syndrome

15 The defense also seeks "funds to do a comprehensive and adequate investigation into  
16 Mr. Thomas social history to determine whether or not he suffers from FASD." Notably,  
17 under Nevada post-conviction law there is no right to discovery until after the writ has been  
18 granted and a date set for an evidentiary hearing. NRS 34.780. Likewise, only if an  
19 evidentiary hearing is required may the parties seek to expand the record. NRS 34.790.  
20 Because counsel has yet to file any claims in a supplemental petition, it remains to be seen  
21 whether an evidentiary hearing will be warranted. Only if Thomas first makes specific  
22 factual allegations, not belied or repelled by the record, which if true would entitle him to  
23 relief, would an evidentiary hearing be appropriate. Hargrove v. State, 100 Nev. 498, 502,  
24 686 P.2d 222, 225 (1984). If the defense believes trial counsel were ineffective in not  
25 investigating Fetal Alcohol Syndrome, they must first allege it in a petition and demonstrate  
26 what counsel failed to do and how the outcome would have been different. At that time, and  
27 only if the court orders an evidentiary hearing on the matter would it be appropriate to  
28 expend public monies for appointment of an expert witness. Otherwise, there is no

1 demonstrated need for such appointment.

2 Moreover, according to the National Task Force on Fetal Alcohol Syndrome and Fetal  
3 Alcohol Effect in conjunction with the National Center on Birth Defects and Developmental  
4 Disabilities, there are no specific or uniformly accepted diagnostic criteria available for  
5 determining whether a person has FAS. Centers for Disease Control and Prevention, Nat'l  
6 Center on Birth Defects and Developmental Disabilities, Fetal Alcohol Syndrome:  
7 Guidelines for Referral and Diagnosis, (July 2004), (hereinafter "Guidelines"), p. 2-3.<sup>1</sup> The  
8 four broad areas of clinical features that constitute a diagnosis of Fetal Alcohol Spectrum  
9 Disorder (hereinafter "FASD") have remained unchanged since 1973. Id. The Guidelines  
10 clearly state, "these broad areas of diagnostic criteria are not sufficiently specific to ensure  
11 diagnostic accuracy, consistency, or reliability." Id. at 2. The Guidelines further state, "it is  
12 easy for a clinician to misdiagnose FASD." Id. at 3. Moreover, the Guidelines demonstrate  
13 that there are no diagnostic criteria to distinguish FAS from other alcohol-related conditions.  
14 Id. at 3.

15 Diagnostic characteristics for FASD vary by provider. This has led to a determination  
16 that the lack of specificity can result in inconsistent diagnostic methodology and the  
17 inconsistent application of the FASD diagnosis. Id. at 11. For example, one particular  
18 method which is widely in use has been criticized because it will result in a number of false-  
19 positive findings. Id. at 11. Nine additional syndromes have overlapping features with FAS.  
20 Id. at 12. Thus, determining whether a particular defendant does suffer from FAS is  
21 subjective, rather than objective. Like ADHD, it is simply the popular label of the day for  
22 evidence (ie. mother's prenatal alcohol abuse and mental impairment) which was already  
23 presented to the jury by defense counsel. Expenditure of public monies must be made in  
24 compliance with Nevada law and not for a "fishing" expedition or to needlessly investigate a  
25 claim that would not have made a difference in the case.

26  
27  
28 <sup>1</sup> See [http://www.cdc.gov/ncbddd/fasd/documents/FAS\\_guidelines\\_accessible.pdf](http://www.cdc.gov/ncbddd/fasd/documents/FAS_guidelines_accessible.pdf)

1 Investigative Expenses

2 Finally, the defense is also seeking \$10,000 for investigative expenses to develop  
3 mitigating circumstances in Thomas's social and family history. As with the claim above,  
4 under Nevada post-conviction law there is no right to discovery until after the writ has been  
5 granted and a date set for an evidentiary hearing. NRS 34.780. Likewise, only if an  
6 evidentiary hearing is required may the parties seek to expand the record. NRS 34.790.  
7 Because counsel has yet to file any claims in a supplemental petition, it remains to be seen  
8 whether an evidentiary hearing will be warranted. Only if Thomas first makes specific  
9 factual allegations, not belied or repelled by the record, which if true would entitle him to  
10 relief, would an evidentiary hearing be appropriate. Hargrove v. State, 100 Nev. 498, 502,  
11 686 P.2d 222, 225 (1984). If the defense believes trial counsel were ineffective in  
12 conducting certain investigation, they must first allege it in a petition and demonstrate what  
13 counsel failed to do and how the outcome would have been different. At that time, and only  
14 if the court orders an evidentiary hearing on the matter would it be appropriate to expend  
15 public monies for appointment of an investigator. Otherwise, there is no demonstrated need  
16 for such appointment.

17 There is no right to appointment of an investigator for the mere asking and prior to a  
18 supplemental petition with substantive claims being filed. Without a petition explaining  
19 what prior counsel did and did not do, there is no basis for this Court to determine whether  
20 reasonable investigation needs exist at this time. Expenditure of public monies must be  
21 made in compliance with Nevada law and not for a "fishing" expedition or to needlessly  
22 investigate a claim that would not have made a difference in the case.

23 CONCLUSION

24 Despite the passage of nearly two years time since Thomas initiated these proceedings  
25 with a pro per petition for post-conviction relief, appointed counsel has failed to prepare and  
26 submit a supplemental petition as ordered by the court and authorized by NRS 34.750. Such  
27 statute contemplates supplemental pleadings from counsel within 30 days of appointment,  
28 not two years. Instead, appointed counsel has withdrawn from the case after collecting



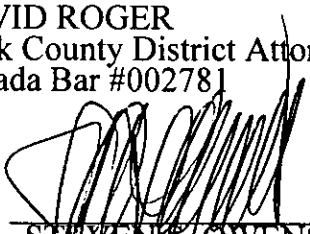
1 \$7,031.25 of the public's money, and subsequent counsel is now seeking an additional  
2 \$20,000 for experts and investigation. Until the supplemental petition is filed, any request  
3 for funds is premature and must be denied at this time.

4 DATED this 8<sup>th</sup> day of December, 2009.

5 Respectfully submitted,

6 DAVID ROGER  
7 Clark County District Attorney  
8 Nevada Bar #002781

9 BY

10   
11 STEVEN S. OWENS  
12 Chief Deputy District Attorney  
13 Nevada Bar #004352  
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1                                    **CERTIFICATE OF FACSIMILE TRANSMISSION**

2                    I hereby certify that service of Response to Request for Funds for Investigative  
3 Assistance, was made this 8<sup>th</sup> day of December, 2009, by facsimile transmission to:

4  
5                                    BRET WHIPPLE, ESQ.  
6                                    FAX #(702) 974-4008

7                                    

8                                    Employee for the District Attorney's  
9                                    Office

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## OFFICE OF THE DISTRICT ATTORNEY

### CRIMINAL APPEALS UNIT

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**CHRIS OWENS**  
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**TERESA M. LOWRY**  
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**MARY-ANNE MILLER**  
*County Counsel*

**STEVEN S. OWENS**  
*Chief Deputy District Attorney*

### FACSIMILE TRANSMISSION

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Telephone No. (702) 671-2750

**TO:** Bret Whipple, ESQ. **FAX#:** (702) 974-4008

**FROM:** Steven S. Owens

**SUBJECT:** Marlo Thomas, C136862, Resp.to Fund's Requested for Inv.Asst.

**DATE:** December 8, 2009

Part 1 of 2

RA 000096

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\*\*\* TX REPORT \*\*\*  
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TRANSMISSION OK

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**OFFICE OF THE DISTRICT ATTORNEY**  
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**SUBJECT:** Marlo Thomas, C136862, Resp.to Fund's Requested for Inv.Asst.  
**DATE:** December 8, 2009

Part 2 of 2

RA 000097

RA 000098

THOMAS F. KINSORA, PH.D.

*Specializing in Neuropsychology*

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(702) 382-1960 FAX (702) 382-4993

## **NEUROPSYCHOLOGICAL ASSESSMENT**

**Patient Name:** Thomas, Marlo  
**Date of Examination:** 12-10-96, 12-16-96, 12-18-96,  
6-07-97, and 6-09-97  
**Place of Examination:** Clark County Detention Center  
**Examiner:** Thomas F. Kinsora, Ph.D.  
**Referral Source:** Peter R. La Porta

**THE CONTENTS OF THIS REPORT ARE STRICTLY CONFIDENTIAL AND ARE NOT TO BE REPRODUCED OR DISSEMINATED IN WHOLE OR IN PART BY ANY MEANS WITHOUT WRITTEN CONSENT OF THE PATIENT.**

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### **HISTORY AND OBSERVATION**

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#### Circumstances of Referral

Mr. Thomas was referred by Mr. La Porta. Mr. La Porta is Mr. Thomas' defense attorney, and is the chief trial deputy at the Nevada State Public Defenders Office. A neuropsychological and personality assessment was ordered to assess current levels and patterns of functioning.

#### History of Presenting Problem

Mr. Thomas is a 24 year old (DOB 11-6-72) African-American male who is awaiting trial for his alleged connection to the robbery of a Lone Star restaurant and the murder of two employees at that restaurant. The date of the alleged offense was April 15, 1996.

#### Social History

Mr. Thomas was born in Las Vegas, Nevada on November 6, 1972. He has three brothers, aged 29, 28 and 16. He reports that his older brothers were his primary caretakers, and described them as strict authoritarians who "kept me out of little neighborhood trouble and stuff". His mother typically worked late afternoons as a custodian in schools. He reports that he lived in lower-middle income neighborhoods, and moved about Las Vegas fairly frequently. He reports that his household was typically well stocked with food, and believed that his mother provided well for her children. He was not raised at any point in his life by his father, although he does know of him. His father has apparently been in prison for the last 17 years for murder. He reported that his family received medical attention when needed, and that his mother was instrumental in seeking help for Mr. Thomas' behavior when he was a child. He believes that

the emotional support and nurturing provided by his mother and brothers was "very good". The discipline techniques that were typically used included restriction and occasional spankings. He denied any physical or sexual abuse.

According to Mr. Thomas, he has had difficulties with his temper and has been in trouble for fighting since his early childhood. At age 10 his behavior became such a problem that he was referred to Children's Behavioral Services and was placed in Miley Elementary School. While there, he was placed on a strict behavioral program and apparently continued to have significant difficulties. On multiple occasions he confronted staff members physically. When he did so he was reported to the police and sent to Juvenile Hall. According to Mr. Thomas, his most vivid memory of the year spent at Miley Elementary consisted of time spent in time-out in which he was required to touch his nose to the corner until the time-out period was over. He reported that after repeated time-outs he began to rebel both verbally and physically. Because of his inability to control his behavior, he was apparently in time-out much of the time during each day. He attended Miley Elementary School for the 6th and 7th grade.

When he was 13 years of age he was found guilty of a felony battery charge and was sent to Elko, Nevada for six months. The battery charge was related to the beating of an adult with a pool stick. Mr. Thomas claims that he was aiding a friend who was being beaten by the adult. During his juvenile years he was picked up for over ten incidences involving battery, two incidences regarding 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 the above incidents were dismissed. He did, however, serve time when he was 16 years old in Elko, Nevada for the stolen vehicle, and spent six years in the Nevada State Penitentiary in Carson City, Nevada for attempted robbery.

#### Education/Work History

Mr. Thomas has 11 ½ years of education. Review of educational history revealed that Mr. Thomas attended many schools throughout his life. In fact, by the 4th grade he had already moved from one school to another nine times. His records reflect that he attended the Children's Behavioral Services center from 2-28-84 until 11-6-84. He entered the Miley Achievement Center Elementary School on 9-9-85, and appears to have attended this school until at least 11-10-86. A portion of his 10th grade was received from Elko, Nevada while he was serving time. Mr. Thomas acknowledges persistent problems through his life with reading, spelling and arithmetic. His grades ranged from C to D's. Psychological reports from as early as 11-12-81 suggest the presence of significant problems in these areas, and the presence of pathognomonic signs of dyslexia, including letter reversals and poor letter-sound association skills. Intellectual assessments of 11-12-81 and 3-26-87 placed his verbal IQ at 85 and 81 respectively, his performance IQ at 86 and 92 respectively, and his full scale IQ at 84 and 85 respectively. His reading, spelling and arithmetic scores have all fallen well below his grade level and age level across assessments.

Mr. Thomas was employed by the Lone Star Restaurant for several months prior to his arrest. Prior to that he had held several jobs at McDonalds, and made money doing other odd jobs occasionally.

#### Social History according to Georgia Thomas, Marlo's mother:

Mr. Thomas' mother, Georgia Thomas was interviewed on 6-05-97. She reported that during her pregnancy with Marlo she drank MD 20/20, Strawberry Hill wine, or Vodka every day until she was extremely intoxicated. In addition, she was frequently physically abused by Marlo's father and was both

punched and kicked in the stomach when she was pregnant with Marlo. She was unable to recall whether or not Marlo's delivery was difficult. She stated that Marlo was a quiet baby and rarely cried. She had difficulty teaching him to use the toilet and reported that he was bladder incontinent nearly every other day until age 12. As a child he was hyper active and had great difficulty with anger control. Various medications were tried, although she was unable to recall what specific medications they were. He accepted affection as a child and liked to be hugged. He tended to sympathize with others and defend those who could not fight for themselves. He liked animals and often took stray animals home. He was never observed to be cruel to animals. Mrs. Thomas was unaware of any fire starting behavior.

Despite his more positive qualities, Marlo was viewed by his mother as temperamental, argumentative, and unable to get along with authority. He was picked on incessantly at school due to his reluctance to shower and from smelling of urine from his bladder control problems. His peers called him "Stinky". Thus, his mother explained, his early peer relations were poor and fraught with negative experiences. He failed a grade according to his mother, but she was unsure which grade it was. By early adolescence he was hanging around other kids who were similarly rejected by peers. Many of them got into trouble with the law and Marlo was apparently all too often willing to go along with the excitement of the moment, whether it be experimenting with drugs or driving around in a stolen vehicle. He ran away on two occasions in elementary school but always returned home.

His mother admitted to "beating him up" and frequently "whipping his behind" when he misbehaved. She stated that Marlo always seemed to think that others were out to hurt him, that no one loved him, and believed that his mother loved the other children better because of his difficulties. She stated that during the same month that he was put in jail for the incident at the Long Horn restaurant, he had arrived home drunk and "drugged up" and tried to beat everyone up at his mother's home. She felt that Marlo did not appear to be himself during that month and attributed his changes to drug abuse. She was however, unable to be more specific with regard to what type of drug he might have been using.

#### Neuromedical History

Currently he is prescribed no medications. His past medical history is negative for any significant illnesses or ongoing medical problems. Developmental milestones occurred on time. He reports a long history of intervention from Children's Behavioral Services, as well as services within the various juvenile facilities and prison facilities that he has been in. Apparently, Children's Behavioral Services worked intensely with Mr. Thomas to help reduce his proneness to losing his temper, becoming physically violent, and with his overall disregard for authority. He has also had multiple psychological assessments performed. He was diagnosed with a "hyperactive" disorder according to his mother and was placed on a variety of medications for a short period of time. She was, however, unsure of the name of the medications, or how long he was on them. Mr. Thomas did not remember what medications he was placed on. Inquiry regarding alcohol and other drug use revealed that Mr. Thomas enjoyed smoking marijuana and occasional alcohol. No significant neuromedical conditions, early childhood illnesses, or head injuries were reported by Mr. Thomas. He is unaware of ever being exposed to neuro-toxic substances. He described himself early on as an overactive child with a poor temper control.

#### Behavioral Observations

Mr. Thomas was seen at the Clark County Detention Center for the assessment. The assessment and interview lasted approximately 10 hours and was conducted over 5 face to face testing sessions. Physically he presented as a casually dressed, African American male of medium to stout stature. He appeared



approximately his stated age. His dress and grooming were neat. Overall, he appeared to be a good historian who neither overstated his accomplishments nor overcriticized himself for his failures or weaknesses. In discussing his past convictions and run-ins with the law, Mr. Thomas seemed to provide a rationale for each of his actions, and in most cases felt that he had been unjustly treated or falsely accused. He was excessively talkative at times. Mechanical aspects of speech were unremarkable.

In general, social and emotional aspects of behavior were normal. His facial expressions appeared congruent with speech content and stated mood. Eye contact was good. There was normal spontaneity in his speech. He established an adequate rapport with this examiner. No delusions or psychopathology were noted. Suicidal ideation was not elicited.

Mr. Thomas's test taking behavior was conducive to obtaining a valid sample of current strengths and weaknesses. He had no difficulty understanding test instructions. Impulsivity was not a problem. In response to difficult problems he appeared to put forth greater effort. Carelessness was not noted. Visual and auditory acuity were adequate for testing purposes.

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### TESTS ADMINISTERED

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Boston Naming Test  
Controlled Oral Word Association Test  
Finger Oscillation Test  
Grooved Pegboard Test  
Hare Psychopathy Checklist - Revised (PCL-R)  
Interview  
Minnesota Multiphasic Personality Inventory-2 (MMPI-2)  
Pace Auditory Serial Addition Test (PASAT)  
Proverb Screen  
Recognition Memory Test - Words  
Rey Auditory Verbal Learning Test  
Rey Complex Figure  
Short Category Test  
Test of Problem Solving  
Trails A  
Trails B  
Wechsler Adult Intelligence Scale-Revised  
Wechsler Memory Scale-Revised (selected subtests only)  
Wide Range Achievement Test-Revised  
Wisconsin Card Sorting Test

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### TEST RESULTS

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Neuropsychological measures are instruments possessing a high degree of reliability and validity in detecting brain dysfunction. Nevertheless, they should only be used to suggest the presence or

absence of brain injury. In most cases each attained score is compared to normative data derived from others of similar age, and whenever possible, of similar age, sex, and education. Test performance can be affected by emotional functioning, motivation, fatigue, natural variability in human performance, and other known and unknown sources. The neuropsychologist must interpret the results of each test in light of these influencing factors.

## MOTIVATION AND COGNITIVE SYMPTOM MANUFACTURE

Upon the initiation of testing Mr. Thomas was told that his cooperation with the testing procedure was imperative.

The neuropsychological battery administered to Mr. Thomas contained a variety of indicators of malingering or symptom exaggeration. On none of the measures did he demonstrate performance which is consistent with an individual who is exaggerating the extent of his cognitive or personality problems. In fact, he performed well within the average range on the majority of the neuropsychological measures. The validity indicators on the Minnesota Multiphasic Personality Inventory-II suggest that Mr. Thomas was relatively honest and forthright in his responses to the personal statements contained in the questionnaire.

Overall, it appears as if Mr. Thomas put forth adequate effort and did not attempt to appear impaired in his cognitive or personality functioning.

