IN THE SUPREME COURT OF THE STATE OF NEVADA
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| MARLO THOMAS,<br><br>Appellant,<br><br>v.<br><br>WILLIAM GITTERE, et al.,<br><br>Respondents. | No. 77345<br><br>District Court Case No. 96C136862-1<br><br>(Death Penalty Case) |

# APPELLANT'S APPENDIX

Volume 31 of 35

Appeal from Order Dismissing Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Stefany Miley, District Judge

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## CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on June 14, 2019. Electronic Service of the foregoing APPELLANT'S APPENDIX shall be made in accordance with the Master Service List as follows:

Steven S. Owens
Chief Deputy District Attorney

/s/ *Jeremy Kip*
An Employee of the
Federal Public Defender,
District of Nevada

supplemental petitions) on Mr. Schieck's alleged ineffectiveness in purportedly (1) "failing to object to Thomas and some of his witnesses appearing shackled in front of the jury," Pet. at 128; (2) failing to investigate and present mitigating evidence, Id. at 129; (3) "failing to object and move for a mistrial after the 'prosecutor displayed highly inflammatory prejudicial images to the jury,'" Id. at 162; and (4) "failing to make an opening statement at the start of the selection phase." Id. at 163.

Petitioner's attempt to meet Strickland's second prong on the basis of any alleged deficiencies on the part of Mr. Whipple fares no better. Mr. Whipple raised many of the arguments Petitioner now makes in support of this allegation in the instant habeas petition. See Ex. 22 – 23. Mr. Whipple raised Claim 14(A) and 14(B). The Nevada Supreme Court, in its July 22, 2016, Order of Affirmance, denied these arguments and ultimately concluded that trial counsel were not ineffective during the second penalty phase and that Petitioner failed to demonstrate prejudice. See Ex. 26.

Although Mr. Whipple did not raise claim 14(C) and 14(D), they would have been unsuccessful. Petitioner has failed to meet his burden under Strickland. Petitioner has failed to show that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065. Accordingly, Petitioner has not established that Mr. Whipple was ineffective for failing to raise that Mr. Schieck was ineffective for failing to raise these claims as they would have been unsuccessful.

Based on the foregoing, the Court should deny Petitioner's claim that trial counsel were ineffective during the second penalty phase because all four of the allegations upon which this claim is predicated are themselves procedurally defaulted, and Petitioner has failed to sufficiently plead good cause to excuse this default.

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**10. Petitioner's Claim of Trial Court Error at The Penalty Retrial is Barred under the Law of The Case**

Claim 16 states that "Thomas's death sentences are invalid under federal constitutional guarantees of due process, equal protection, and a fair trial because of error by the trial court. Pet. at 167. Petitioner makes 1 specific allegation in support of his claim. Petitioner states that "the trial court improperly limited the defense theory regarding Angela Love's involvement and the State's decision not to charge her as an accessory." Id.

This Court should find that Claim 16 is barred under the law of the case. See Pellegrini, 117 Nev. at 879, 34 P.3d at 532 (citing McNelton v. State, 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). Petitioner raised this issue in his direct appeal from the second penalty hearing. The Nevada Supreme Court held, "[t]his claim warrants no relief." Ex. 19 at 13. The Nevada Supreme Court further stated that "Thomas fails to show how evidence that Love was not charged was relevant to his sentence or that admission of such evidence was required by the Constitution . . . [and] it lacks merit." Id. at 14. Therefore, Petitioner has not established that Mr. Whipple was ineffective for failing to raise that Mr. Schieck was ineffective for failing to raise these claims as they would have been unsuccessful. This Court should find that Claim 16 is barred under the law of the case.[22]

**11. Petitioner's Claim of Prosecutorial Misconduct at The Penalty Retrial is either Barred under the Law of the Case or Waived under NRS 34.810(1)(b)(2)**

Claim 18 states that "Thomas's death sentences are invalid under federal constitutional guarantees of due process, equal protection, a fair trial, freedom from cruel and unusual punishment, and a reliable sentence because of pervasive prosecutorial misconduct." Pet. at 172. Petitioner makes 3 specific allegations to support this claim. First, Petition alleges that "the State intentionally injected character evidence into the eligibility phase, in violation of the bifurcation order." Id. Next, Petitioner claims that the State made improper closing arguments. Id. at 173. Finally, Petitioner alleges that "the trial court erred in failing to sua

[22] See Footnote 1.

sponte order a mistrial or admonish the jury after the prosecutor displayed highly inflammatory prejudicial images during closing arguments." Id. at 175.

