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



MARLO THOMAS,

Appellant,

Vs.

THE STATE OF NEVADA,

Respondent

Case No.: 65916

**PETITION FOR REHEARING PURSUANT TO NRAP 40**

**ATTORNEY FOR APPELLANT**
BRET O. WHIPPLE, ESQ.
JUSTICE LAW CENTER
1100 South 10th Street
Las Vegas, NV 89104
Phone: 702-731-0000
Fax: 702-974-4008

**ATTORNEY FOR RESPONDENT**
STEVEN B. WOLFSON, ESQ.
DISTRICT ATTORNEY
200 Lewis Ave
Las Vegas, NV 89101
Phone: 702-671-2500

ADAM LAXALT
Nevada Attorney General
100 North Carson Street
Carson City, Nevada
(775) 684-1265

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES



## ARGUMENT

Rehearing is required in this case because this Court's decision misapprehended a material question of law and misapplied controlling decisions, NRAP 40(c)(2)(A,B), with regard to the failing of resentencing counsel to obtain and present crucial mitigating evidence. Post-conviction

counsel's request for an evidentiary hearing was denied, thus there was no record before this Court of resentencing counsel's reasons for failing to present evidence of Mr. Thomas's impaired intellectual functioning at his penalty-phase retrial.

Second, this Court found that Thomas essentially abandoned, in the court below, the claim that he was mentally retarded. Because this Court notes it has a long-standing rule against considering issues argued for the first time on appeal, it treated the issue of mental retardation as essentially waived. *See* Order of Affirmance, Pg. 2. However, Appellant argues that this holding was erroneous, as the bar on the execution of the mentally retarded is "absolute." Therefore a procedural bar cannot operate to allow the State of Nevada to violate the Eighth Amendment's absolute prohibition on the execution of a defendant who is shown to be mentally retarded.

This Court, relying on *Cullen v. Pinholster,* 563 U.S. 170, 196 (2011), nevertheless "infer[red] that [resentencing] counsel made a strategic decision to take a different approach at the second penalty hearing because the record shows counsel knew of the testimony and evidence offered at the first penalty hearing." Order of Affirmance at 4.

The Supreme Court has warned against invoking "strategy" as a post-hoc rationalization of counsel's conduct rather than an accurate description of their deliberations prior to sentencing to explain counsel's decisions. *Keith v. Mitchell*, 466 F.3d 540, 543-44 (6th Cir. 2006) (quoting *Wiggins v. Smith*, 539 U.S. 510, 527 (2003)). See also *Brown v. Sternes*, 304 F.3d 677, 691 (7th Cir. 2002). It is not the role of a reviewing court to engage in a post hoc rationalization for an attorney's actions by 'construct[ing] strategic defenses that counsel does not offer' or engage in Monday morning quarterbacking." (citing *Harris v. Reed*, 894 F.3d 871, 878 (7th Cir. 1990)) (second alteration in original); *Harris v. Reed*, 894 F.3d 871, 878 (7th Cir. 1990) ("Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct counsel's strategic defenses which counsel does not offer.") (citing *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986)). Yet this Court found, without any evidentiary support, that resentencing counsel made a "strategic decision" "to generally acknowledge Thomas' problems from his family's perspective," and to forgo presenting expert testimony regarding Thomas's impaired intellectual functioning. After generating its own purported strategic decision and attributing it to resentencing counsel, the Court then went on to find that the

decision not to call an expert "was objectively reasonable." Order of Affirmance at 5-6. The Court's conclusion cannot be sustained because the case it relies on is readily distinguishable from the case at bar.

The Supreme Court characterized the available mitigation evidence in *Wong v. Belmontes* as "neither complex nor technical .... requir[ing] only that the jury make logical connections of the kind a layperson is well equipped to make." 558 U.S. 15, 24 (2009) (per curiam). For a jury to understand the mitigating effect of impaired intellectual functioning, however, demands the assistance of an expert. See *Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014) ("That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising .... Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue") (emphasis added}.

This Court's conclusion that the evidence proffered by post-conviction counsel was a "double-edged sword" because it "also could have supported the State's argument that [Thomas] would never be a manageable inmate," Order of Affirmance at 5, 6, was unreasonable based on the facts before it. As the Court pointed out, the State did present evidence about Thomas's

"abhorrent behavior while incarcerated, which included accounts that he attacked officers and encouraged fellow inmates to do the same, failed to comply with institution rules, and belittled, harassed, and threatened female corrections officers." Order of Affirmance at 4-5 n.3.