## INTELLECTUAL TESTING

Grossly, intellectual functioning is in the borderline range of intellectual functioning (WAIS-R Full Scale IQ = 79, just 10 point away from being considered mentally retarded). Overall, his capacity to retrieve learned knowledge and his ability to solve complex and novel problems is currently better than only 8% of his same aged peers.

Various components of intellect were examined to determine if significant variability exists in his intellectual skills. Problem solving which requires both verbal reasoning and the retrieval of stored knowledge was determined to be in the low average to borderline range (WAIS-R Verbal IQ = 82; which is at the 12 percentile compared to others his age). Problem solving which requires both spatial analysis and the ability to solve novel problems under the duress of time were found to be in the borderline range (WAIS-R Performance IQ = 78; which is at the 7 percentile compared to others his age). The 4 point discrepancy is not considered significant. His overall performance is lower, but consistent with his previous intellectual assessment results.

## ACADEMIC ACHIEVEMENT

As measured by the WRAT-R, Mr. Thomas could sound out or flash read single stimulus words at the 4 percentile compared to others his age. He was able to spell words dictated to him at the 1 percentile compared to others his age.

Timed arithmetic problem solving was found to be at the 1 percentile compared to others his age.

Analysis of his spelling errors suggests that he has great difficulty translating auditory information into correct sound units in written language. Likewise, his reading problems appear to also come from an inability to decode the sounds of written information. His academic problems appear to be due to

legitimate learning disabilities, limited intellectual capacity, poor education, and an impoverished environment.

## ATTENTION, CONCENTRATION, MENTAL SPEED

*This section reports on auditory and visual attention span, the ability to continuously track internal and external stimuli without distraction, mental speed, mental tracking skills, and the ability shift attentional focus.*

### Status:

Mr. Thomas was alert and oriented. Auditory attention span was found to be within normal limits, as he was able to repeat up to 6 numbers immediately after being presented by the examiner. More effortful concentration was found to be in the mildly impaired range, as he could recall no more than 4 numbers inconsistently in reverse order. His poor performance is, however, consistent with his learning disorder as several transpositional errors were noted, common among dyslexics.

On a connect the dots type test, Mr. Thomas performed within the average range (31 seconds), yet demonstrated significant problems on a test conceptual tracking involving the rapid alternation between numbers and letters in order (trails B time = 113). On a timed test involving visual-motor and general mental processing speed Mr. Thomas demonstrated borderline to mildly impaired speed compared to others his age (Digit Symbol, WAIS-R;  $t=41$ ). On a measure of mental tracking and concentration involving arithmetic story problems, Mr. Thomas demonstrated significant problems and was over one and one half deviations below the mean for his age and education. His poor performance on this task was likely due in part to his poor arithmetic skills, however.

Sustained mental tracking skills were measured using a task which required Mr. Thomas to add numbers presented to him while retaining a previously presented number for future use (PASAT). There are four series of presentations with fifty numbers presented in each series. Each series is presented in a slightly more rapid manner than it's immediately preceding series. On this task he demonstrated severely impaired performance on the first trial and moderately impaired performance on the second, more rapidly presented trial.

### Functional Implications:

Overall, Mr. Thomas demonstrates attention, concentration, and mental processing speed that are significantly below average when compared to others 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 disfunction.

## LANGUAGE SKILLS

*This category of findings resulted from measurements designed to assess the ability to understand, repeat, and produce the symbols of language.*

### Status:

Upon gross screening, 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.

**Functional Implications:**

Overall, language skills are intact but reflect an impoverished background with limited academic and intellectual resources.

**SPATIAL-CONSTRUCTIONAL ABILITIES**

*The ability to perceive, process, and motorically translate visual stimuli was assessed at increasing levels of complexity. These skills can be affected by such factors as visual field inattention and self-regulatory skill deficits.*

**Status:**

When asked to copy a complex geometric figure (Rey Complex Figure), Mr. Thomas exhibited an organized approach to the drawing, and a relatively accurate final product. Overall, his accuracy score was within the average range (34 pts.). His ability to replicate geometric designs using colored cubes was in the mildly impaired range (Block Design subtest, WAIS-R;  $t=37$ ). On a less structured test of constructional skills involving puzzle construction, Mr. Thomas demonstrated low average to borderline impaired performance (Object Assembly subtest, WAIS-R;  $t=42$ ).

**Functional Implications:**

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 requires him to analyze spatial details, differentiate subtle features, or put complex objects or products together.

**MEMORY**

*Memory processing is a complex orchestration of many brain areas which allow for the encoding, storage, and retrieval of information. Memory processes are reliant on several cognitive skills that are not part of the theoretical memory neuro-mechanisms. These include attention, concentration, and the ability to initially process the information. In addition, memory functioning can be affected by such factors as motivation, anxiety, and emotional functioning.*

**Status:**

Spatio-temporal orientation was clearly intact. Immediate and delayed retrieval of logical and linearly organized information exceeding immediate attention span was assessed with the Logical Memory subtests from the Wechsler Memory Scale-Revised. The exam involves the presentation of two short stories. Examination of immediate recall revealed borderline retrieval (19/50 bits of information which is at the 17th percentile). His 30 minute delayed recall of the complex figure discussed in the section above was in the average range.

His retrieval performance on a challenging list learning task was assessed using the Rey Auditory Verbal Learning Test. On this task, he was presented 15 unrelated words over a series of five presentations. He was able to retrieve an average number of words on the first trial (7 words) and exhibited average overall learning across trials (59 words total). By the fifth trial he was able to recall 15 words, performance which is in the average range. He recalled 7, 11, 11, 15, and 15 words on the first through fifth trial respectively, suggesting a positive and strong learning curve. After a second word list was presented to distract him, he demonstrated no difficulty returning to the original word list, retrieving 12 words. Six intrusion errors were noted, which is slightly higher than expected. After a 30 minute activity filled delay he recalled 12 words, performance in the average range. His ability to recognize the target words among a larger body of words was found to be in the average range as he recognized 14 of the 15 original words.

**Functional Implications:**

Overall, 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.

**FRONTAL SYSTEMS/SELF-REGULATION**

*This category of findings reflect the ability to orchestrate internal searches, alternate attentional focus, generate and test hypotheses, sustain and self monitor behavior, and to inhibit impulses.*

**Status:**

Mr. Thomas was administered a measure of problem solving skills (TOPS). The measure involved the presentation 13 stories and hypothetical problems for which Mr. Thomas was required to demonstrate the ability recognized the issues surrounding a problem, the ability to generate solutions to those hypothetical problems, and the ability to provide good rationale for his solutions. On this measure he performed rather poorly and his performance was within the range normally seen among 14 year olds (38 pts.; 14-4 year range).

Mr. Thomas demonstrated average verbal fluency on a lexical word generation task (producing words beginning with a given letter) in the presence of mildly reduced performance on a measure of semantic fluency (generating words belonging to a particular semantic category).

Mental set shifting skills were examined through the use of a measure which required rapid alternation between numbers and letters in order (Trails B time = 113 seconds). On this test he displayed performance that was over one and one half standard deviations from the norm, placing him in the mildly impaired range. His ability to shift mental sets, generate hypotheses, and utilize verbal feedback to alter his response set was measured using a conceptual card sorting test (Wisconsin Card Sorting Test). On this test he was able reason out a card sorting strategy six out of six times, with an average number of errors. He displayed no significant tendency to perseverate, and utilized feedback provided adequately to shift his response pattern. Mr. Thomas was administered a concept formation that involves the development and application of problem solving strategies through the use of response feedback (Short Category Test). On this measure he was required to determine which number (1, 2, 3, or 4) was symbolized by the stimuli presented to him. Among other skills, this measure requires concept formation skills, problem solving skills, the ability to use response feedback (correct or incorrect), and the ability to maintain a response set once the correct answer is found. On this measure he demonstrated low average performance. Abstraction skills appear to be in the low average range.

**Functional Implications:**

Overall, Mr. Thomas possesses significantly impaired skills related to social judgement and social problem solving. He may fail to understand social situations 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.

**MOTOR SKILLS****Status:**

Overall both fine motor speed and fine motor dexterity are bilaterally intact.

## SOCIAL/EMOTIONAL FUNCTIONING

### MMPI-2

*The MMPI-2 is the most widely used, well respected, and well researched personality assessment tools available. It involves the analysis of 567 true and false statements. The resulting profile contains ten main profile scales and many subscales to aid the examiner in painting an accurate picture of a patient's personality functioning. The profiles generated by the patient's performance can be compared to known populations of personality types and various personality disorders. The measure also contains multiple scales of validity to assess whether, and to what degree a patient is minimizing or exaggerating psychopathology, and can detect carelessness and inconsistent responding.*

Mr. Thomas completed the MMPI-2 in my presence during one two hour session. He was able to read all of the items and subjectively felt as if he had understood each statement. The validity scales indicated that he did not attempt to exaggerate his symptoms ( $F-K = -1$ ,  $Sub-Obv = 115$ ,  $|F(9)-Fb(6)| = 3$ ,  $VRIN = 10$ ,  $TRIN = 8$ , etc.). Analysis of the consistency of his responding suggested that he did not take a haphazard or inconsistent approach to the inventory. Likewise, he did not appear to be overly guarded, and he did not endorse items which were obviously untrue. Thus, the profile appeared to be a valid indicator of current personality functioning.

The clinical profile was remarkable for multiple significant clinical scale elevations (Welsh Code 9"7864' - 20/13:5# FL-/:K#). His 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 is 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.

### HARE PCL-R

*The PCL-R was developed through research on many thousands of inmates and forensic patients. It is likely the most widely respected and empirically driven measure of sociopathic and antisocial personalities. The interrater reliability is high ranging from .83 to .86 and from .91 to .93 when two independent ratings of a single individual are averaged. Statistical analysis of the measure suggests that two factors together characterize the antisocial personality. The first, and most important is Factor 1 related to callousness and remorseless use of others (see table 1 below). Factor 2 is related to chronically unstable and antisocial lifestyle (see table 2 below).*

Table 1

#### FACTOR 1

*Glibness/Superficial Charm  
Grandiose Sense of Self Worth  
Pathological Lying  
Conning/Manipulative  
Lack of Remorse or Guilt  
Shallow Affect  
Callous/Lack of Empathy  
Failure to Accept Responsibility*

Table 2

#### FACTOR 2

*Need for Stimulation/Proneness to Boredom  
Parasitic Lifestyle  
Poor Behavior Controls  
Early Behavior Problems  
Lack of Realistic Long Term Goals  
Impulsivity  
Irresponsibility  
Juvvenile Delinquency  
Revocation of Conditional Release*

Mr. Thomas was rated on the Hare Psychopathy Checklist - Revised (PCL-R). Factor 1 was scored a 7 while factor 2 was scored at 16. His total adjusted score of 24.2 is consistent with the score obtained by about 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.

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### SUMMARY AND RECOMMENDATIONS

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Mr. Thomas is a 24 year old (DOB 11-6-72) African-American male who is awaiting trial for his alleged connection to the robbery of a Lone Star restaurant and the murder of two employees at that restaurant. The date of the alleged offense was April 15, 1996.

The neuropsychological assessment appears to accurately portray his current neuropsychological functioning. There was no indication of purposeful or unconscious malingering or suboptimal effort. The following pattern of performance emerged from the assessment:

1. Intellectual functioning is in the borderline range at 79. Verbal reasoning and visual/perceptual reasoning are equally poor.
2. Academic skills testing suggest the clear presence of a learning disability for reading writing and arithmetic.
3. Attention, concentration and mental processing speed are significantly below average. More complex forms of concentration are rather severely impaired.
4. Basic language skills related to word finding and comprehension are adequate although his vocabulary level 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 when under the duress of time or stress.
8. Motor skills are grossly intact with regard to speed and dexterity.
9. Personality assessment revealed a highly suspicious young man with persistent feelings of betrayal, impulse control problems and difficulties with authority.

Together, there are multiple indicators of mild but significant levels of neurocognitive dysfunction. While he is not considered mentally deficient or retarded, his performance was certainly severe enough to present major obstacles in social and emotional functioning.

Overall, several conclusions can be made when all factors are considered (his neuropsychological assessment and personality assessment, together with clinical observations and background history):

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 ethics that, while unique and not always appropriate for this society, are nonetheless suggestive of a strong moral code. In this sense he is capable of showing remorse and has the ability to care deeply for others. Such qualities are lacking in the true sociopath.

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. Mr. 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.

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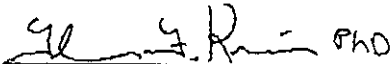
#### ICD-9 DIAGNOSTIC IMPRESSIONS

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Antisocial Personality Disorder

Thank you for this most interesting referral.

Respectfully Submitted,



Thomas F. Kinsora, Ph.D.  
Clinical Neuropsychologist  
License PY265





CLARK COUNTY SCHOOL DISTRICT  
SPECIAL STUDENT SERVICES  
**PSYCHOLOGICAL REPORT**

## FOR RESTRICTED USE ONLY

Information contained in this report is confidential. It is intended for professional staff, to be utilized in working with the child.

NAME THOMAS, Marlo (#300128) B.D. 11-6-72 Age 9-0

SCHOOL Decker GRADE 2 Primary Language Spoken Other than English

☒ INITIAL EVALUATION

☐ REEVALUATION  
Present Handicapping Condition \_\_\_\_\_

Reason for referral Learning difficulties

Date(s) tested 11-12-81 Instruments used WISC-R, WRAT, PIAT, PPVT,

Beery, Motor Free, Behavior Problem Checklist

## WECHSLER INTELLIGENCE SCALES

	Scaled Score	IQ	Verbal Tests	Scaled Score
Verbal	38	85	Information	6
Performance	40	86	Similarities	8
Full Scale Score	78	84	Arithmetic	8
			Vocabulary	9
			Comprehension	7
			(Digit Span)	

Performance Tests	Scaled Score
Picture Completion	8
Picture Arrangement	8
Block Design	9
Object Assembly	10
Coding	5
(Mazes)	

## OTHER INTELLIGENCE TESTS

Name of Test	M.A.	I.Q.
PPVT	6-10	81

## WIDE RANGE ACHIEVEMENT TEST (JASTAK)

Reading	Grade	SS	66	%ile	1
Spelling	Grade	SS	69	%ile	2
Arithmetic	Grade	SS	84	%ile	14

## OTHER ACHIEVEMENT TESTS

Name of Test	Grade	SS	%ile
PIAT		82	12
Math		72	3
Reading Recog.			
Reading Comp.		69	2
Spelling			

## OTHER DIAGNOSTIC INSTRUMENTS AND RESULTS

Beery: VMI Age 6-5

Motor Free: Perceptual Age 6-8

Behavior Problem Checklist: Acting out and aggressive tendencies

☐ A. T. Qualified

☐ A. T. Non-Qualified

FOR USE WITH ACADEMICALLY TALENTED REFERRALS ONLY

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Jerry Swan - School Psychologist  
EXAMINER/TITLE 4-1-82 bah

RA 000111

### Referral

Marlo was referred because of academic difficulties and behavior problems.

### Test Behaviors

Marlo readily accompanied the examiner on the day of the evaluation. There were no indications of undue situational anxiety relative to the evaluation. Marlo was cooperative in attempting requested tasks. Marlo did respond verbally when the nature of the task required so, but he did not initiate or engage in extraneous conversation. At times Marlo's speech was somewhat difficult to understand. He seemed to have some difficulty with language related concepts. There was no excessive non-directed motor activity noted during the evaluation. Marlo seemed to relate more easily to highly structured tasks.

### Test Results

The Wechsler Intelligence Scale for Children-Revised was administered to assess the level of intellectual functioning. Marlo's scores indicated that he is currently functioning in the slow learner range of intellectual development overall. There was not a discrepancy noted between the Verbal (auditory-vocal) and the Performance (visual-motor) score. This would suggest that these major channels are operating equally effectively in the gathering and processing of information. The overall profile was not characterized by significant amounts of inter-subtest variability. The Peabody Picture Vocabulary Test was also administered. The results of the PPVT suggested that receptive vocabulary skills are at a level comparable to the overall level of intellectual functioning.

An assessment of the level of academic functioning included the Wide Range Achievement Test and the Peabody Individual Achievement Test. On the WRAT Marlo obtained the following grade equivalent scores: reading, 2.0; spelling, 1.9; and arithmetic, 2.9. On the PIAT the following grade equivalent scores were obtained: mathematics, 2.3; reading recognition, 1.5; and spelling, 1.5. Although Marlo has developed a minimal sight word reading vocabulary, he would appear to lack phonetic analysis skills. Responses to both decoding and encoding tasks were marked by a lack of letter-sound association skills. A tendency to reverse letters was also noted. Marlo characteristically responds to the initial consonant sound in a word.

On the Beery Development Test of Visual-Motor Integration, Marlo obtained an age score of six years and five months. His chronological age at the time of the evaluation was nine years and zero months. The results would suggest poorly developed visual-motor integration skills for his current age and level of functioning. The Motor-Free Visual Perception Test was also administered. Marlo obtained an age score of six years and eight months on the Motor-Free. This score is also below the expectancy.

The Behavior Problem Checklist was completed by the classroom teacher as a result of Marlo's frequent behavior problems in unstructured situations (recess, playground, lunch room). The results indicated that Marlo was rated at one standard deviation above the mean on the Conduct Problem Scale in comparison to an unselected second grade population. The other scales were at or below the mean for his age.

THOMAS, Marlo  
11-6-72

CCF-561  
Page 3

Test Results (Continued)

The Conduct Problem scale is a reflection of aggressive and acting out tendencies. Behavioral reports and discipline referrals would confirm the presence of acting out tendencies. However, it should be noted that at the present time these incidents are confined to unstructured settings and are not a major problem in the regular classroom.

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.

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 program is also recommended relative to unstructured time. Behavior in the classroom should be closely monitored and if this area becomes a concern, the Multidisciplinary Team should be reconvened to consider appropriate alternatives.

Jerry Swan - School Psychologist  
4-1-82 bah

RA 000113

CLARK COUNTY SCHOOL DISTRICT  
SPECIAL STUDENT SERVICES  
**PSYCHOLOGICAL ADDENDUM**

SP-1

STUDENT I.D. NUMBER: 300128  
NAME THOMAS, MARIO B.D. 11-6-72 Age 11-3  
SCHOOL CBS GRADE 4  
Addendum Date 2-29-84 Test Date \_\_\_\_\_  
Recommendations for eligibility and/or programs: SEE BELOW

**SUMMARY AND RECOMMENDATIONS**

The above named student was presented to the Special Programs Review Committee. The IEP committee met this date and he/she is recommended for placement in the following program.

	CODE
<input type="checkbox"/> Specialized LD	62
<input checked="" type="checkbox"/> Specialized EH/ED	64
<input type="checkbox"/> Communicatively and Behaviorally Disordered	64
<input type="checkbox"/> Severe Oral Language Handicapped	65
<input type="checkbox"/> Multiple Handicapped	67
<input type="checkbox"/> EMH/TMH	71
<input type="checkbox"/> Mildly Mentally Handicapped (First Grade)	72

For eligibility change, the appropriate "Multidisciplinary Team Report" (CCF-542 — CCF-546) is required.