Regarding Claim 18(A) and (B), this Court should find that they are barred under the law of the case. See Pellegrini, 117 Nev. at 879, 34 P.3d at 532 (citing McNelton v. State, 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). Petitioner raised this issue in his direct appeal from the second penalty hearing. As to Claim 18(A), the Nevada Supreme Court held that although some statements "were not proper at the eligibility phase . . . the error was minimal and did not affect his substantial rights." Ex. 19 at 8. As to Claim 18(B), the Nevada Supreme Court held that "the impropriety was not prejudicial," and the jury was properly instructed on the law. Id. at 9. Therefore, Petitioner has not established that Mr. Whipple was ineffective for failing to raise that Mr. Schieck was ineffective for failing to raise these claims as they would have been unsuccessful. This Court should find that these allegations are barred under the law of the case.[23]

This Court should find that Claim 18(C) is waived under NRS 34.810(1)(b)(2). See Franklin, 110 Nev. at 752, 877 P.2d at 1059. This allegation could have been raised on direct appeal to the Nevada Supreme Court. However, Petitioner failed to raise it. Moreover, Petitioner has failed to demonstrate good cause for the failure to present this ground earlier. The probative value of these photos was not substantially outweighed by the danger of unfair prejudice. NRS 48.035. Petitioner does not even allege that prejudice occurred. Therefore, Petitioner cannot establish that Mr. Whipple was ineffective for failing to raise that Mr. Schieck was ineffective for failing to raise these claims as they would have been unsuccessful. Thus, this Court should find that Claim 18(C) has been waived.[24]

**12. Petitioner's Claim Regarding The Prior Crime Aggravating Circumstance is Barred under the Law of the Case**

Claim 25 states that "Thomas's death sentences are invalid under federal constitutional guarantees of due process, effective counsel, equal protection, trial before an impartial jury,

[23] See Footnote 1.
[24] See supra pg. 6 – 9.

freedom from cruel and unusual punishment, and a reliable sentence because the State improperly relied on the prior violent felony aggravating circumstance." Pet. at 215.

This Court should find that Claim 25 is barred under the law of the case. See Pellegrini, 117 Nev. at 879, 34 P.3d at 532 (citing McNelton v. State, 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). The Nevada Supreme Court reviewed the death sentences, including the applicability of the aggravators, on both direct appeals based on the mandatory death sentence review. Ex. 5 at 27; Ex. 19 at 16. Thus, Petitioner has not established that Mr. Whipple was ineffective for failing to raise that Mr. Schieck was ineffective for failing to raise these claims as they would have been unsuccessful. Therefore, this Court should find that these allegations are barred under the law of the case.[25]

**13. Petitioner's Claim of Juror Misconduct and Bias at The Penalty Retrial is Waived under NRS 34.810(1)(b)(2)**

Claim 26 states that "Thomas's death sentences are invalid under federal constitutional guarantees of due process, a fair trial, an impartial jury, a reliable sentence, effective assistance of counsel, and freedom from cruel and unusual punishment because several jurors on Thomas's penalty retrial panel were biased and engaged in juror misconduct." Pet. at 218.

Petitioner makes 6 specific allegations in support of this claim. Petitioner argues that "seated jurors refused to consider and give effect to Thomas's presented mitigation." Id. Petitioner claims that he "suffered ineffective assistance of counsel when trial counsel failed to challenge biased jurors for cause and adequately question jurors during voir dire." Id. at 219. Petitioner states that "seated jurors decided Thomas's punishment with the knowledge that [he] had already been sentenced to death by a prior jury." Id. at 222. Petitioner claims that "juror Cunningham introduced extraneous prejudicial information and improperly influenced other jurors." Id. at 225. Petitioner next alleges that Cunningham was "dishonest on her juror questionnaire." Id. at 227. Petitioner states that Cunningham "refused to consider all four

[25] See supra pg. 6 – 9.

penalties" for which he was eligible. Id. Finally, Petitioner alleges that "seated jurors determined before deliberation that they would vote for death." Id. at 228.

This Court should find that Claim 26 is waived under NRS 34.810(1)(b)(2). See Franklin, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal to the Nevada Supreme Court. However, Petitioner failed to raise them. Moreover, Petitioner has failed to demonstrate good cause for the failure to present these grounds earlier.

To support these claims, Petitioner relies on a number of juror declarations. This is impermissible and may not be considered. NRS 50.065(2) states in pertinent part:

> Upon an inquiry into the validity of a verdict or indictment:
>
> (c) A juror shall not testify concerning the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.
>
> (d) The affidavit or evidence of any statement by a juror indicating an effect of this kind is inadmissible for any purpose.

In Echavarria, 108 Nev. 734, 839 P.2d 589, in a post-trial interview, a juror revealed to the defense that she only voted for the death penalty because she thought the verdict would be overturned on appeal due to juror misconduct. At the evidentiary hearing, the court excluded Pool's statements regarding her reason for voting for the death penalty as violative of NRS 50.065(2), which prohibits consideration of affidavits or testimony of jurors concerning their mental processes or state of mind in reaching the verdict. See Riebel, 106 Nev. at 263, 790 P.2d at 1008. The Nevada Supreme Court affirmed the district court's decision. Echavarria, 108 Nev. 734, 839 P.2d 589. Accordingly, the juror declarations Petitioner relies on to support these claims are inadmissible for any purpose. Moreover, this inadmissible information was not available to Mr. Schieck or Mr. Whipple. Further, Petitioner quotes some juror statements from voir dire, out of context, and does not include the later rehabilitation of those jurors. Thus, Petitioner has not established that Mr. Whipple was ineffective for failing to raise that

Mr. Schieck was ineffective for failing to raise these claims as they would have been unsuccessful. Thus, this Court should find that Claim 26 has been waived.[26]

**14. Petitioner's Claim that He Received Ineffective Assistance of Second Direct Appeal Counsel Consists Exclusively of Allegations of Ineffective Assistance of Counsel, which Are Themselves Procedurally Barred**

Claim 20 states that "Thomas's death sentences are invalid under federal constitutional guarantees of due process, equal protection, effective assistance of counsel, freedom from cruel and unusual punishment, and a reliable sentence due to the ineffective assistance of appellate counsel for the second direct appeal." Pet. at 178.