The Court offers no explanation as to how evidence of Thomas's impaired intellectual functioning "could have been just as harmful as helpful" in light of the evidence the jury had already heard. Indeed, as the Court itself acknowledged, "[t]he newly-proffered evidence might have explained why Thomas acted out." Order of Affirmance at 4-5 (emphasis in original). The Supreme Court will not "countenance the suggestion that low IQ evidence is not relevant mitigating evidence." *Tennard v. Dretke*, 542 U.S. 274, 287 (2004). The failure of resentencing counsel to present this evidence to Thomas's jury was objectively unreasonable.

This Court's finding that Thomas failed to demonstrate prejudice because the newly proffered evidence was "not so compelling that there is a reasonable probability that the proceedings would have ended differently has it been presented," Order of Affirmance at 6, runs contrary to clearly established Supreme Court precedent. Evidence of "impaired intellectual functioning is inherently mitigating." *Tennard*, 542 U.S. at 287 (citing *Atkins*

*v. Virginia*, 536 U.S. 304, 316 (2002)) (emphasis added). If the resentencing jury had been told by an expert that Thomas's behavior was the product of his impaired intellectual functioning, there is a reasonable probability that one juror might not have voted to sentence him to death.

Finally, no State in this country can execute a person who is mentally retarded. The bar on doing so is categorical and absolute. The Court in *Atkins* noted: "In light of these deficiencies, our death penalty jurisprudence provides two reasons consistent with the legislative consensus that **the mentally retarded should be categorically excluded from execution**." *Atkins v. Virginia*, 536 U.S. 304, 318, 122 S. Ct. 2242, 2251 (2002). The Court there went on to hold that "death is not a suitable punishment for a mentally retarded criminal." *Id.* As such, the Constitution's Eighth Amendment "places a substantive restriction on the State's power to take the life" of a mentally retarded offender." *Atkins v. Virginia,* 536 U.S. 304, 321, 122 S. Ct. 2242, 2252 (2002).

This Court erroneously held that, in essence, the issue of whether or not Thomas is mentally retarded was rendered immaterial by procedural waiver. In Appellant's view, the need for an evidentiary hearing to determine whether or not an individual facing execution is mentally retarded

may never, under any circumstances, be lost through procedural waiver. This is because the prohibition is on the State itself; the bar on such executions is "categorical" and "substantive."

This requirement is found in the Eighth Amendment protection against cruel and unusual punishment. If it is unconstitutionally cruel to execute a mentally retarded person as a *class* because of the mental faculties of that class of persons, it does not suddenly become less "cruel" because of a procedural misstep.

For these reasons, this Court should grant rehearing, reverse the district court's denial of habeas corpus relief, and remand this case for a new sentencing hearing in which the constitutional, proper decision maker-an impartial jury-can assess the weight to be given to the significant mitigating evidence that was not presented, and consider, in light of that evidence, what the appropriate sentence should be. See *Bennett v. State*, 111 Nev. 1099, 1109- 10,901 P.2d 676, 683 (1995) (capital jurors not required to vote to impose death under any circumstances).

DATED THIS 8th day of August, 2016.

**/s/ Bret O. Whipple, Esq.**
**ATTORNEY FOR APPELLANT**
Bar Number. 6168

## CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the:

PETITION FOR REHEARING PURSUANT TO NRAP 40

by e-filing and/or mailing via US Regular mail thereon fully prepaid, to the following:
Marlo Thomas Inmate #50682
ELY STATE PRISON PO Box 1989
Ely, Nevada 89301

and providing a copy to the following by virtue of e-filing the brief and appendix with the Supreme Court:

STEVEN B. WOLFSON, ESQ.
CLARK COUNTY DISTRICT ATTORNEY
200 LEWIS AVENUE
LAS VEGAS, NV 89155-2212

Dated this 8th day of August, 2016.

**/s/ Michael Mee**
AN EMPLOYEE OF JUSTICE LAW CENTER

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(7)(a)(ii) and the type style requirements of NRAP32(a)(6) because:

This brief has been prepared in proportionally spaced typeface using Word Perfect, Font size 14, Times New Roman. I further certify that this brief complies with the page- or typevolume limitations of NRAP 40 as this PETITION is less than 10 (ten) pages long.

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

Dated 8th day of August, 2016.

/S/ Bret O. Whipple, Esq.

Nevada Bar # 6168
1100 S. Tenth Street
Las Vegas, Nevada 89104
JUSTICE LAW CENTER
(702) 731-0000
Fax (702) 974-4008