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Jeffrey R. Amos / Elem. Case Mgr.  
Signature/Title

PSYCHOLOGICAL REPORTFOR RESTRICTED USE ONLY

Information contained in this report is confidential.  
It is intended for professional staff, to be utilized in working with the child.

NAME THOMAS, Marlo #300128B.D. 11-6-72Age 11SCHOOL H.M. SmithGRADE 4Primary Language Spoken  
Other than English

INITIAL EVALUATION

☒ REEVALUATIONPresent Handicapping Condition L.D.Reason for referral To determine current levels of functioning.Dates(s) tested 2-2-84Instruments used SIT, WRAT, PLAT, ERP, Behavior ProblemChecklist, CIBS - BenderWECHSLER INTELLIGENCE SCALESOTHER INTELLIGENCE TESTS

	Scaled		Verbal Tests	Scaled		Performance Tests	Scaled	Name of Test	M.A.	I.C.
	Score	IQ		Score			Score			
Verbal			Information			Picture Completion		<u>SIT</u>	<u>9-4</u>	<u>83</u>
Performance			Similarities			Picture Arrangement				
Full Scale Score			Arithmetic			Block Design				
			Vocabulary			Object Assembly				
			Comprehension			Coding				
			(Digit Span)			(Mazes)				

WIDE RANGE ACHIEVEMENT TEST (JASTAK)OTHER ACHIEVEMENT TESTS

Reading	Grade	SS <u>75</u>	%ile <u>5</u>
Spelling	Grade	SS <u>62</u>	%ile <u>1</u>
Arithmetic	Grade	SS <u>82</u>	%ile <u>12</u>

Name of Test	Grade	SS	%ile
Math		<u>85</u>	<u>16</u>
Reading Recog.		<u>74</u>	<u>4</u>
Reading Comp.		<u>72</u>	<u>3</u>
Spelling		<u>-65</u>	<u>-1</u>

OTHER DIAGNOSTIC INSTRUMENTS AND RESULTS

CIBS- Math - Mastery of addition in mastery of single digit division beginning to memorize multiplication tables.

## Behavior Problem Checklist:

Rater 1 - CP, 14

Rater 2 - CP, 11

Rater 3 - CP, 7

Bender - 1 error

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Canary - Student's Confidential Folder

Jerry Swan, School Psychologist

Examiner/Title 2-23-84 dap

RA 000115

NAME: THOMAS, Marlo #300128  
Birthdate: 11-6-72

CCF-561  
Page 2

1. Referral and Background Information:

Referral source Teacher

Referral question Current levels and appropriate programming.

Pertinent Educational History Resource placement on basis of learning disability with secondary behavioral concerns.

Pertinent Health/Developmental Information:

Vision

Hearing

Medication

Other

Comments: No significant medical concerns noted.

2. Test Behavior/Observations - Comment on following:

Attending skills

Activity level No excessive non-directed motor activity noted during evaluation.

Relationship with examiner Minimal cooperation, resistive.

Communication Verbalized only when directly addressed.

Problem Solving Behavior

Comments:

3. Behavior/Social/Emotional:

Source(s): Behavior Problem Checklist, BRP

Comments: Average score of 11 on C.P. score of BPC is 2 standard deviations above mean for unselected sample of 4th grade scales (Touliatos and Lindholm 1975). Specific concerns by all raters included attention seeking, disruptiveness, short attention span, fighting, disobedience and easily angered. BRP results reflected an aggressive frequently disciplined, disruptive student who consistently refuses to follow school rules.

4. Perceptual/Motor:

Source(s): Bender

Comments: There was one rotation in Marlo's execution of the Bender designs. The presence of dashes for dots would seem to reflect Marlo's lack of interest in the task and passive resistance to the task. Overall performance would suggest minimal compliance.

5. Other (Prevocational/Vocational, Language, Adaptive Behavior, etc.):

Source(s):

Comments:

RA 000116

NAME: THOMAS, Marlo  
Birthdate: 11-6-72

CCF-561  
Page 3

6. Intellectual:

Source(s): SIT

Classification/Range: V.I.O. P.I.Q. F.S.I.Q.

Comments: The results of the intellectual screening indicated that Marlo continues to function in the slow learner range of intellectual development with an M.A. of 9-4 and an IQ of 83.

7. Academic Skills:

Source(s): WRAT, PIAT, CTBS-Math

	<u>AREA</u>	<u>COMMENTS</u>
A. Reading Range/level SS - 74-75	<u>Recognition</u>	Functional sight word skills.
	<u>Attack</u>	Poorly developed phonetic analysis skills.
	<u>Comprehension</u>	Comparable to and limited by decoding skills.
B. Spelling Range/level SS - 62-65	<u>Written</u>	Frequent reversals (b-d), limited ability to apply.
	<u>Recognition</u>	Basic letter - sound associations to encoding.
C. Written Expression Range/level _____		
D. Math Range/level SS - 82-85	<u>Concepts</u>	Understands processes of addition and subtraction.
	<u>Computation</u>	Mastery of addition and single digit subtraction.

Comments: Marlo appears to understand the basic processes of addition and subtraction although he has not mastered computations. He has memorized some multiplication and division combinations.

Spelling (written language) is an area of significant difficulty for Marlo. Reversals (b-d) and still present and would be viewed as highly significant at this point.

RA 000117



NAME: THOMAS, Marlo  
Birthdate: 11-6-72

CCF-561  
Page 4

8. Analysis of skills and abilities:

A. Strengths

Math is an area of relative academic strength. Capable of functioning at an acceptable level in a one to one setting.

B. Weaknesses

Behavior -

Aggressive, acting out (verbal and physical)

Failure of following school rules

Disruptive - distracts other students, verbal outbursts

Insubordination - refusal to follow commands

Academic -

Poorly developed decoding and comprehension skills, significant deficits in encoding

9. 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.

10. Recommendations:

It is recommended that the MDT consider eligibility as an educationally handicapped student on the basis of the discordant peer relationships, failure to adapt and function of 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.

Jerry Swan, School Psychologist  
2-23-84 dap

RA 000118

CONFIDENTIAL PSYCHOLOGICAL EVALUATION:

NAME: MARLO THOMAS  
AGE: 12  
DATE OF BIRTH: November 6, 1972  
SCHOOL: Bracken  
GRADE: 5th  
REFERRED BY: Ted Shoemaker  
EXAMINED: November 13, 1984  
EXAMINER: Eric Smith, Ph.D.

This 12-year-old Black male was referred for a psychological evaluation due to his aggressive behavior. He is presently being charged before the Court with Trespassing and Battery. Allegedly, Marlo had entered a residence unlawfully and kicked a female occupant as he left. He has a history of confrontations with those in authority.

PHYSICAL PRESENTATION:

Marlo Thomas has black hair and brown eyes. He looks to be of average height and weight, and physically appears about his chronological age. His appearance was neat and his posture and body movements were normal. Walk and gait were normal. No atypical psychomotor activity was noted. Facial expressions during the interview generally reflected no particular affect. Marlo spoke in a soft voice and rate of speech was appropriate. Manner of speech was noted as normal, but his stream of speech was sometimes incoherent. No other unusual or bizarre aspects of speech were noted.

MENTAL STATUS:

Marlo was fairly cooperative in his interactions with the Examiner. Level of consciousness during the session was unimpaired. Marlo was well oriented in time, place and person. Mild deficits were observed in attention span and concentration. Marlo exhibited no impairment for recent memory, and there was no evidence of amnesia. Current intellectual level functioning appears to be below average. Examination of perceptual processes revealed no evidence of hallucinations of any nature. Evaluation of thought content showed no unusual aspects. The predominant mood during the evaluation was that of composure with limited affect. There was no evidence of significant cyclic mood changes. Judgement appears to be extremely poor and degree of impulse control was estimated to be extremely limited. There is no history of serious alcohol or drug abuse, suicidal threats or attempts.

DIAGNOSIS:

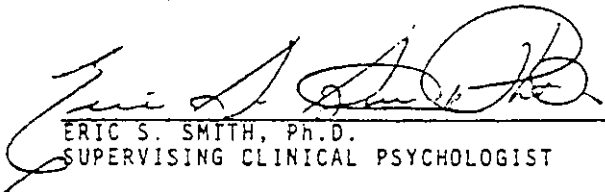
312.00 Conduct Disorder, Undersocialized, Aggressive

CONFIDENTIAL PSYCHOLOGICAL EVALUATION  
MARLO THOMAS  
PAGE 2

PROGNOSIS:

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.

If further information is needed, please contact the Juvenile Court Psychology Department and arrange for a case staffing.



ERIC S. SMITH, Ph.D.  
SUPERVISING CLINICAL PSYCHOLOGIST

dw

RA 000120

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 \*\*\*\*\*

DATE: 08/26/89		P R E V I O U S   R E C O R D				PAGE: 01	
PREVIOUS RECORD FOR: THOMAS		MARLE		DEMITRIUS		ID#: 78470304	
PROBATION OFFICER: ENSWORTH-NYTC		CASE #: 029999					
REF	DEF	REFERRAL	OFFENSE	REFAL	STATUS	PROBATION	OFF
#	#	DATE	DESCRIPTION	AGENCY	DATE	ACTION	OFFICER
013	001	07/09/87	BROAD WEAP	NLVPD	08/19/87	DISMISSED	F GUZMAN
012	001	06/04/87	G L	LVMPD	10/29/87	COMMIT NYTC	F GUZMAN
011	001	03/04/86	BATTERY	NLVPD	07/07/86	DN-OFFNS INSIG	X J.S.MACDONALD
010	001	03/14/86	BATTERY	CCSD	04/11/86	DISMISSED	F GUZMAN
009	001	10/04/85	BATTERY	LVMPD	11/15/85	DISMISSED	FRED FISHER
008	001	10/04/85	BATTERY	LVMPD	11/15/85	DISMISSED	FRED FISHER
007	001	10/04/85	BATTERY	LVMPD	11/15/85	DISMISSED	FRED FISHER
006	001	10/02/85	BATTERY	LVMPD	11/15/85	DISMISSED	FRED FISHER
005	001	05/08/85	BATTERY	LVMPD	07/18/85	REF PROBATION	FRED FISHER
004	001	05/15/85	BATTERY	LEGAL	05/15/85	DN-OTHER	SCOTT MITCHELL
003	001	11/07/84	TRESPASSING	LVMPD	12/12/84	DISMISSED	F GUZMAN
002	001	11/07/84	BATTERY	NLVPD	12/12/84	DISMISSED	F GUZMAN
001	001	09/25/84	EVADING POL OPR	NLVPD	12/12/84	DISMISSED	F GUZMAN
000	001	09/25/84	VAG/ABOM	NLVPD	09/27/84	DN-FILING O/CHC	BOS 7511000
003	001	07/19/84	BATTERY	LVMPD	01/02/85	FORM PROE	JOHN MCGURDARY
002	001	12/12/84	BATTERY	NLVPD	01/02/85	FORM PROB	JOHN MCGURDARY
001	001	07/05/84	ROBBERY				
001	001	03/28/84	BATTERY	LVMPD	05/04/84	JUD REPRIMAND	FRED FISHER
TOTAL 31 REF 013 DEF 012							

Exhibit "B"

RA 000121

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PREVIOUS RECORD FOR: THOMAS MARLO DEMITRIUS ID#: 78420304 PG 02

PROGRAM & TREATMENT STATUS

REFERRAL NUMBERS	-- WARDSHIP -- S/DATE T/DATE	FACILITY	PRGM/TREAT	DT PRGM/TREAT - STARTED ENDED
09/02/87		THIRD COTTAGE NYTC	COMM 3RD COTT NO PRGM RPTD	09/02/87 10/29/87
09/02	01/02/85 01/23/86	LEGAL RESIDENCE NYTC BARDED	LEGAL RESIDENCE HMP	10/29/87 06/21/88
03 02		LEGAL RESIDENCE FORMAL PROB		10/23/84 11/08/84
				01/02/85 01/23/85

PSYCHOLOGICAL REPORT

## FOR RESTRICTED USE ONLY

Information contained in this report is confidential.

It is intended for professional staff, to be utilized in working with the child.

NAME THOMAS, Marlo D. #300128B.D. 11-06-72Age 14-4SCHOOL (Garside JHS) Milley A.C.GRADE 8Primary Language Spoken  
Other than English

INITIAL EVALUATION

☒ REEVALUATIONPresent Handicapping Condition S.E.H. (64)Reason for referral ReevaluationDates(s) tested 03-24-87, 03-26-87Instruments used WISC-R, Kaufman Test of Educational Achievement (K-TEA), Test of Written Language (TOWL), Incomplete Sentence Blank, Brigance, Differential Sorter, Parent Information Questionnaire.WECHSLER INTELLIGENCE SCALESOTHER INTELLIGENCE TESTS

			Scaled		Scaled			
			Verbal Tests	Score	Performance Tests	Score	Name of Test	M.A. I.Q.
	Scaled							
	Score	IQ	Information	6	Picture Completion	7		
Verbal	35	81	Similarities	9	Picture Arrangement	12		
Performance	45	92	Arithmetic	6	Block Design	7		
Full Scale Score	80	85	Vocabulary	7	Object Assembly	8		
			Comprehension	7	Coding	11		
			(Digit Span)	(5)	(Mazes)			
				35		45		

K-TEAOTHER ACHIEVEMENT TESTS

				Name of Test			Grade	SS	%ile
Reading	Grade	3.1	SS 66	%ile	01				
Spelling	Grade	1.8	SS 55	%ile	.1	Math			
Arithmetic	Grade	4.4	SS 68	%ile	02	Reading Recog.			
						Reading Comp.			
						Spelling			

OTHER DIAGNOSTIC INSTRUMENTS AND RESULTSBrigance

Reading - approx. level - 3rd grade

TOWL (Paragraph Writing Section)

Very poor paragraph development

Poor spelling, word usage and thematic maturity.

## DISTRIBUTION

Original - Office File

Canary - Student's Confidential Folder

James A. Treanor, School Psychologist

Examiner/Title 05-05-87 sjo dis RA 000123

D

BACKGROUND AND REFERRAL INFORMATION:

Marlo was referred for a three year Special Education evaluation. He was seen by the School Nurse with no apparent physical, visual or hearing impairment reported.

Marlo was originally referred to Special Student Services in November, 1981. He was evaluated and placed as a Learning Disabled student in the Resource Room program at Decker Elementary. In February, 1984 he was referred to a school multidisciplinary team and found eligible as an Educationally Handicapped student. He was then referred to the Special Programs committee and sent to the CBS - SEH program in March, 1984. Marlo's mother requested he be removed from CBS in October, 1984 and returned to a regular campus. He attended the Bracken SEH program with poor results and he returned to CBS in September, 1985. Again in September, 1986, Marlo was returned to a regular campus SEH program, Garside J.H.S., on a transitional basis. In November, 1986 he returned to Miley Center (previously CBS) due to his inability to meet the criteria of the transitional placement. Marlo's behavior has improved throughout the remainder of the 1986-87 school year and he has been projected for another trial placement at Garside JHS for the last nine weeks of the school year.

Marlo has been involved with the Juvenile Court system because of various incident involving physical aggressive behaviors.

OBSERVATIONS:

This evaluator has observed Marlo in many settings and over an extended period of time. His behaviors could be characterized by a DSM-III category of Conduct Disordered-Socialized. He has social attachments and often exhibits leadership characteristics. He doesn't seem to feel remorse or guilt over his acts and he has a pattern of conduct in which the basic rights of other or rules are violated. Marlo's behavior has been observed as inconsistent. He can choose to accept consequences and he can make decisions about his own behavior. Marlo has many characteristics of a learning disabled student and he can become easily frustrated if given material too difficult for him to handle. At that point acting out or aggressive behaviors can be exhibited. Marlo has a tendency to give non-verbal facials that cue an observer to his feelings.

In the formal testing environment Marlo was very cooperative and friendly. He related his desire to leave Miley and attend a regular campus so he could play football next year. He did experience frustration and he handled it well with a simple explanation that the test was designed for older aged children. Marlo did seem to like the successes he had on the intelligence test and he worked well with simple praise and encouragement. Two years ago he gave up easily on tasks and now he was able to work for two minutes on frustrating block design tasks.

This evaluator has seen personal growth in Marlo over the past two years. He can control his behaviors but he needs a very consistent consequential environment to enable him to make appropriate decisions.

TEST RESULTS AND INTERPRETATIONS:

WISC-R:

Marlo scored in the Low Average range on both the Verbal and Full Scale scores of this instrument. His Performance score fell just above the Low Average range. There was not a significant discrepancy between the scores although the Performance score was eleven points higher. This score was similar to this last WISC-R score in 1981, and a Slosson Test score from 1984. This evaluator would consider this test as a valid estimate of the areas evaluated when compared to others his age. Marlo was quick on the Performance Tasks but had to use a trial and error method on the manipulative block design and object assembly tasks. His learning expectancy level would approximate a late sixth grade to early seventh grade level.

TEST RESULTS AND INTERPRETATIONS: CONT'D

Kaufman Test of Educational Achievement:

This achievement test looked at the math, reading and spelling areas. Marlo was significantly low in all three areas when compared to other children his age. Marlo's spelling scores were at an ending first grade level. He had trouble with choosing the correct vowel in his attempts at spelling the word. He was easily frustrated in this area. Marlo's reading score was slightly higher, a beginning third grade level with a sight word approach most evident in his decoding process. He had trouble utilizing contextual clues to derive meaning from sentences. Marlo's interpersonal strength areas was mathematical computations. His grade equivalent score approximated a fourth grade level with adequate basic operations skill development. Marlo still made simple errors in regrouping and he was very slow at multiplication and division problem solving. Marlo had difficulty deciding which operation to use on story problems presented to him.

Test of Written Language - (TOWL):

Marlo reluctantly attempted the paragraph writing section of this test. His paragraph was short and had many spelling and sentence development mistakes. He would need much improvement in this area prior to attempting to pass the Nevada Competency Test.

Brigance:

The classroom teacher gave this instrument to Marlo. The results indicated approximate beginning third grade level skills in reading, second grade skills in spelling and third grade skills in arithmetic computations. He had trouble with borrowing in subtraction and with multidigit by multidigit multiplication problems.

Incomplete Sentences Blank:

Marlo's feeling level responses were typical teenager responses. He stated he liked sports and football in particular. He did not like school and he has a worry about returning to "Juvy". No significant emotional problems were evident in this projective instrument.

Differential Problem Sorter and Parent Information Questionnaire:

These two instruments were given to Marlo in an SEH study conducted by the CCSD and Dr. Kelly from UNLV. The results should be looked at diagnostically as the instruments are not validated or normed at this time. Basically, Marlo came out as a conduct disordered type student with no emotional indicators evident to a degree of significance. This would concur with the Miley observations of Marlo.

SUMMARY AND RECOMMENDATIONS:

Marlo Thomas is a fourteen year old eighth grade student at Miley Achievement Center. He has been in Special Education as a learning disabled or emotionally handicapped student since 1981. Marlo continues to exhibit both learning and emotionally/behavioral problems that indicate a need for Special Education Services. Marlo is about to be transitioned to the Garside SEH program because his behaviors have been appropriate for an extended period of time. Marlo exhibits conduct disordered-socialized aggressive type behaviors that need continual monitoring in a consistent environment. Based on the observations, teacher input and the formal/informal testing this evaluator would recommend:

1. Marlo be staffed by the Miley MDT to determine eligibility for Special Education.

RA 000125



THOMAS, Marlo D. #300128  
11-06-72

OCF-561  
Page 4

SUMMARY AND RECOMMENDATIONS: CONT'D

2. At this time Marlo primary handicapping condition would seem to fall in the emotional area followed closely by his learning problems.
3. The Miley staff closely monitor and work with the Garside staff.
4. Marlo be taught at his appropriate grade level of achievement.
5. Natural consequences for physical aggression should be followed (juvenile authorities should be notified if appropriate).

James A. Treanor, School Psychologist  
Examiner/Title 05-05-87 sjo disk 227

RA 000126

CONFIDENTIAL PSYCHOLOGICAL EVALUATION:

NAME: MARLO THOMAS  
AGE: 14  
DATE OF BIRTH: November 6, 1972  
SCHOOL: Miley Achievement Center  
GRADE: 8th  
REFERRED BY: Mary Resendez  
EXAMINED: July 22, 1987  
EXAMINERS: Tracey Quinn, Psychology Intern  
Samuel Butler, Ph.D., Juvenile Court Psychologist

PSYCHOLOGICAL TESTS ADMINISTERED:

Carlson Psychological Survey (CPS)  
Junior-Senior High School Personality Questionnaire (HSPQ)

PSYCHOMETRIC RESULTS:

Carlson Psychological Survey (CPS):

This test provides an indication of the level of chemical abuse, degree of thought disturbance, assessment of antisocial tendencies and character of the self-image experienced by the adolescent. Of the 18 possible personality/behavioral types identified by this particular test, the subject minor is classified as a "Type 3".

Adolescents of this type are usually described as immature and rebellious, but not decidedly antisocial. They commonly look for support from their peers and get into trouble while looking for this approval if they think some antisocial act will be looked upon with favor. That is, their offenses are generally unplanned, impulsive reactions to situations with little financial gain.

They are restless and, although they may start a project with great enthusiasm, their interest quickly fades and they are unable to complete a task. At that time, they may consider themselves confused and in need of assistance, but within a few days, they are involved in a new project. Generally, their motivation for change is crisis-limited.

This type of adolescent is usually a follower and his institutional adjustment will depend largely on the attitude of his fellow residents. They are seldom the cause of serious problems, but their immaturity makes it difficult for them to cope with structure and they may rebel, especially if encouraged by others. They appear to function best in minimum security settings.

# School District LETTERS

Junior-Senior High School Personality Questionnaire (HSPQ):

The Junior-Senior High School Personality Questionnaire is a standardized test which measures fourteen distinct traits of personality.

<u>FACTOR</u>	<u>SCALE</u>	<u>STEN SCORE</u> *
A	Introversion	vs. Extroversion: 7
B	Concrete thinking	vs. Abstract thinking: 5
C	Emotionally unstable	vs. Emotionally stable: 5
D	Inactive	vs. Overactive: 3
E	Accommodating	vs. Assertive: 4
F	Sober	vs. Enthusiatic: 5
G	Expedient	vs. Conscientious: 7
H	Shy	vs. Adventurous: 7
I	Tough-minded	vs. Tender-minded: 8
J	Impulsive	vs. Reflective: 4
O	Secure	vs. Apprehensive: 5
Q2	Group-dependent	vs. Self-sufficient: 6
Q3	Disregards social rules	vs. Socially precise: 4
Q4	Relaxed	vs. Tense: 4

\* Sten scores are standard scores such that a 5 or 6 is "average" while scores of 1 and 2 or 9 and 10 represent extremes of a given dimension.

Test results indicate that at times, complacency, inactivity and a reluctance to act quickly characterize Marlo. He may prefer a more deliberate and careful approach, and may have difficulty in completing tasks.

In terms of interpersonal relationships, he will tend to be obedient and easily led by others. He will also likely be somewhat dependent and conforming.

Present scores suggest that Marlo is likely to be somewhat adventurous and socially bold. He likes meeting people, is responsive, friendly and carefree.

Test scores suggest a general orientation toward the tender-minded, sensitive and somewhat overprotected end of the dimension. He is likely to be somewhat insecure, dependent and clinging, and may have tendencies toward imaginative, artistic expression.

A tendency toward group participation and group approval characterize Marlo. He is likely to go along with group pressure and may quickly conform to group standards.

Marlo's poor self-integration tends to produce behaviors that would be described as socially uncontrolled or careless of social protocol. He may not function well in group settings.

Marlo appears to be extremely field-dependent. He may tend to make poor judgements, lack care in his work and generally be less aggressive. He will likely have difficulty in complying with demands of exactness and precision.

The likelihood of Marlo becoming involved in activities related to juvenile delinquency appears at this time to be only moderate. His scores indicate that his personality pattern is only moderately related to delinquency proneness.

His leadership potential appears to be unpredictable and about average. He may take initiative in group settings only on certain occasions, and may assume responsibilities in some situations, but not others.

In terms of neuroticism, Marlo appears to be somewhat above average. His scores indicate that he may be expected to display some neurotic-type symptoms such as fearfulness, frustration and depression.

The likelihood of his responding favorably to a treatment program appears to be about average. His scores suggest moderate probability of success of a behavioral change program.

#### SUMMARY AND RECOMMENDATIONS:

Marlo is a 14-year-old male adolescent currently detained due to charges of Grand Larceny and Battery With a Deadly Weapon. He has been involved with Juvenile Court Services several times in the past three years for a series of similar and escalating offenses. There are also indications of repeated behavioral and social problems at Children's Behavioral Services and at each of the subject minor's schools. A review of Marlo's Clark County School District psychological evaluation suggests a "Learning Disabled" classification for which he receives specialized educational designation and programming.

Test results indicate that Marlo is particularly prone to manipulation by his peers. He is excessively dependent upon their approval, and may behave inappropriately in order to gain their social acceptance. Faulty judgement and inadequate impulse control also seem indicative of this adolescent.


He is assessed as being behaviorally disordered with no substantial intrusion of emotional disturbance that contributes to his escalating behavioral excesses. Clinically, he was diagnosed as 'Conduct Disordered, Undersocialized, Aggressive' (312.00 = DSM III classification) by a previous Juvenile Court Psychological Report dated November 13, 1984 (see copy attached). During the period between that and this present report, Marlo has continued in irresponsible, delinquent patterns of behavior albeit in concert with, and under the impetus of, negative peers.

MARLO THOMAS  
PAGE 4

This Unit can support a recommendation for institutional commitment as the subject minor's behavioral history indicates that he is better able to maintain in a structured, supervised environment. Neither does he make the connection between the character of -- and the natural or logical consequences of -- his behaviors. He is in need of behavioral disciplining, additional coping skills, impulse control and social orientation to make him compatible with behavioral norms. It is felt that an institutional commitment will initiate behavioral remediation in those areas.

If you have any questions or comments regarding this report, please contact the Psychological Services Unit on extension 5230.

  
TRACEY QUINN  
PSYCHOLOGY INTERN

  
SAMUEL F. BUTLER, Ph.D.  
JUVENILE COURT PSYCHOLOGIST

dw

RA 000131

TEST DIAGNOSIS OF NONMASTERY

NAME: THOMAS, MARLO DEMETRIUS

TEST LEVEL: 15

READING:

Level Vocabulary:  
4.7 (✓) same meanings (✓) opposite meanings (✓) multimeanings

Comprehension:

Literal:  
(✓) recall of facts

Interpretative:

(✓) inferred meanings (✓) character analysis  
(✓) figurative language

Critical:

(✓) author attitude/position ( ) techniques of persuasion

SPELLING:

Level (✓) consonant phonemes/graphemes (✓) morphemic units  
5.2 (✓) vowel phonemes/graphemes

LANGUAGE:

Level Capitalizations:  
4.1 (✓) I/proper nouns/adjectives (✓) beginning words/titles

Punctuations:

(✓) end marks (✓) quotations (✓) comma ( ) colon/semicolon  
( ) period/exclamation/question

Usage:

(✓) pronouns (✓) adjectives (✓) verbs

Sentence Structure:

( ) subject/verbs ( ) verbosity/repetition  
(✓) modifying/transitional words  
( ) misplaced modifiers/nonparallel  
(✓) complete/incomplete/run-on

Paragraph Organization:

(✓) sequence/topic ( ) concluding sentences

MATHEMATICS:

Level Computations:  
4.7 (✓) addition (✓) subtraction (✓) multiplication (✓) division

Concepts & Applications:

(✓) numeration (✓) measurements (✓) number properties  
(✓) number theory (✓) graph (✓) story problems  
(✓) number sentences ( ) functions (✓) geometry  
(✓) common scales

Reviewed and Submitted By:

*Jerry Herring*  
Jerry Herring, School Counselor

Date: March 25, 1988

TEST DIAGNOSIS OF NONMASTERY

NAME: THOMAS, MARLO DEMETRIUS

TEST LEVEL: 15

READING:

Level Vocabulary:  
4:7 (X) same meanings (X) opposite meanings (X) multimeanings

Comprehension:  
Literal:  
(X) recall of facts

Interpretative:  
(X) inferred meanings (X) character analysis  
(X) figurative language

Critical:  
(X) author attitude/position ( ) techniques of persuasion

SPELLING:

Level (X) consonant phoenemes/graphemes (X) morphemic units  
5.2 (X) vowel phonemes/graphemes.

LANGUAGE:

Level Capitalizations:  
4.1 (X) I/proper nouns/adjectives (X) beginning words/titles

Punctuations:  
(X) end marks (X) quotations (X) comma ( ) colon/semicolon  
( ) period/exclamation/question

Usage:  
(X) pronouns (X) adjectives (X) verbs

Sentence Structure:  
( ) subject/verbs ( ) verbosity/repetition  
(X) modifying/transitional words  
( ) misplaced modifiers/nonparallel  
(X) complete/incomplete/run-on

Paragraph Organization:  
(X) sequence/topic ( ) concluding sentences

MATHEMATICS:

Level Computations:  
4.7 (X) addition (X) subtraction (X) multiplication (X) division

Concepts & Applications:  
(X) numeration (X) measurements (X) number properties  
(X) number theory (X) graph (X) story problems  
(X) number sentences ( ) functions (X) geometry.  
(X) common scales

Reviewed and Submitted By: Jerry Herring

Jerry Herring, School Counselor

Date: 12/14/88



# CLARK COUNTY SCHOOL DISTRICT

2832 EAST FLAMINGO ROAD LAS VEGAS, NEVADA 89121 TELEPHONE (702) 736-5011



## BOARD OF SCHOOL TRUSTEES

Mrs. Lucille Lusk, President  
Mr. Dan Goldfarb, Vice President  
Mrs. Patricia A. Bendorf, Clerk  
Mrs. Virginia Brooks Brewster, Member  
Mr. Donald R. Feltz, Member  
Mr. Robert Forbush, Member  
Mrs. Shirley Holst, Member  
Robert E. Wentz, Superintendent

November 5, 1984

Mrs. Thomas:

The Clark County School District staff members who are familiar with Marlo Thomas feel that the appropriate program placement for identified IEP goals and objectives to be carried out is the SEH program housed at Children's Behavioral Services.

Since you have requested that Marlo be placed in a less restrictive setting, we would like to remind you of Clark County School District Student Regulations and Procedures that will be followed should Marlo violate them. Attached please find copies of pertinent regulations.

If Marlo cannot be adequately and safely maintained in the lesser restrictive setting, a CBS placement will again be recommended.

RA 000134

# CLARK COUNTY SCHOOL DISTRICT

2832 EAST FLAMINGO ROAD LAS VEGAS, NEVADA 89121 TELEPHONE (702) 736-5011



December 6, 1984

## BOARD OF SCHOOL TRUSTEES

Mrs. Lucille Lusk, President  
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Mrs. Stanley Holst, Member  
Robert E. Wentz, Superintendent

To: Juvenile Court Services  
Ted Schumacher, Probation Officer

From: Beth Sylvester, Special Education Zone Consultant

Re: Marlo Thomas

Dear Mr. Schumacher:

In response to your request for information regarding Marlo Thomas I have briefly summarized the most recent status on his placement changes.

In February 1984 Marlo Thomas' case was presented to the Elementary Special Programs Review Committee of the Clark County School District. At that time it was the committee's recommendation that Marlo be placed in the Specialized Emotionally Handicapped (SEH) Program at Children's Behavioral Services (CBS). A "less restrictive" SEH placement on a regular school campus was considered to be inappropriate at that time due to the severity of Marlo's acting-out behaviors.

Once placed in the CBS/SEH Program Marlo demonstrated behaviors that were indicative of needing the more specialized setting. He was agitated and disruptive in the classroom and was verbally and physically aggressive with peers and adults. In one particular instance he physically kicked a classroom aide. It was at this time that he was picked up by Metropolitan Police and charged with battery.

Following this incident Mrs. Thomas asked that Marlo be removed from the CBS/SEH Program. She voiced concerns that she did not want her son to be placed in Juvenile Detention. Arrangements were made for Marlo to begin in the SEH Program housed at Walter Bracken Elementary School. Attached please find two letters that were shared with Mrs. Thomas regarding the placement changes of Marlo.

Marlo continues to demonstrate aggressive acting-out behaviors in the Bracken SEH Program. He is making matter-of-fact choices in his behavior and has had to be restrained for threatening other classroom students. He has left the classroom on several occasions and has been suspended for purposeful actions against others and continued, persistent refusal to follow directions without physical restraint.

It is the feeling of those Special Educators (approximately 6-8) involved with

RA-000135

Marlo's case that Marlo does need a more restrictive placement. The Oasis program at CBS has been investigated by his mother. Should the Juvenile Court System agree that a more consistent and structured environment be warranted for this student, we would ask that careful consideration also be given to placing him back in a more restrictive setting for schooling.

If I can be of further assistance in clarifying any information, please contact me at 385-2270.

Sincerely,

*Beth Sylvester*  
Beth Sylvester

BS/sd

ENC: 2

TO WHOM IT MAY CONCERN:

I understand that my son, Marlo Thomas, has been recommended for placement in the Specialized Emotionally Handicapped (S.E.H.) class at CBS/MH and an I.E.P. has been developed for this program.

Although the Individualized Education Program Committee recommends that the S.E.H. placement at CBS/MH would be the most appropriate educational setting and best serve the needs of my son, I no longer wish him to continue in this placement.

It is my wish that Marlo be placed in an S.E.H. program on a regular school campus. I understand that this placement is contingent upon Marlo maintaining acceptable behavior for adequately working in an S.E.H. program placed upon a regular school campus.

Marlo Thomas  
(Signature/Date)

Ray B. L.  
(Witnessed/Date)

RA 000137

  
CLERK OF THE COURT

**WRIT**  
BRET O. WHIPPLE  
Nevada Bar No. 6168  
**BRET O. WHIPPLE ATTY AT LAW**  
1100 S. Tenth Street  
Las Vegas, NV 89104  
(702) 257-9500 [phone]  
(702) 974-4008 [fax]  
Attorney for Petitioner  
*Marlo Thomas*

**EIGHTH JUDICIAL DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

MARLO THOMAS,	)		
	)		
Petitioner,	)	<b>Case No.</b>	<b>C136862</b>
	)	<b>Dept. No.</b>	<b>XXIII</b>
v.	)		
	)	Date of Hearing:	8 / 30 / 10
	)	Time of Hearing:	9 : 30
	)		
E.K. MCDANIEL, Warden	)		
Ely State Prison, et al.,	)		
	)	(Death Penalty Case)	
Respondent.	)		

**PETITION FOR WRIT OF HABEAS CORPUS**  
**(POST-CONVICTION)**

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: **Ely State Prison, Ely, Nevada 89301**
  2. Name and location of court which entered the judgment of conviction under attack: **Eighth Judicial District, Las Vegas, Nevada, Clark County**
  3. Date of judgment of conviction:
  4. Case Number: **C136862**
  5. (a) Length of sentence:
  6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes \_\_\_ No X
- If "yes", list crime, case number and sentence being served at this time:

- 1 7. Nature of offense involved in conviction being challenged:
- 2 8. What was your plea? (check one)
- 3 (a) Not guilty X (c) Guilty but mentally ill \_\_\_\_
- 4 (b) Guilty \_\_\_\_ (d) Nolo contendere \_\_\_\_
- 5 9. If you entered a plea of guilty or guilty but mentally ill to one count of an
- 6 indictment or information, and a plea of not guilty to another count of an indictment or
- 7 information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: **N/A**
- 8 10. If you were found guilty after a plea of not guilty, was the finding made by: (check
- 9 one)
- 10 (a) Jury X
- 11 (b) Judge without a jury \_\_\_\_
- 12 11. Did you testify at the trial? Yes \_\_\_\_ No X
- 13 12. Did you appeal from the judgment of conviction?
- 14 Yes \_\_\_\_ No X
- 15 13. If you did appeal, answer the following:
- 16 (a) Name of court:
- 17 (b) Case number or citation:
- 18 (c) Result:
- 19 (d) Date of result:
- 20 14. If you did not appeal, explain briefly why you did not: **By following the advice of**
- 21 **counsel and pleading guilty, Peitioner could not appeal is conviction.**
- 22 15. Other than a direct appeal from the judgment of conviction and sentence, have you
- 23 previously filed any petitions, applications or motions with respect to this judgment in any court,
- 24 state or federal? Yes \_\_\_\_ No X
- 25 16. If your answer to No. 15 was "yes," give the following information:
- 26 (a) As to any first petition, application or motion, give the same information:
- 27 (1) Name of court:
- 28 (2) Nature of proceeding:

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- (3) Grounds raised:
- (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes \_\_\_\_ No \_\_\_\_
- (5) Result:
- (6) Date of result:
- (7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) As to any second petition, application or motion, give the same information:

- (1) Name of court:
- (2) Nature of proceeding:
- (3) Grounds raised:
- (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes \_\_\_\_ No \_\_\_\_
- (5) Result:
- (6) Date of result:
- (7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach. **N/A**

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion? **No.**

- (1) First petition, application or motion?  
Yes \_\_\_\_ No \_\_\_\_
- (2) Second petition, application or motion?  
Yes \_\_\_\_ No \_\_\_\_
- (3) Third or subsequent petitions, applications or motions?  
Yes \_\_\_\_ No \_\_\_\_

Citation or date of decision.

(e) If you did not appeal from the adverse action on any petition, application

or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length) N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify: N/A

(a) Which of the grounds is the same:  
(b) The proceedings in which these grounds were raised:  
(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes\_\_\_ No X.

If yes, state what court and the case number:



21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack:

Yes \_\_\_\_ No X

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. Each claim is presented below.

**INTRODUCTION:**

Marlo Thomas has been convicted of two counts of first degree capital murder. Mr. Thomas has an unusual procedural history that brings him to this court. He has two different sentencing proceedings. His first sentencing proceeding was overturned by the Nevada Supreme Court. As a result, the State had to present its case for death before another jury. The second penalty jury sentenced Mr. Thomas to death. However, they did so without the benefit of a wealth of mitigation evidence that counsel failed to prepare and present.

This honorable court appointed Bret Whipple counsel pursuant to Supreme Court Rule 250 to investigate and file Mr. Thomas' state post conviction petition related to his second penalty phase trial. This court denied any additional investigative funds to appointed counsel. It is a well-settled matter of law that defendants sentenced to death in Nevada are entitled to effective assistance of post conviction counsel. Crump v. Warden, 113 Nev. 293 (1997) (relying upon N.R.S. 34.820(1)(a)). Without the ability to secure funds to fully investigate the potential, viable claims in this case, present counsel has no strategic justification for his failure to pursue Mr. Thomas' possible claim of mental retardation

Current counsel's believe that such evidence exists comes in large part from the testimony of Dr. Thomas Kinsora. Dr. Kinsora is a neuropsychologist who was hired to test Mr. Thomas. Dr. Kinsora testified in the first penalty trial. The jury in the second penalty trial was denied the benefit of his observations. Dr. Kinsora identifies several areas that current counsel must investigate in order to assure that both Mr. Thomas' constitutional Due Process rights under the Fourteenth Amendment and his rights to effective assistance of counsel under the Sixth Amendment are protected.

1 **GROUND ONE**

2 **MR. THOMAS' CONVICTION AND SENTENCE ARE INVALID UNDER THE 1<sup>ST</sup>, 6<sup>TH</sup>,**  
3 **AND 14<sup>TH</sup> FEDERAL CONSTITUTIONAL AMENDMENT GUARANTEES OF DUE**  
4 **PROCESS AND EQUAL PROTECTION UNDER THE LAW AND ARTICLE 1 OF THE**  
5 **NEVADA CONSTITUTION BECAUSE COUNSEL'S PERFORMANCE FELL BELOW AN**  
6 **OBJECTIVE STANDARD OF REASONABLENESS AS IS MANDATED BY Strickland v.**  
7 **Washington, 466 U.S. 668 (1984)**

8 **Legal Authority Relevant to All Claims of Ineffective Assistance of Counsel**

9 The Sixth Amendment of the United States Constitution guarantees that an accused person  
10 shall "have the Assistance of Counsel for his defense." The United States Supreme Court has clearly  
11 defined when the assistance of counsel becomes ineffective and an accused person is denied this  
12 right. In Strickland v. Washington, 466 U.S. 668 (1984), the Court established a two-prong test for  
13 determining ineffective assistance of counsel at trial. See also Porter v. McCollum, 130 S. Ct. 447,  
14 175 L. Ed. 2d 398 (2009). To prevail under Strickland, a defendant must demonstrate both that his  
15 "counsel's performance was deficient" and "that the deficient performance prejudiced the defense."  
16 Id. at 687. To satisfy the second prong of Strickland, a defendant must show that his trial counsel's  
17 performance prejudiced his defense such that he suffered actual prejudice and that "there is a  
18 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding  
19 would have been different. A reasonable probability is a probability sufficient to undermine  
20 confidence in the outcome." Strickland, 466 U.S. at 694. This test has also been adopted in Nevada.  
21 See Hurd v. State, 114 Nev. 182, 953 P.2d 270 (1998). Further, trial counsel's actions must be based  
22 on reasonable strategic decisions. Strickland, 466 U.S. at 691.

23 In this case, Mr. Thomas' trial counsel, David Schieck and Daniel Albregts made a series of  
24 errors that so undermined the proper functioning of the adversarial process that the outcome of Mr.  
25 Thomas' proceedings cannot be relied upon as have produced a just result.

26 **A. Prior Counsel Failed to Properly Present Evidence Related to Mr. Thomas' Possible**  
27 **Mental Retardation That Was Readily Available to Them From Dr. Kinsora's Original**  
28 **Testimony.**

1. Dr. Kinsora Testified That Mr. Thomas May Be Mentally Retarded.

Dr. Kinsora gave Mr. Thomas a series of neuropsychological tests that yielded over thirty  
different measurements of Mr. Thomas' neurocognitive functioning. (Exhibit A, II-19-20). Mr.

1 Thomas' full scale IQ fell in the eighth (8<sup>th</sup>) percentile. Id. at II-22. Dr. Kinsora testified that  
2 someone in this range would be considered to have borderline intellectual functioning. Dr. Kinsora  
3 also determined that Mr. Thomas' reading skills were in the fourth (4<sup>th</sup>) percentile range, and Dr.  
4 Kinsora testified that 96% of the population can read better than Mr. Thomas. Mr. Thomas' spelling  
5 and math ability were both in the first (1<sup>st</sup>) percentile. Overall, Mr. Thomas' full scale IQ was in the  
6 eighth percentile. Dr. Kinsora described this as "very, very poor. That's considered borderline  
7 intellectual functioning". (II-22).

8 In 2002, the United States Supreme Court determined that it was cruel and unusual  
9 punishment to execute someone who is mentally retarded. Atkins v. Virginia, 536 U.S. 304 (2002).  
10 Dr. Kinsora testified that the mentally retarded range occurs at 69. Mr. Thomas was approximately  
11 10 points off or six percentile points from the mentally retarded range. This is critical testimony and  
12 central to Mr. Thomas' defense. Even though the IQ score of 79 puts Mr. Thomas out of the mentally  
13 retarded range, the Flynn Effect must be considered when calculating Mr. Thomas' full scale IQ. The  
14 Flynn Effect is the principle that after an IQ test has been normed, people's scores start to creep  
15 upward over time. For the general population, the score creep is accepted at 0.33 points per year. For  
16 the mentally retarded population, the score creep is closer to 0.45 points per year.

17 It is counsel's belief that Dr. Kinsora administered one of the IQ tests that were normed in  
18 the mid-1970s. As such, Mr. Thomas full scale IQ could be off anywhere from seven (7) to over nine  
19 (9) points lower than the score of 79 Dr. Kinsora reached. (21 years multiplied by 0.33 and 0.45  
20 respectively). This decline in Mr. Thomas' IQ puts him either at the low end of high functioning  
21 individuals with mental retardation or below the level for mental retardation. In order to get a much  
22 more accurate picture of Mr. Thomas' full scale IQ, it would be necessary to hire a  
23 neuropsychologist to travel to Ely, Nevada and conduct a minimum of two days of testing.

24 An individual's IQ is only one element that has to be proven for Mr. Thomas to qualify for  
25 relief under Atkins. To be found mentally retarded, counsel must show that Mr. Thomas suffers from  
26 significant adaptive deficits, and that those adaptive deficits existed prior to his eighteenth birthday.  
27 Id.

1 Dr. Kinsora provides insight into the possibility that Mr. Thomas meets both the second and  
2 the third prong of the Atkins requirements. He testified that an evaluation of Mr. Thomas'  
3 psychological records from his childhood revealed that he had "significant learning problems" (II-  
4 13). Mr. Thomas also "qualified as learning disabled very early on [and] [h]e was way behind in  
5 school".

6 One significant thing to point out is that Mr. Thomas had been tested prior to his eighteenth  
7 birthday (1981 and 1984) according to Dr. Kinsora. Dr. Kinsora notes that his findings were "pretty  
8 much consistent with where he was when [Mr. Thomas] was in the program for emotionally and  
9 behaviorally disturbed kids and for learning disabilities". (II-23).

10 Without the benefit of a more accurate evaluation of Mr. Thomas' neurocognitive functioning  
11 and an investigation into any adaptive deficits he had prior to the age of eighteen, post-conviction  
12 counsel will not be able to perform in accordance with the rigors demanded by the Constitution and  
13 set forth in Strickland.

14 2. Mr. Thomas May Suffer From Fetal Alcohol Spectrum Disorder (FASD).

15 Although Mr. Thomas does not currently display the physical characteristics associated with  
16 individuals who have FASD, there is evidence to support this diagnosis. There is no one test that can  
17 definitively declare that Mr. Thomas has FASD; however, by reconstructing his social history and  
18 performing neurocognitive tests, a diagnosis of FASD can be hypothesized. Some of the hallmarks  
19 of FASD include: deficits in cognition or intellect, reasoning, memory, or concentration. (II-17).

20 Mr. Thomas' mother admitted that during the time she was pregnant with him, she drank  
21 wine or vodka every day "until she was extremely (II-14). This occurred throughout her pregnancy  
22 with Mr. Thomas. This level of alcohol consumption would be consistent with a diagnosis of FASD.

23 One of the cognitive deficits seen in individuals with FASD is a difficulty with concentration.  
24 One of the tests administered to Mr. Thomas measured his concentration skills. According to Dr.  
25 Kinsora, "Mr. Thomas had a very, very-a very, very hard time with this test and performed at the  
26 less than one percentile on the first trial and at the one percentile on the second trial". (II-24). In fact  
27 the test was so difficult for Mr. Thomas to perform that Dr. Kinsora did not force him to attempt  
28

1 a third or a fourth scoring.

2 Mr. Thomas also struggled with problem solving or reasoning tasks. On one test, Mr. Thomas  
3 scored below the sixteenth percentile and fell in the “impaired range”. Dr. Kinsora estimated that Mr.  
4 Thomas performed at the level of a 13-14 year-old in his ability to solve problems. (II-26).

5 Counsel requests the necessary funds to do a comprehensive and adequate investigation into  
6 Mr. Thomas social history to determine whether or not he suffers from FASD. Without this  
7 investigation, counsel cannot prepare a defense for Mr. Thomas that satisfies the demands of the  
8 Constitution.

9 **B. Trial Counsel Failed to Investigate and Present Evidence That Mr. Thomas’ Mother**  
10 **Virtually Abandoned Him at a Young Age, He Suffered From Physical Abuse, and an**  
11 **Impoverished Upbringing and, As a Result, Mr. Thomas Developed Severe Behavioral**  
12 **Problems.**

13 Mr. Thomas’ physical abuse started before he was born. His mother reported that she was  
14 frequently physically abused by Marlo’s father and that the “punched and kicked [her] in the stomach  
15 many times while she was pregnant”. (II-14-15). Mr. Thomas’ mother admitted that she continued  
16 to physically abuse him when he was a child.

17 The environment in which Mr. Thomas was raised was less than ideal:

18 His early childhood was apparently not particularly conducive to good—to  
19 being raised as a –you know, with normal development. He had his father who was  
20 incarcerated when he was rather young, he–his mother apparently did quite a bit of  
21 physical whipping him (sic) and things like that. His brother was apparently the main  
22 person who raised him because his mother worked quite a bit. (II-15).

23 Mr. Thomas suffered from behavioral issues from an early age. He spent time in Children’s  
24 Behavioral Services, and was later placed in Miley Achievement Center, which is an achievement  
25 center for severely emotionally disturbed kids. (II-15)

26 Mr. Thomas felt an acute sense of abandonment from his mother. Dr. Kinsora testified that  
27 Mr. Thomas’ felt his mother loved his other brothers more than him. He also suffered from very poor  
28 peer relations and had a hard time gettin along with anyone that was his age. He frequently felt  
picked on by his peers. (II-16).

All of these elements of Mr. Thomas’ social history are important and need to be fully  
investigated. Mr. Thomas has a right to have this generally mitigating information presented to a

finder of fact. Wiggins v. Smith, 539 U.S. 510 (2003). Counsel would be per se ineffective for making any strategic decisions about Mr. Thomas' case in the absence of a comprehensive investigation into his social history.

Counsel had no tactical or strategic justification within the range of reasonable competence for his failure to properly investigate factual witnesses and material facts in this case.

**C. Trial Counsel Failed To Properly Excuse Potential Venire Persons Who Could Prejudice the Panel**

Mr. Thomas believes and therefore alleges that prior counsel failed to properly excuse two jurors--Mr. Quenzer and Ms. Mowen--based upon the information included in their juror questionnaires. Their responses during voir dire infected the panel so much so that the fairness the Constitution demands is absent from Mr. Thomas' penalty trial.

**1. Mr. Quenzer**

Mr. Quenzer is a restaurant manager who works for the company that owns Longhorn Steakhouse. He does not sit on the jury. However, there is a very lengthy discussion about whether or not he would overly identify with the victims. Additionally, it is eventually revealed that one of his friends that he used to work with at another restaurant was murdered in a robbery.

**2. Ms. Mowen**

Ms. Mowen's sister was the victim in a capital murder case. Ms. Mowen testified during the victim impact portion during the capital trial of Dante Johnson. When she was questioned during voir dire in Mr. Thomas' case, she stated that in Mr. Johnson's case, the **death penalty was completely warranted**.

There is no strategic justification for allowing either of these potential venire persons to be questioned in front of the other potential panel members. To do so allowed the jury to sit with and among people who had been intimately and personally touched by murder. Prior counsel did not ask to do individual voir dire of these individuals or to have them stricken from the panel prior to the commencement of the penalty phase.

1           **D.     Prior Counsel Failed to Challenge the District Court Judge's Failure to**  
2           **Properly Admonish the Jurors When They Left the Courtroom**

3           Mr. Thomas contends that he was denied his right to a fair trial because the district court  
4 failed to admonish the jury pursuant to NRS 176.40 1 prior to every recess. (PT 11/01/05 pg. 23).  
5 The record reveals two occasions on which the court did not provide the full statutory  
6 admonishment.

7           In Bollinger v. State, the Nevada Supreme Court stressed the importance of fully  
8 admonishing the jury before each and every recess in accordance with the mandatory provisions of  
9 NRS 175.401. Therefore, the district court erred in failing to do so.

10          The Nevada Supreme Court again cited the importance of fully admonishing the jury before  
11 each and every recess in accordance with the mandatory provisions of NRS 175.401 in Blake v.  
12 State,. This opinion was issued on October 20, 2005 and the district court should be considered to  
13 be on notice of the Nevada Supreme Court's disapproval of the practice of failing to admonish the  
14 jury. These failures to admonish the jury would appear to be pervasive in Judge Loehrer's courtroom  
15 as she was the subject of the Court's opinion in the Blake case.

16          NRS 175.401 provides:

17          At each adjournment of the court, whether the jurors are permitted to separate or  
18 depart for home overnight, or are kept in charge of officers, they must be admonished  
19 by the judge or another  
20 officer of the court that it is their duty not to:

- 21          1.       Converse among themselves or with anyone else on any subject connected  
22 with the trial;
- 23          2.       Read, watch or listen to any report of or commentary on the trial or any  
24 person connected with the trial by any medium of information, including without  
25 limitation newspapers, television and radio; or
- 26          3.       If they have not been charged, form or express any opinion on any subject  
27 connected with the trial until the cause is finally submitted to them.

28          Trial counsel should have objected to the court's failure to admonish the jury. Mr. Thomas  
believes and therefore alleges that the court's failure to admonish the jury allowed them to act in an  
impermissible fashion and taint the proceedings with error.

**E.     Trial Counsel Failed to Have the Bench Conference Recorded**

Numerous portions of this capital proceeding were closed to the public in the form of off-the-

1 record bench conferences.<sup>1</sup> The off-the-record bench conferences and conversations were never  
2 transcribed. The trial judge additionally failed to take any other measures to effectuate the public  
3 interest in observation and comment on these judicial proceedings. Mr. Thomas is informed and  
4 believes, and therefore alleges, that during these unrecorded conferences, the trial judge took  
5 material, substantial actions, including ruling on evidentiary matters and establishing courtroom  
6 procedure and scheduling. Such proceedings are integral parts of a criminal case in general, and of  
7 Mr. Thomas' capital murder case in particular.

8 The trial judge failed to articulate any reasons for the failure to record critical proceedings  
9 in Mr. Thomas' trial, and no such reasons exist. The failure of the trial judge to secure an adequate  
10 record of these capital proceedings violated Mr. Thomas' constitutional rights, as well as those of  
11 the public to free and open proceedings. The trial judge's failure also violated Mr. Thomas' rights  
12 under international law, which guaranteed every person a fair and public hearing by a competent,  
13 independent, and impartial tribunal.<sup>2</sup> The failure of trial counsel to request the transcription of these  
14 proceedings violated Mr. Thomas' constitutional rights which guarantee him the right to effective  
15 assistance of counsel in securing a fair and open trial as well as a record of the proceedings against  
16 him.

17 These constitutional violations were prejudicial per se; no showing of specific prejudice is  
18 required in order to obtain relief for a violation of the public trial guarantee. The trial judge's failure  
19 to secure a complete record substantially and adversely affected Mr. Thomas' constitutional rights.

20 **F. Trial Counsel Failed to Object to the Prosecutors Numerous References**  
21 **Whereby They Equate the Death Penalty With Holding an Individual**  
22 **Accountable for Their Crime**

23 \_\_\_\_\_ The prosecutors impermissibly equate imposing the death penalty with holding an individual  
24 accountable for their actions. They do this with Juror McIntosh (PT 10/31/2005 pg. 72 lines 2-12),  
25 Juror Adona (Id. at pg. 85 lines 17-24), and Juror McGrath (Id. at pg. 125 lines 14-22). Prior counsel  
26 never objected to this line of questioning. This becomes an issue again during closing argument  
27  
28



1 when the State reminds the jury that “each and every one of you told us when we were selecting this  
2 jury that you believe people should be held accountable for their actions and you believe in the  
3 appropriate case that you could return with a verdict of death. (PT 11/04/2005 pg. 167 lines 17-21).  
4 Trial counsel failed to object to this misstatement of what the venire panel said and allowed the  
5 prosecution to again conflate the issues of accountability and the imposition of the death penalty. Mr.  
6 Thomas was prejudiced by this failure and this court cannot be confident with the outcome given  
7 prior counsels’ failure to properly object to the statements of the State.

8 **G. Trial Counsel Failed to Present Favorable Evidence From Correctional Officers**

9 The State presented numerous witnesses from the Nevada Department of Corrections who  
10 spoke of Mr. Thomas’ history of violent behavior while incarcerated. Trial counsel failed to contact  
11 and present the testimony of correctional officers that could have refuted the testimony of those  
12 correctional officers presented by the State.

13 By failing to present this evidence, the State was able to paint a picture of Mr. Thomas  
14 whereby he was cast in the light of a dangerous individual and the jury was given a view of Mr.  
15 Thomas’ years of incarceration that was not fully in line with the actuality of the years he spent  
16 behind bars. Mr. Thomas was highly prejudiced by this failure and this court cannot be confident in  
17 the outcome given prior counsel’s failure to properly investigate and present favorable evidence  
18 regarding Mr. Thomas. There cannot be any strategic or tactical reason for this choice.

19 **GROUND TWO**

20 **MR. THOMAS CONVICTION AND DEATH SENTENCE ARE INVALID UNDER THE**  
21 **FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL**  
22 **PROTECTION, A PUBLIC TRIAL, FREEDOM OF THE PRESS, A RELIABLE**  
23 **SENTENCE, EFFECTIVE ASSISTANCE OF COUNSEL, AND ADEQUATE REVIEW OF**  
**THE SENTENCE OF DEATH, DUE TO THE TRIAL COURT’S NUMEROUS FAILURES.**  
**U.S. CONST. ART. VI; AMENDS. I, V, VI, VIII, XIV; INTERNATIONAL COVENANT ON**  
**CIVIL AND POLITICAL RIGHTS ART. XIV.**

24 **A. The Trial Court Failed to Record Integral Portions of the Proceedings.**

25 Numerous portions of this capital proceeding were closed to the public in the form of off-the-  
26 record bench conferences.<sup>3</sup> The off-the-record bench conferences and conversations were never  
27 \_\_\_\_\_  
28

1 transcribed. The trial judge additionally failed to take any other measures to effectuate the public  
2 interest in observation and comment on these judicial proceedings. Mr. Thomas is informed and  
3 believes, and therefore alleges, that during these unrecorded conferences, the trial judge took  
4 material, substantial actions, including ruling on evidentiary matters and establishing courtroom  
5 procedure and scheduling. Such proceedings are integral parts of a criminal case in general, and of  
6 Mr. Thomas' capital murder case in particular.

7 The trial judge failed to articulate any reasons for the failure to record critical proceedings  
8 in Mr. Thomas' trial, and no such reasons exist. The failure of the trial judge to secure an adequate  
9 record of these capital proceedings violated Mr. Thomas' constitutional rights, as well as those of  
10 the public to free and open proceedings. The trial judge's failure also violated Mr. Thomas' rights  
11 under international law, which guaranteed every person a fair and public hearing by a competent,  
12 independent, and impartial tribunal.<sup>4</sup> The failure of trial counsel to request the transcription of these  
13 proceedings violated Mr. Thomas' constitutional rights which guarantee him the right to effective  
14 assistance of counsel in securing a fair and open trial as well as a record of the proceedings against  
15 him.

16 These constitutional violations were prejudicial per se; no showing of specific prejudice is  
17 required in order to obtain relief for a violation of the public trial guarantee. The trial judge's failure  
18 to secure a complete record substantially and adversely affected Mr. Thomas' constitutional rights.

19 **B. The Trial Court Failed to Properly Admonish the Jury Each and Every Time**  
20 **They Left the Courtroom.**

21 Mr. Thomas contends that he was denied his right to a fair trial because the district court  
22 failed to admonish the jury pursuant to NRS 176.40 1 prior to every recess. (PT 11/01/05 pg. 23).  
23 The record reveals two occasions on which the court did not provide the full statutory  
24 admonishment.

25 In Bollinger v. State, the Nevada Supreme Court stressed the importance of fully  
26 admonishing the jury before each and every recess in accordance with the mandatory provisions of

1 NRS 175.401. Therefore, the district court erred in failing to do so.

2 The Nevada Supreme Court again cited the importance of fully admonishing the jury before  
3 each and every recess in accordance with the mandatory provisions of NRS 175.401 in Blake v.  
4 State. This opinion was issued on October 20, 2005 and the district court should be considered to  
5 be on notice of the Nevada Supreme Court's disapproval of the practice of failing to admonish the  
6 jury. These failures to admonish the jury would appear to be pervasive in Judge Loehrer's courtroom  
7 as she was the subject of the Court's opinion in the Blake case.

8 NRS 175.401 provides:

9 At each adjournment of the court, whether the jurors are permitted to separate or  
10 depart for home overnight, or are kept in charge of officers, they must be admonished  
11 by the judge or another

12 officer of the court that it is their duty not to:

13 1. Converse among themselves or with anyone else on any subject connected  
14 with the trial;

15 2. Read, watch or listen to any report of or commentary on the trial or any  
16 person connected with the trial by any medium of information, including without  
17 limitation newspapers, television and radio; or

18 3. If they have not been charged, form or express any opinion on any subject  
19 connected with the trial until the cause is finally submitted to them.

20 Trial counsel should have objected to the court's failure to admonish the jury. Mr. Thomas  
21 believes and therefore alleges that the court's failure to admonish the jury allowed them to act in an  
22 impermissible fashion and taint the proceedings with error.

23 **C. The Trial Court Erred By Refusing to Remove the Leg Shackles from Mr.**  
24 **Thomas' Legs**

25 On the opening day of the trial, David Schieck asked that the Marshalls be allowed to remove  
26 Mr. Thomas' leg restraints. The trial Judge denied the request and said:

27 You can take the arm restraints off. He can't fly, but he might be able to run.  
28 And certainly a person who's already been convicted of two first degree murders with  
the use of a deadly weapon has more reason to flee than someone who is either not  
yet convicted or someone who doesn't know what penalty they received the first time  
around. So leave the leg chains on.

(PT 10/31/2005 pgs. 6-9).

It is a well-settled matter of law that the United States Supreme Court has indicated that a  
defendant has a right to appear in front of a jury without physical restraints or jail clothing, and the

1 trial court may not reference the fact that the defendant is incarcerated. See Estelle v. Williams, 425  
2 U.S. 501, 504-05, 96 S.Ct. 1691, 48 L.Ed.2d, 126 (1976); see also Haywood v. State, 107 Nev. 285,  
3 288, 809 P.2d 1272, 1273 (1991).

4 The trial court's eventual solution to this problem is to prohibit Mr. Thomas and his counsel  
5 not to stand when the jury came into the courtroom or at any other time to keep the jury from seeing  
6 the leg restraints.

7 **D. Trial Court Allowed the Prosecutors to Introduce Testimonial Hearsay in the**  
8 **Penalty Phase in Violation of Crawford.**

9 At the penalty hearing, the prosecutors introduced the testimony of Nevada Highway Patrol  
10 Trooper Baily to testify to the statements made by Kenya Hall. Trooper Bailey based is testimony  
11 solely on the transcript of the interview he conducted with Mr. Hall—not upon his memory of the  
12 interview. The admission of testimonial hearsay from Trooper Bailey denied Mr. Thomas the  
13 opportunity to confront and cross-examine Mr. Hall about Mr. Hall's version of the events of the  
14 robbery and murder.

15 The Sixth Amendment to the Constitution provides that, “[i]n all criminal prosecutions, the  
16 accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const.  
17 Amend. VI. In its landmark decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158  
18 L.Ed.2d 177 (2004), the Supreme Court held that the Confrontation Clause bars admission of  
19 “testimonial statements” of a witness who does not appear at trial, unless the witness is unavailable  
20 to testify, and the defendant previously had the opportunity to cross-examine the declarant. *Id.* at 53-  
21 54, 124 S.Ct. 1354. The United States Supreme Court has also specifically held that once the  
22 activity of a sentencer stops being an exercise of discretion and becomes constitutionally significant  
23 fact-finding, the right to confrontation attaches. Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209,  
24 18 L.Ed.2d 326 (1967); see also United States v. Buckland, 289 F.3d 558, 568 (9th Cir.2002) (en  
25 banc) (holding that functional equivalent of an element of a crime must be treated as “any other  
26 material fact in a criminal prosecution: it must be charged in the indictment, submitted to the jury,  
27 subject to the rules of evidence, and proved beyond a reasonable doubt”), Proffitt v. Wainwright, 685

1 F.2d 1227, 1254-55 (11th Cir.1982), Coble v. Dretke, 444 F.3d 345, 353-54 (5th Cir.2006).<sup>5</sup> The  
2 penalty hearing in a capital murder trial is clearly a criminal prosecution. Due process demands that  
3 a defendant in such a hearing be allowed to present a defense, and confront and cross-examine the  
4 evidence against him, at the very least, regarding the alleged aggravators. Mr. Thomas was denied  
5 this opportunity.

6 Mr. Thomas was denied the right to confront and cross-examine the witnesses against him  
7 that established aggravating elements and eligibility for the death penalty. The prosecutors cannot  
8 prove beyond a reasonable doubt that this error did not impact the sentence they jury delivered.

9 **E. The Trial Judge Impermissibly Coached the Prosecutor**

10 In the midst of the discussion regarding the confrontation clause, the trial judge begins  
11 coaching the prosecutor. The judge says, “Isn’t that the witness I asked ‘do I get to ask a question?’  
12 [that means] something that you said in opening statements hasn’t come in yet.” (PT 11/02/2005 pg.  
13 8). Trial counsel responds that if the State doesn’t ask the right questions I don’t think the Court  
14 should help them out”. Id. This overt bias to the State is prejudicial per se and no showing of specific  
15 prejudice is required in order to obtain relief when the trial judge is actively working to ensure that  
16 the State is making its case.

17 **F. The Trial Judge Impermissibly Allowed the Prosecutors to Argue in Violation**  
18 **of Clearly Established Law**

19 The State argued that there must be some causation or connection between the fact and the  
20 thing that the person did before it becomes a mitigator. (PT 11/02/2005 pg. 267). Mr. Thomas’  
21 counsel objected and the trial judge overruled the objection. This violates well settled Supreme Court  
22 law. Tennard v. Dretke, 124 S. Ct. 2562 (2004). (The Eighth Amendment requires that the jury be  
23 able to consider and give effect to a capital defendant's mitigating evidence. A State cannot preclude  
24 the sentencer from considering any relevant mitigating evidence that the defendant proffers in  
25 support of a sentence less than death. Virtually no limits are placed on the relevant mitigating  
26 evidence a capital defendant may introduce concerning his own circumstances).

1 The prosecutor further argues that three of the mitigators occur after the murder.<sup>6</sup> These are  
2 mitigating factors established by the legislators of the State of Nevada. Again, this argument is in  
3 direct violation of the Eighth Amendment and well-established Supreme Court law. Tennard v.  
4 Dretke, 124 S. Ct. 2562 (2004).

5 **CONCLUSION**

6 Mr. Thomas' conviction is unconstitutional under the federal and state constitutions for each  
7 of the reasons herein. His judgment of conviction must therefore be vacated.

8 Wherefore, Petitioner prays that the court grant petitioner relief to which he may be entitled  
9 in this proceeding.

10 Executed at Las Vegas, Clark County, Nevada on the 8<sup>th</sup> day of July, 2010.

11  
12 /s/ Bret O. Whipple  
13 BRET O. WHIPPLE  
Nevada Bar No. 6168  
14 **BRET O. WHIPPLE ATTY AT LAW**  
1100 S. Tenth Street  
Las Vegas, NV 89104  
15 (702) 257-9500 [phone]  
16 (702) 974-4008 [fax]  
Attorney for Petitioner  
17 *Marlo Thomas*

18 **VERIFICATION**

19 Pursuant to N.R.S. 34.730(1) I, Bret O. Whipple, swear under penalty of perjury that the  
20 pleading is true except as to those matters stated on information and belief and as to such matters,  
21 counsel believes them to be true.

22 \\\

23 \\\

24 \\\

25 \\\

26 \_\_\_\_\_  
27 <sup>6</sup> Counsel did not object to these statements. The failure to object to these questions  
28 is ineffective assistance of counsel because Mr. Thomas was prejudiced by the State being  
allowed to effectively dismiss statutory mitigators.

1 I am the counsel of record for Marlo Thomas and have his personal authorization to  
2 commence this action.

3  
4 /s/ Bret O. Whipple, Esq.  
5 BRET O. WHIPPLE, ESQ,  
6 Nevada Bar No. 6168  
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12 Attorney for Petitioner  
13 *Marlo Thomas*  
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*David Roger*  
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DISTRICT COURT

CLARK COUNTY, NEVADA

96C136862-1  
RSPN  
Response  
1036275



THE STATE OF NEVADA,

Plaintiff,

-vs-

MARLO THOMAS ,  
#1060797

Defendant.

CASE NO: 96C136862-1

DEPT NO: XXIII

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: 12/13/10  
TIME OF HEARING: 11:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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1 appointed on January 7, 2009, and filed a supplemental petition<sup>1</sup> on July 12, 2010, to which  
2 the State now responds.

3 **STATEMENT OF FACTS**<sup>2</sup>

4 Defendant Thomas and his brother-in-law, 15-year-old Kenya Hall, were charged  
5 with two counts of First-Degree Murder with the Use of a Deadly Weapon and other crimes.  
6 The charges resulted from their early-morning robbery of the Lone Star Steakhouse and the  
7 stabbing deaths of two employees who were present during the robbery, Matthew Gianakis  
8 and Carl Dixon. Defendant was a former employee of the restaurant. Vince Oddo, the  
9 kitchen manager, was also present during the robbery but escaped without injury. He called  
10 911 after his escape, and when police responded to the scene, Oddo identified Defendant as  
11 one of the perpetrators. Defendant, Hall, and Defendant's wife Angela Love were arrested  
12 later that day.

13 After their arrest, Hall was interviewed by Nevada Highway Patrol Officer David  
14 Bailey. Hall confessed to his role in the crimes and implicated Defendant. He agreed to plead  
15 guilty to lesser charges in exchange for testifying against Defendant. He testified at  
16 Defendant's preliminary hearing but then refused to testify any further and sought to  
17 withdraw his guilty plea. His preliminary hearing testimony was read into the record at  
18 Defendant's trial. A jury convicted Defendant of two counts of First-Degree Murder with the  
19 Use of a Deadly Weapon, Conspiracy to Commit Murder and/or Robbery, Robbery with the  
20 Use of a Deadly Weapon, Burglary While in Possession of a Firearm, And First-Degree  
21 Kidnapping with the Use of a Deadly Weapon.

22 On remand for the new penalty hearing in 2005, the district court ordered it be  
23 bifurcated into an eligibility phase and a selection phase. The State alleged four aggravators:  
24 (1) Defendant had a prior conviction for a felony involving violence or the threat of violence,  
25 Attempted Robbery; (2) He had a second such conviction, Battery with Substantial Bodily  
26

27 <sup>1</sup> Although not captioned as a "supplemental," the State will proceed on the belief that the petition filed by Whipple on  
28 July 12, 2010, was intended as a supplement to the pro se petition filed on March 6, 2008.

<sup>2</sup> These facts are adapted from Thomas v. State, 122 Nev. 1361, 148 P.3d 727 (2006).

1 Harm; (3) The murder was committed to avoid or prevent a lawful arrest; and (4) Defendant  
2 was convicted in the instant proceeding of more than one murder.

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

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

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

1 Another division employee, John Springgate, authenticated two Presentence  
2 Investigation reports prepared for Defendant's convictions in 1990 of Attempted Robbery  
3 and in 1996 of Battery with Substantial Bodily Harm. Two victims of Defendant's prior  
4 crimes testified about those incidents. The State called ten corrections officers to testify  
5 about Defendant's behavior while in prison. Some of the officers authenticated prison  
6 discipline documents. Finally, the fathers of Carl Dixon and Matthew Gianakis gave victim-  
7 impact testimony.

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

### 17 POINTS AND AUTHORITIES

#### 18 1. Effective Assistance of Counsel at the Second Penalty Hearing

19 Upon remand for a new capital penalty hearing, this Court appointed David Schieck  
20 and Dan Albregts to represent Defendant on March 31, 2004. Schieck also happens to be the  
21 prior post-conviction counsel in this case who successfully argued ineffective assistance of  
22 trial counsel and won a new penalty hearing for Defendant. The new penalty hearing was  
23 conducted on October 31, 2005, through November 7, 2005.

24 It has long been recognized that "the right to counsel is the right to the effective  
25 assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063  
26 (1984). A defendant making an ineffectiveness claim must show both that counsel's  
27 performance was deficient, which means that "counsel's representation fell below an  
28 objective standard of reasonableness," Strickland, 466 U.S. at 668, and that the deficient

1 performance prejudiced the defendant, which means that “there is a reasonable probability  
2 that, but for counsel’s unprofessional errors, the result of the proceeding would have been  
3 different.” Id. at 694; See Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683  
4 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). “Effective counsel does  
5 not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of  
6 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, Nevada State  
7 Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann, 397 U.S. 759, 771.

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

14 A defendant who contends that his attorney was ineffective because he did not  
15 adequately investigate must show how a better investigation probably would have rendered a  
16 more favorable outcome. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). In  
17 order to demonstrate a reasonable probability that, but for counsel’s failure to investigate, the  
18 result would have been different, it must be clear from the “record what it was about the  
19 defense case that a more adequate investigation would have uncovered.” Id.

20 A. Failure to Present Evidence Readily Available from Dr. Kinsora’s Original  
21 Testimony

22 1. Evidence of “Possible” Mental Retardation

23 Defendant first claims that counsel failed to properly present evidence related to  
24 Defendant’s “possible” mental retardation that was readily available from Dr. Thomas  
25 Kinsora’s original testimony. In 2002, the Supreme Court held that executions of the  
26 mentally retarded would violate the 8<sup>th</sup> Amendment’s prohibition against cruel and unusual  
27 punishment. Atkins v. Virginia, 56 U.S. 304, 122 S.Ct. 2242 (2002). Notably, Dr. Kinsora  
28 testified at Defendant’s first penalty hearing in 1997, but was not called as a witness in the

1 2005 penalty hearing.

2 In Nevada, "mentally retarded" means "significant subaverage general intellectual  
3 functioning which exists concurrently with deficits in adaptive behavior and manifested  
4 during the developmental period." NRS 174.098(7). As noted by the United States Supreme  
5 Court, "mild" mental retardation is typically used to describe people with an IQ level of 50-  
6 55 to approximately 70. Atkins v. Virginia, 536 U.S. 304, 309 n.3, 122 S.Ct. 2242 (2002),  
7 citing Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), pp. 42-43 (4<sup>th</sup> ed.  
8 2000). "It is estimated that between 1 and 3 percent of the population has an IQ between 70  
9 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual  
10 function prong of the mental retardation definition." Id. at n.5. "Mental retardation is a  
11 relatively rare thing. It's about one percent of the population." Id.

12 Dr. Kinsora testified in 1997 that Defendant's full scale IQ of 79 fell in the 8<sup>th</sup>  
13 percentile which was considered borderline intellectual functioning. (Transcript June 25,  
14 1997, pp. 5-58 – Day 2 of Penalty Hearing). Furthermore, Dr. Kinsora specifically testified  
15 that Defendant was not mentally retarded:

16  
17 His full scale IQ, which is what we call your person's IQ, basically, fell at the  
18 eighth percentile, which again is very, very poor. That's considered borderline  
19 intellectual function.

20 The mentally retarded range occurs at 69, so he was approximately ten points  
21 off or six percentile points off from that.

22 \* \* \*

23 Q On page 5 of your report, you state that the defendant has an IQ of 79,  
24 which is ten points away from being considered retarded?

25 A That's true.

26 \* \* \*

27 Q Okay. In your summary you state "The defendant is not mentally  
28 deficient or retarded," is that correct?

A He's not considered mentally retarded, no.

29  
30 Id. at pp. 22-3, 42, 44-5. Dr. Kinsora, was relying on not just his own test scores taken in  
31 1997, but on those from Defendant's school years which would be the most relevant for  
32 determining onset or manifestation during the developmental years:

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

4 \* \* \*

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

9 Id. at p. 14, 23. Defendant has failed to allege how Dr. Kinsora's prior evaluation in this  
10 case for mental retardation is deficient in any way or how circumstances have changed such  
11 that another evaluation is necessary. As in 1997, the fact remains that Defendant's IQ has  
12 always been low, but clearly above that required for a diagnosis of mental retardation.  
13 Because Dr. Kinsora can not diagnose Defendant as mentally retarded, the failure to present  
14 such testimony did not deprive Defendant of any available defense to the death penalty.  
15 Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002) (mentally retarded are not eligible  
16 for the death penalty). Even if adjusted down by 7 to 9 points due to a purported "Flynn"  
17 effect, this would still be inadequate to place him in the mentally retarded range.

18 Nor has Defendant demonstrated that counsel was ineffective in not re-calling Dr.  
19 Kinsora in the new penalty hearing where his testimony had failed to persuade the first jury  
20 not to sentence the Defendant to death. At the beginning of the 2005 penalty hearing,  
21 Schieck explained to the jury that his strategy in presenting evidence to them would be to  
22 humanize Defendant through members of his family who would relate his personal history:

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

Transcript 11/1/05, p. 42. Consistent with the stated strategy, counsel presented evidence of  
Defendant's mental disabilities and personal history through family members in lieu of an  
expert witness. An older brother, Darrell Thomas, testified that he observed Defendant to

1 have mental problems:

2  
3 Q Did you ever tell your mother that you thought Marlow had mental problems?

4 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.  
5  
6

7 Transcript 11-2-5 at p. 170-71. Defendant's mother, Georgia Thomas, also testified how  
8 Defendant needed mental help and was placed in special education:  
9

10 A He - - when he was in grade school, when Marlow was in grade school, he began to act out some, just act out some things. 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.  
11  
12

13 Q Who told you he needed help?

14 A Walter Braken School.

15 Q What kind of help did they tell you he needed?

16 A Actually they told me he needed mental help.  
17

18 \* \* \*

19 A They put him in - - they used to call it Molly Achievement. It was a mental school.  
20  
21

22 Id. at pp. 191-92, 194. Eliciting such information through family members rather than a  
23 hired expert had the effect of humanizing Defendant for the jury. Whereas counsel in the  
24 first penalty hearing had called only three family members (Linda McGilbra, Georgia  
25 Thomas, Darrell Thomas), Schieck emphasized the family connections by calling at least  
26 seven family members to the stand to talk about their perspectives and unique experiences  
27 with Defendant (David Hudson, Eliza Bousley, Shirley Nash, Charles Nash, Darrell Thomas,  
28 Paul Hardwick, Georgia Thomas).

While perhaps Dr. Kinsora could have offered additional details and expert opinion on Defendant's mental ability, his testimony was a two-edged sword which also included arguable evidence in aggravation. For instance, Dr. Kinsora described Defendant as an individual who experiences significant feelings of grandiosity and is very paranoid at times



1 with impulse control problems and a great deal of difficulty with authority. (Transcript 6-  
2 25-97, p. II-28). He was also described as hypomanic, meaning very impulsive and would  
3 get angry very easily while having a hard time controlling himself. Id. at p. II-29.  
4 Defendant's test scores showed he has an antisocial personality disorder almost bordering on  
5 being a sociopath. Id. at p. II-32.

6 The prosecutor's cross-examination of Dr. Kinsora in 1997 further demonstrates the  
7 problems with re-using such testimony in the new penalty hearing. The prosecutor pointed  
8 out that Dr. Kinsora was not a medical doctor and that subjective psychological opinions  
9 may be wrong. Id. at pp. II-38-40. Defendant was not on any medication and had no  
10 significant neuro-medical conditions, early childhood injuries or illnesses or head injuries.  
11 Id. at p. II-42. Dr. Kinsora was forced to admit that having a low IQ was not the reason  
12 Defendant committed the violent murders in this case and that millions of people have IQ's  
13 less than Defendant and lead productive lives. Id. at p. 43. The prosecutor also elicited that  
14 Defendant's routine response to difficulties is anger and physical threats which was expected  
15 to continue to get him in trouble in society. Id. at p. 44.

16 The cross-examination of Dr. Kinsora in 1997 also gave the prosecutor another  
17 chance to review and remind the jury of Defendant's violent criminal history and the plight  
18 of the numerous victims. Id. at pp. 46-50. The prosecutor was also able to undermine Dr.  
19 Kinsora's testimony by referring to "The Abuse Excuse" and the famous "twinkie" defense.  
20 Id. at p. 52. Dr. Kinsora also opined that Defendant "explodes and someone invariably gets  
21 hurt". Id. at p. 53. The doctor's opinion that Defendant would likely function well in prison  
22 was severely undermined by reference to the inordinate number of criminal and disciplinary  
23 violations Defendant had committed in prison. Id. at p. 54-5. Dr. Kinsora was also  
24 effectively impeached by prior testimony that he was "uncertain about everything as a  
25 psychologist." Id. at p. 57. Under these circumstances, with Dr. Kinsora's testimony cutting  
26 both ways in terms of mitigation/aggravation and not having saved the Defendant from the  
27 death penalty in the first hearing, it was not ineffective of new counsel to forego calling Dr.  
28 Kinsora and rely primarily on family members to humanize Defendant and provide his

1 mitigating circumstances.

2 2. Evidence of Fetal Alcohol Spectrum Disorder (FASD)

3 Defendant next claims that Defendant may suffer form Fetal Alcohol Spectrum  
4 Disorder (FASD) and renews his request for funding to do "a comprehensive and adequate  
5 investigation into Mr. Thomas social history to determine whether or not he suffers from  
6 FASD." Notably, Dr. Kinsora testified in 1997 that while Defendant had neurocognitive  
7 deficits, he displayed none of the characteristics of Fetal Alcohol Syndrome:

8  
9 A Well, there is a syndrome called fetal alcohol syndrome, which - -  
10 which is - - has distinct physical characteristics when an individual is born that  
11 is clearly fetal alcohol, okay. And that includes, for example, a smaller - - a  
12 smaller last finger, the lip is created - - is created a little bit differently, and  
13 there are epicanthal folds in the eyelids that would not typically appear in most  
14 individuals, unless you are from Asian descent. That's normal for an Asian  
15 descent individual.

16 But Mr. Thomas does not have those characteristics; however, we know  
17 from research that there are a lot of effects that alcohol causes, especially  
18 extreme levels of alcohol during pregnancy, that may not show up in physical  
19 characteristics, but clearly show up in neurocognitive functioning. There are -  
20 - there are no present tests that we can give him to say, yes, you are definitely  
21 fetal alcohol syndrome, but he definitely shows neurocognitive deficits that are  
22 consistent with that.

23 Id. at pp. 16-17.

24 Q Now you stated he had no characteristics of this fetal alcohol syndrome  
25 that you've discussed.

26 A No physical characteristics.

27 Q No - -

28 A He seems to have not - -

Q - - I'm sorry, no physical characteristics.

Id. at p. 51.

Also in 1997, the defense relied upon the testimony of Linda Overby, a school  
psychologist with the Clark County School District, who had contact and worked with  
Defendant as a child in middle school. Id. at pp. 71-77. While she agreed that Defendant's  
behavioral problems were similar to fetal alcohol, they were more comparable to  
hyperactivity, attention deficit disorder, and impulsivity. Id. at pp. 76-77.

Defendant has failed to allege how Dr. Kinsora's prior evaluation in this case for  
FASD is deficient in any way or how circumstances have changed such that another

1 evaluation is necessary. As in 1997, the fact remains that Defendant still displays none of  
2 the physical characteristics associated with the disorder and there are no present tests to  
3 diagnose it. Notably, FASD is not even represented as a specific mental disorder in the  
4 current DSM-IV (*Diagnostic & Statistical Manual for Mental Disorders IV*, American  
5 Psychiatric Association).

6 Moreover, according to the National Task Force on Fetal Alcohol Syndrome and  
7 Fetal Alcohol Effect in conjunction with the National Center on Birth Defects and  
8 Developmental Disabilities, there are no specific or uniformly accepted diagnostic criteria  
9 available for determining whether a person has FAS. Centers for Disease Control and  
10 Prevention, Nat'l Center on Birth Defects and Developmental Disabilities, Fetal Alcohol  
11 Syndrome: Guidelines for Referral and Diagnosis, (July 2004), (hereinafter "Guidelines"), p.  
12 2-3.<sup>3</sup> The four broad areas of clinical features that constitute a diagnosis of Fetal Alcohol  
13 Spectrum Disorder (hereinafter "FASD") have remained unchanged since 1973. Id. The  
14 Guidelines clearly state, "these broad areas of diagnostic criteria are not sufficiently specific  
15 to ensure diagnostic accuracy, consistency, or reliability." Id. at 2. The Guidelines further  
16 state, "it is easy for a clinician to misdiagnose FASD." Id. at 3. Moreover, the Guidelines  
17 demonstrate that there are no diagnostic criteria to distinguish FAS from other alcohol-  
18 related conditions. Id. at 3.

19 Diagnostic characteristics for FASD vary by provider. This has led to a determination  
20 that the lack of specificity can result in inconsistent diagnostic methodology and the  
21 inconsistent application of the FASD diagnosis. Id. at 11. For example, one particular  
22 method which is widely in use has been criticized because it will result in a number of false-  
23 positive findings. Id. at 11. Nine additional syndromes have overlapping features with FAS.  
24 Id. at 12.

25 Pursuant to NRS 7.135, Defendant is entitled to appointment of an expert "as may be  
26

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27 <sup>3</sup> See [http://www.cdc.gov/ncbddd/fasd/documents/FAS\\_guidelines\\_accessible.pdf](http://www.cdc.gov/ncbddd/fasd/documents/FAS_guidelines_accessible.pdf)  
28

1 necessary for an adequate defense” and only for “expenses reasonably incurred.” It is within  
2 the discretion of the district court whether to grant funds to conduct post-conviction  
3 investigation and is appropriately denied absent a showing of ineffective assistance of trial  
4 counsel. Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1997).

5 Defendant has failed to allege how Dr. Kinsora’s prior evaluation and testimony in  
6 this case in regards to FASD is deficient in any way or how circumstances have changed  
7 such that another psychological evaluation is necessary. Nor has Defendant shown how  
8 prior counsel was ineffective in anyway in failing to conduct further investigation and  
9 evaluation of Defendant’s mental deficiencies. As in 1997, the fact remains that Defendant  
10 still can not be diagnosed with FASD. Because FASD was previously investigated and  
11 testified to in this case, there is no showing of necessity to conduct further testing or  
12 investigation.

13 B. Investigation and Presentation of Mitigating Evidence

14 Defendant next claims that counsel failed to investigate and present evidence that  
15 Defendant’s mother virtually abandoned him at a young age, he suffered from physical  
16 abuse, and an impoverished upbringing and, as a result, developed severe behavioral  
17 problems. Defendant’s citation to the record for these facts show they are all derived from  
18 Dr. Kinsora’s testimony at the first penalty hearing and were based on hearsay from the  
19 family. (Transcript 6-25-97, p. II-14-16). Experts may base their opinions on facts or data  
20 that are otherwise inadmissible, if such information is of a type reasonably relied upon by  
21 experts in the field. NRS 50.285. Notably, when Defendant’s mother and other family  
22 members testified at the first penalty hearing they corroborated the behavioral problems but  
23 were not specifically asked about abuse or abandonment issues. (Transcript 6/23/97, I-217-  
24 32).

25 At the new penalty hearing, the family members gave a firsthand account of  
26 Defendant’s upbringing. Cousin David Hudson testified that Defendant was a normal child  
27 growing up but that his older brother Larry would pick on him and he had no father involved  
28 in his life. (Transcript 11/2/05 part 1, p. 104). He further testified that Defendant’s mother

1 was the "meanest aunt he had" and that she spanked her boys and would grab Defendant by  
2 the collar. Id. Aunt Eliza Bousley testified that because Defendant's father was in prison he  
3 had no real father-figure growing up. Id. at p. 118. She also described how Defendant's  
4 mother played favorites with her children and gave more attention to Defendant's siblings.  
5 Id. Aunt Shirley Nash confirmed that Defendant's father went to prison when Defendant  
6 was six or seven years of age and that Defendant's mother would discipline him with a belt.  
7 Id. at p. 131. Cousin Charles Nash testified that Defendant started acting up because he was  
8 getting neglected at home and that Defendant's mother was harder on Defendant than his  
9 older brothers. Id. at p. 147. Older brother Darrell Thomas testified that after their father  
10 went to prison, their mother had to work the swing shift which left the children to baby-sit  
11 each other. Id. at p. 165. Younger brother Paul Hardwick testified how Defendant would  
12 pick him up from school because their mother was at work. Id. at p. 173.

13 Finally, Defendant's mother, Georgia Thomas, testified that Defendant's father,  
14 Bobby Lewis, was verbally and physically abusive and that he would beat her. Id. at p. 180.  
15 She testified that Defendant had a good childhood and was her "baby" until Paul was born  
16 and then she stopped giving attention to Defendant. Id. Bobby would deny that Defendant  
17 was his child and would favor Defendant's brother, Darrell. When she and Bobby would  
18 fight, Defendant would try to protect her from being beat but Bobby would push him away.  
19 Defendant would act up and get in fights at school. She was aware that he needed mental  
20 help and that Defendant went to Molly Achievement mental school as a teenager. She  
21 admitted she did not care about Defendant like she did her younger son, Paul. Defendant  
22 and Darrell would get in fights and Darrell hit Defendant with a fire extinguisher. When  
23 Defendant acted out as a teenager, she would beat him.

24 Instead of relying on hearsay statements from Dr. Kinsora, counsel at the new penalty  
25 hearing elicited firsthand accounts from Defendant's family members about his problems  
26 growing up and the failings of the family. Undoubtedly, this had a more potent and  
27 meaningful impact on the jury. The family witnesses who were called and the questions that  
28 were asked show that counsel did investigate Defendant's upbringing and elicited powerful

1 mitigation evidence from them.

2 C. Failure to Excuse Potential Venire Persons

3 Defendant next argues that prior counsel erred in allowing potential venire persons to  
4 be questioned in front of the entire panel and should have stricken them prior to  
5 commencement of the penalty phase. Specifically, Defendant alleges that juror  
6 questionnaires informed prior counsel that juror Quenzer was a restaurant manager and that  
7 juror Mowen's sister was a victim in a capital case. Defendant fails to cite to the record  
8 below or to any supporting case authority for this argument.

9 Absent a showing that the district court abused its discretion or that the defendant was  
10 prejudiced, the Nevada Supreme Court will not disturb a district court's determination to  
11 conduct a collective voir dire of prospective jurors. Summers v. State, 102 Nev. 195, 718  
12 P.2d 676 (1986). It is unlikely that a request for individual voir dire would have been  
13 granted considering that more than 100 prospective jurors had to be questioned. Also,  
14 Schieck did file a motion to allow jury questionnaire which was granted over the State's  
15 objection. Schieck's rationale for the jury questionnaire was because "juror questioning  
16 must be extensive in order to ensure that Defendant receives an unbiased jury" and to enable  
17 counsel "to obtain the information necessary to challenge for cause those jurors who cannot  
18 fairly and impartially sit in judgment of the Defendant." Defendant was permitted  
19 reasonable voir dire of the prospective jurors. Neither juror presented grounds for being  
20 stricken for cause nor would it have been reasonable to exercise peremptory challenges  
21 based solely on the questionnaires before the commencement of the penalty phase.  
22 Defendant fails to cite any authority that a peremptory challenge may be exercised based  
23 solely on the questionnaire and before the prospective jurors even come to court. Under  
24 these circumstances any failure to request individual voir dire or to preemptively remove  
25 prospective jurors Quenzer and Mowen did not fall below an objective standard of  
26 reasonableness and there has been no showing of prejudice.

1           D. Failure to Object to Lack of Admonishment at All Recesses

2           Defendant next complains that counsel was ineffective in failing to object when the  
3 district court excused the jurors for a recess without reading to them the standard juror  
4 admonishment found in NRS 175.401. Specifically, the statute requires at each adjournment  
5 that the jurors be admonished not to converse with anyone on any subject connected with the  
6 trial, not to read, watch or listen to any report or commentary on the trial, and not to form or  
7 express any opinion on any subject connected with the trial. NRS 175.401. While it is  
8 required that the district court admonish the jury at each adjournment, reversal is not  
9 warranted unless the appellant demonstrates that he “was prejudiced by the district court's  
10 omissions.” Blake v. State, 121 Nev. 779, 798, 121 P.3d 567, 579 (2005). For the same  
11 reasons, any allegation of ineffective assistance of counsel for failing to object to the lack of  
12 an admonishment must demonstrate prejudice. Defendant has utterly failed to allege any  
13 prejudice.

14           Furthermore, the single instance cited in support concerned a brief recess of about ten  
15 minutes due to a technical problem with the courtroom equipment immediately before  
16 opening statements in the case. Transcript 11/1/05 p. 22-3. This recess was immediately  
17 preceded by a lengthy admonishment by the court spanning nearly twenty pages which  
18 advised the jurors of their duties at the commencement of the penalty hearing. Id. at pp. 5-  
19 22. Jurors were admonished to “wait in forming your opinion as to what the sentence should  
20 be until after you’ve heard all of the evidence.” Id. at p. 6. Jurors were also reminded not to  
21 talk to each other about the case or with anyone else, including family members, until the  
22 case was submitted for decision. Id. at p. 18. The jury was also instructed not to “read any  
23 news stories or articles or listen to any radio or television report about the case.” Id. at p. 19.  
24 Immediately after the lengthy admonition, the equipment failed and the jury was recessed.  
25 Therefore, any objection would have been improper as the jury was in fact instructed per  
26 NRS 175.401 immediately before the adjournment.

1           E. Failure to Object to Unrecorded Bench Conferences

2           Defendant next complains that counsel was ineffective in failing to object to certain  
3 unrecorded bench conferences where allegedly material and substantial rulings were made.  
4 Only rarely should a proceeding in a capital case go unrecorded. Daniel v. State, 119 Nev.  
5 498, 507, 78 P.3d 890, 897 (2003). However, the Court has also recognized that a capital  
6 defendant's right to have trial proceedings recorded and transcribed is not absolute,  
7 Archanian v. State, 122 Nev. 1019, 1033, 145 P.3d 1008, 1018-19 (2006), and that "[t]he  
8 mere failure to make a record of a portion of the proceedings . . . is not grounds for reversal."  
9 Daniel, 119 Nev. at 508, 78 P.3d at 897. Rather, a defendant must show that the subject  
10 matter of the omitted portions of the record was so significant that meaningful appellate  
11 review is handicapped. Id. There is no presumption of per se prejudice as Defendant argues  
12 without citation to legal authority. In order to show ineffective assistance of counsel for  
13 failing to ensure all matters were recorded, Defendant must show prejudice.

14           Defendant's cursory and general claim that "Mr. Thomas is informed and believes,  
15 and therefore alleges, that during these unrecorded conferences, the trial judge took material,  
16 substantial actions, including ruling on evidentiary matters and establishing courtroom  
17 procedure and scheduling," is inadequate. Defendant must allege with specificity how he  
18 was prejudiced.

19           F. Failure to Object to Prosecutor Equating Death Penalty with Accountability

20           Defendant next argues that prior counsel should have objected at voir dire and again  
21 during closing arguments when the prosecutor equated the death penalty with holding an  
22 individual accountable. Defendant fails to cite any authority which remotely suggests it is  
23 inappropriate to equate the death penalty with accountability.

24           The purpose of "jury voir dire is to discover whether a juror will consider and decide  
25 the facts impartially and conscientiously apply the law as charged by the court." Witter v.  
26 State, 112 Nev. 908, 914, 921 P.2d 886, 891 (1996). "[T]he proper standard for determining  
27 when a prospective juror may be excluded for cause because of his or her view on capital  
28 punishment . . . is whether the juror's views would 'prevent or substantially impair the



1 performance of his duties as a juror in accordance with his instructions and his oath.”  
2 Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844 (1985) (quoting Adams v. Texas, 448  
3 U.S. 38, 45, 100 S.Ct. 2521, 2526 (1980)). With these purposes in mind, inquiring whether a  
4 juror could return a death verdict in the appropriate case is entirely permissible in voir dire.  
5 Transcript 10-31-05 p. 72, lines 2-12; p. 85, lines 17-24; p. 125, lines 14-22. If a juror will  
6 not return a death verdict under any set of circumstances, they are not qualified to sit as a  
7 juror. In a separate question, asking whether a juror believes that people should be held  
8 accountable for their actions is entirely permissible voir dire.

9 Also, a prosecutor's statement during rebuttal penalty phase argument of a capital  
10 murder prosecution, that the jury must be “accountable” and “do the right thing,” is not  
11 “prosecutorial misconduct” that can be successfully objected to. Lisle v. State, 113 Nev.  
12 540, 554, 937 P.2d 473, 482 (1997). It is even acceptable for a prosecutor to argue, “This is  
13 the time for accountability and responsibility. Death is the only appropriate sentence in this  
14 case. Anything less is disrespectful to the dead and irresponsible to the living.” Domingues  
15 v. State, 112 Nev. 683, 917 P.2d 1364 (1996). Accordingly, Defendant’s argument that  
16 accountability was somehow improperly equated with the death penalty and that prior  
17 counsel should have objected is without merit or support in the law. Such an objection  
18 would have had no legal basis and would not have been sustained.

19 G. Failure to Present Favorable Evidence From Correctional Officers

20 Any claim of ineffective assistance of counsel based upon a failure to call certain  
21 witnesses must allege with specificity which witnesses were not called and what the  
22 substance of their testimony would have been that would have made a difference in the trial.  
23 Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (A defendant who contends that  
24 his attorney was ineffective because he did not adequately investigate must show how a  
25 better investigation probably would have rendered a more favorable outcome); Evans v.  
26 State, 117 Nev. 609, 28 P.3d 498 (2001) (A defendant claiming ineffective assistance from  
27 the failure to prepare defendant's mother and two sisters for the penalty phase so that they  
28 could provide more mitigating evidence should have alleged with specificity what that

1 evidence would have been); State v. LaPena, 114 Nev. 1159, 968 P.2d 750 (1998) (Counsels'  
2 failure to call witnesses did not establish ineffective assistance of counsel, where defendant  
3 did not elaborate on what witnesses' testimony might have been); Bejarano v. State, 106  
4 Nev. 840, 801 P.2d 1388 (1990) ("Without knowing who these other witnesses are, or  
5 indeed, if any even exist, we cannot determine whether appellant was prejudiced by his trial  
6 attorney's failure to call witnesses").

7 To counter the State's numerous correctional officers who testified to Defendant's  
8 violent behavior in prison, Shieck called four prior inmates with a different perspective.  
9 Transcript 11/4/05, pp 7-45. They testified to mistreatment by the guards who antagonized  
10 and provoked Defendant into committing minor violations. They also testified how  
11 Defendant interacted well with other inmates and advised others to avoid problems with the  
12 guards. Shieck even went to the extraordinary effort of calling Defendant's prison warden,  
13 Dwight Neven, and eliciting testimony that Defendant had been non-problematic while at  
14 High Desert Prison, suggesting that prior problems he had while at Ely Prison was because  
15 of the guards. Id. at p. 46-66.

16 Defendant only speculates that there are additional correctional officers in existence  
17 who could have refuted the testimony of the State's witnesses. Unless Defendant can  
18 identify an actual witness, Defendant fails to show that prior counsel was derelict in failing  
19 to locate such a non-existent witness. Furthermore, without knowing what contrary  
20 testimony might have been offered, Defendant can not show prejudice as to how the  
21 outcome would have been different.

## 22 2. Trial Court Errors at the Second Penalty Hearing

23 In the final section of his petition, Defendant alleges numerous errors of trial counsel  
24 at the second penalty hearing including the failure to record proceedings, failure to admonish  
25 jurors, refusing to remove leg shackles, allowing testimonial hearsay, coaching of  
26 prosecutor, and allowing impermissible argument. Such claims are not properly raised for  
27 the first time in a post-conviction petition absent a showing of cause and prejudice.

28 A post-conviction petition must be dismissed under NRS 34.810(1) if the grounds for

1 the petition could have been presented to the trial court or raised in a prior proceeding.  
2 Dismissal of a successive petition is also required if it fails to allege new or different grounds  
3 for relief and the prior determination was on the merits or, if new and different grounds are  
4 alleged, the failure to assert those grounds in a prior petition constitutes an abuse of the writ.  
5 NRS 34.810(2). Defendant has the burden of pleading and proving specific facts that  
6 demonstrate good cause for the failure to present the claim or for presenting the claim again,  
7 and actual prejudice. NRS 34.810(3); see also Evans v. State, 117 Nev. 609, 646-647, 29  
8 P.3d 498, 523 (2001) ("A court must dismiss a habeas petition if it presents claims that either  
9 were or could have been presented in an earlier proceeding, unless the court finds both cause  
10 for failing to present the claims earlier or for raising them again and actual prejudice to the  
11 petitioner"). "Claims that are appropriate for a direct appeal must be pursued on direct  
12 appeal, or they will be considered waived in subsequent proceedings." Franklin v. State, 110  
13 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).

14 Trial court error is properly raised and reviewed on direct appeal. Defendant filed  
15 such an appeal and could have raised all of his claims of trial court error in that proceeding.  
16 Thomas v. State, 122 Nev. 1361, 148 P.3d 727 (2006). In fact, Defendant did raise his claim  
17 of error in admitting confrontational hearsay and was denied because the Confrontation  
18 Clause does not apply to capital sentencing hearings. Thomas, supra, 148 P.3d at 732. Not  
19 only has Defendant failed to allege good cause and prejudice for re-raising this claim, it is  
20 also now barred by law of the case. Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798  
21 (1975) ("The law of a first appeal is the law of the case on all subsequent appeals in which  
22 the facts are substantially the same").

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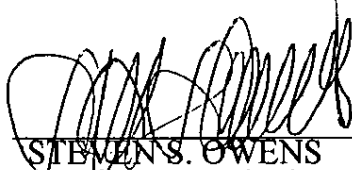
1 WHEREFORE, the State respectfully opposes Defendant's petition for post-  
2 conviction relief and requests that it be denied.

3 DATED this 4th day of November, 2010.

4 Respectfully submitted,

5 DAVID ROGER  
6 Clark County District Attorney  
7 Nevada Bar #002781

8  
9 BY

  
10 STEVEN S. OWENS  
11 Chief Deputy District Attorney  
12 Nevada Bar #004352  
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BRET O. WHIPPLE, ESQ.  
1100 South Tenth Street  
Las Vegas, Nevada 89104

Eileen Davis

SSO/ed

  
CLERK OF THE COURT

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11 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10 Plaintiff,

11 -vs-

12 MARLO THOMAS,  
13 #1060797

14 Defendant.

CASE NO: 96C136862-1

DEPT NO: XXIII

15 **RESPONSE TO SUPPLEMENTAL PETITION**

16 DATE OF HEARING: 4/2/14  
17 TIME OF HEARING: 11:00 AM

18 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County  
19 District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby  
20 submits the attached Points and Authorities in Opposition to Defendant's Supplemental  
21 Petition for Writ of Habeas Corpus (Post-Conviction).

22 This response is made and based upon all the papers and pleadings on file herein, the  
23 attached points and authorities in support hereof, and oral argument at the time of hearing, if  
24 deemed necessary by this Honorable Court.

25 **POINTS AND AUTHORITIES**

26 Thomas first raised a claim of ineffective assistance of counsel in regards to  
27 "possible" mental retardation and Fetal Alcohol Spectrum Disorder in his supplemental  
28 petition filed on July 12, 2010. At that time, Thomas was arguing that counsel should have

1 presented the testimony of Dr. Kinsora who had testified at the first penalty hearing, but did  
2 not testify in the second penalty hearing. The State responded that Dr. Kinsora had  
3 determined that Thomas was NOT mentally retarded and did NOT have the characteristics of  
4 Fetal Alcohol Syndrome. Additionally, the record shows that counsel strategically elected to  
5 elicit Thomas' mental health deficiencies through family members instead of an expert  
6 witness. See State's Response, filed 11/4/2010.

7 Next, despite the State's objection<sup>1</sup>, this Court granted funding for yet another  
8 neuropsychological examination at taxpayer expense which has resulted in an evaluation by  
9 Dr. Jonathan Mack, attached as Exhibit A to the recent supplemental petition. Now, Thomas  
10 is arguing that counsel was ineffective in failing to investigate and present evidence of  
11 mental retardation and Fetal Alcohol Spectrum Disorder in accord with Dr. Mack's  
12 evaluation. This argument fails for the same reasons as previously argued by the State.  
13 Additionally, although Dr. Mack diagnoses Thomas with Fetal Alcohol Spectrum Disorder,  
14 like Dr. Kinsora, he does NOT diagnose Thomas as mentally retarded.

15 As to "mental retardation," the legislature now euphemistically refers to it as  
16 "intellectual disability." See NRS 174.098. Second, Thomas' claim of intellectual disability  
17 is raised and framed solely as an ineffective assistance of counsel claim rather than  
18 substantively under the procedures provided for in NRS 175.554(5). Third, as previously  
19 briefed, because counsel had already obtained a neuropsychological evaluation from Dr.  
20 Kinsora who had opined that Thomas was NOT mentally retarded, counsel's failure to seek  
21 and obtain a second neuropsychological evaluation did not fall below an objective standard  
22 of reasonableness. Fourth, as previously briefed, had trial counsel requested funds for a  
23 second evaluation the request surely would have been denied (notwithstanding this court's  
24 erroneous funding of a second such expert in post-conviction). Fifth, as previously briefed,  
25 no reasonable and competent neuropsychologist could ever diagnose Thomas as  
26 intellectually disabled because his childhood IQ scores preclude a finding of onset before  
27

28 <sup>1</sup> See the State's Response to Request for Funds filed on December 8, 2009.

1 age 18 regardless of his present intellectual deficiencies. Sixth, contrary to representations  
2 in Thomas' supplemental petition, Dr. Mack does NOT diagnose Thomas as mentally  
3 retarded ("Thus, overall, it is difficult to diagnose Mr. Thomas with mild mental retardation  
4 due to his IQ scores before the age of 18," see Dr. Mack's evaluation, p. 36), which is  
5 consistent with Dr. Kinsora's conclusion. Finally, Dr. Mack's evaluation was unnecessary  
6 and does not change the fact that counsel strategically chose to forego expert testimony in  
7 lieu of humanizing Thomas for the jury by presenting mitigating evidence through family  
8 members.

9 As to Fetal Alcohol Spectrum Disorder, as previously briefed, because Dr. Kinsora  
10 and Thomas' childhood psychologist, Linda Overby, both denied that Thomas suffered from  
11 any fetal alcohol disorder, counsel's failure to seek and obtain yet another expert opinion on  
12 the matter did not fall below an objective standard of reasonableness. Second, as previously  
13 briefed, had trial counsel requested funds for a second or third opinion on Fetal Alcohol  
14 Syndrome the request surely would have been denied (notwithstanding this court's erroneous  
15 funding of another such expert in post-conviction). Third, as previously briefed, Fetal  
16 Alcohol Syndrome is of marginal value in mitigation because it is not recognized in the  
17 current DSM-IV and has no specific or uniformly accepted diagnostic criteria to ensure  
18 diagnostic accuracy or reliability. Fourth, presenting Dr. Mack's opinion on Fetal Alcohol  
19 Spectrum Disorder to the jury would have directly conflicted with the opinions of previous  
20 defense witnesses, Dr. Kinsora and Linda Overby, who would have been called as witnesses  
21 by the State to impeach Dr. Mack and undermine the credibility of the defense. Finally, Dr.  
22 Mack's evaluation was unnecessary and does not change the fact that counsel strategically  
23 chose to forego expert testimony in lieu of humanizing Thomas for the jury by presenting  
24 mitigating evidence through family members.

25 There are "countless ways to provide effective assistance in any given case. Even the  
26 best criminal defense attorneys would not defend a particular client in the same  
27 way." Harrington v. Richter, 131 U.S. 770, 131 S.Ct. 770, 788-89 (2011). Rare are the  
28 situations in which the "wide latitude counsel must have in making tactical decisions" will



1 be limited to any one technique or approach. Id. In a capital case, there are any number of  
2 hypothetical experts—specialists in psychiatry, psychology, ballistics, fingerprints, tire  
3 treads, physiology, or numerous other disciplines and subdisciplines—whose insight might  
4 possibly have been useful. Id. But counsel was entitled to formulate a strategy that was  
5 reasonable at the time and to balance limited resources in accord with effective trial tactics  
6 and strategies. Id. Even if an expert theoretically could support a client’s defense theory, a  
7 competent attorney may strategically exclude it, consistent with effective assistance, if such  
8 expert may be fruitless or harmful to the defense. Id. at 789-90. Given that expert testimony  
9 on Thomas’ mental deficiencies and a psychological defense did not convince the jury to  
10 spare Thomas’ life in the first trial, counsel re-doing the penalty hearing reasonably shifted  
11 strategies to a family sympathy type defense.

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

1 In the instant case, all that Thomas has done is to propose an alternative strategy and  
2 theory of defense which in hindsight he speculates might have resulted in a non-death  
3 sentence. The role of a court in considering allegations of ineffective assistance of counsel is  
4 “not to pass upon the merits of the action not taken but to determine whether, under the  
5 particular facts and circumstances of the case, trial counsel failed to render reasonably  
6 effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), *citing*  
7 Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977). Any hindsight criticism of  
8 counsel’s effectiveness in penalty phase must begin with an honest assessment of what  
9 counsel did do under the circumstances at the time. As previously briefed, the record shows  
10 that Thomas’ counsel employed a family sympathy defense much like that in Pinholster  
11 *supra*. But Thomas’ trial counsel went far beyond the defense in Pinholster, because he  
12 called numerous family members to testify to Thomas’ mental health and other mitigating  
13 circumstances. The question is not whether a different defense or investigation would have  
14 been more successful or even whether counsel could have done a better job. In Strickland,  
15 this Court made clear that “the purpose of the effective assistance guarantee of the Sixth  
16 Amendment is not to improve the quality of legal representation ... [but] simply to ensure  
17 that criminal defendants receive a fair trial.” 466 U.S., at 689, 104 “S.Ct. 2052. Thus, “[t]he  
18 benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct *so*  
19 *undermined* the proper functioning of the adversarial process that the trial cannot be relied  
20 on as having produced a just result.” *Id.*, at 686, 104 S.Ct. 2052.

21 At most, the investigation and allegedly new evidence detailed in Thomas’ current  
22 petition and Dr. Mack’s evaluation represent an alternative theory of defense in hindsight,  
23 but not one consistent with the strategy trial counsel believed would be most persuasive at  
24 the time. Some of Dr. Mack’s evaluation arguably is not even mitigating because it portrays  
25 Thomas in a poor light and would have been inconsistent with counsel’s reasonable strategy  
26 of humanizing Thomas and making him likable to the jury. Much of the evidence was  
27 actually presented to the jury through family members and further details through an expert  
28 would have been purely cumulative, unnecessary, and potentially damaging. Under the

1 standard enunciated in Strickland, Pinholster, and Harrington, above, Thomas has failed to  
2 show ineffective assistance of counsel in penalty hearing.

3 An evidentiary hearing would be irrelevant and unnecessary for denying the petition  
4 in this case. A defendant is entitled to an evidentiary hearing if his petition is supported by  
5 specific factual allegations, which, if true, would entitle him to relief, unless the factual  
6 allegations are belied by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603,  
7 605 (1994). However, "[a] defendant seeking post-conviction relief is not entitled to an  
8 evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v.  
9 State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984); *citing* Gronidin v. State, 97 Nev. 454,  
10 634 P.2d 456 (1981). Even if Thomas' factual allegations were all true and Dr. Mack  
11 testified in accord with his evaluation, Thomas still would not be entitled to relief on this  
12 petition because denial of the petition does not depend in any way upon any factual dispute  
13 or the credibility of Dr. Mack. Instead, the facts, even as alleged, show no deficiency of  
14 counsel in not obtaining yet another neuropsychological evaluation and no prejudice under  
15 Strickland that would have probably resulted in a non-death sentence.


16 WHEREFORE, the petition must be denied.

17 DATED this 14th day of April, 2014.

18 Respectfully submitted,

19 STEVEN B. WOLFSON  
20 Clark County District Attorney  
Nevada Bar #001565

21  
22 BY

  
23 STEVEN S. OWENS  
24 Chief Deputy District Attorney  
Nevada Bar #004352  
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