The Court should reject this claim of ineffective assistance of counsel because the allegations upon which this claim is predicated are themselves procedurally defaulted. As noted above, this is the second habeas petition in which Petitioner is raising claims related to the penalty-phase of his capital proceedings. All penalty-phase claims/allegations of ineffective assistance of counsel—to include claims/allegations of ineffective assistance of *appellate* counsel—should have been raised in Petitioner's second habeas petition (or, rather, his first habeas petition after the second penalty hearing). The factual basis for each and every allegation raised in Claim 20 of the Petition was available during the timeframe in which Petitioner's second habeas petition was filed. And the record reflects that many of the allegations were raised by Mr. Whipple—Petitioner's second post-conviction counsel. See Ex. 22 – 23.

To the extent Petitioner's appellate counsel did not raise each and every claim/allegation/argument that Petitioner now makes, the Court should find that Petitioner has failed to overcome the presumption that appellate counsel's actions were reasonable and, thus, Mr. Whipple cannot be deemed ineffective for failing to attack appellate counsel's strategic decisions. The United States Supreme Court has observed that it is "difficult" to prevail on a claim of ineffective appellate counsel based on counsel failing to raise a particular claim. Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 782 (2000). The United States Court of Appeals for the Third Circuit has noted that "it is a well-established principle that counsel decides

[26] See supra pg. 6 – 9.

which issues to pursue on appeal, [ ] and there is no duty to raise every possible claim. [ ] An exercise of professional judgment is required." Sistrunk v. Vaughn, 96 F.3d 666, 670, (3d Cir. 1996) (quoting Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983)). Moreover, a claim of ineffective assistance of appellate counsel is more likely to succeed "only when ignored issues are clearly stronger than those presented[.]" Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Here, Petitioner's penalty-phase appellate counsel filed a 51-page Opening Brief, raising 5 issues, several of which broke down into sub-issues. Importantly, the issues presented by appellate counsel in the Opening Brief were the strongest issues—i.e., those most likely of being resolved in Petitioner's favor—that could have been raised. None of the "new" claims, allegations, or arguments that Petitioner now raises were stronger than those actually presented. Accordingly, Petitioner's appellate counsel was not deficient in representing Petitioner on appeal from the penalty retrial. Petitioner has failed to establish deficiency on the part of his appellate counsel, thus, he has failed to establish deficiency on the part of Mr. Whipple, who would have been responsible for raising such ineffective-assistance-of-counsel claims in the second habeas petition.

Therefore, because all allegations of ineffective assistance of appellate counsel raised by Petitioner in the instant Petition were reasonably available at the time Petitioner filed his second habeas petition, this Court should deny Claim 20 on the basis that it consists exclusively of procedurally defaulted allegations of ineffective assistance of appellate counsel, and Petitioner has failed to establish good cause to overcome this procedural default.

**B. The Penalty Phase Claims are Successive under NRS 34.810(2) and Petitioner Failed to Establish Good Cause and Undue Prejudice**

As noted above, the instant petition is the second habeas petition regarding the penalty phase claims. To the extent that Petitioner articulates new and different allegations within these claims, this Court should find that Petitioner's failure to assert those ground in a prior petition constitutes an abuse of the writ. While NRS 34.810(3) affords Petitioner the opportunity to overcome the procedural bar, Petitioner failed to establish good cause for the very same reasons that he failed to establish good cause under NRS 34.726(1). Further, Petitioner failed

to establish undue prejudice. Accordingly, this Court should deny the penalty phase claims as they are procedurally barred under NRS 34.810(2).

**C. The State Pleads Laches**

NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period exceeding 5 years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." The Nevada Supreme Court stated: "petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system" and that "[t]he necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984). To invoke NRS 34.800(2)'s presumption of prejudice, the statute requires that the State specifically plead laches.

The State affirmatively pleads laches, under NRS 34.800(2), because 11 years have elapsed between the affirmance on direct appeal of the death sentence and the filing of this petition. To overcome the presumption of prejudice to the State, Petitioner has the heavy burden of proving a fundamental miscarriage of justice. See Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). Petitioner failed to meet that burden. Accordingly, this Court should dismiss the penalty phase claims pursuant to NRS 34.800(2).

**III. THE REMAINING CLAIMS MUST FAIL**

The claims yet to be addressed are Claims 21, 22, 23, 24, and 27. To the extent any of the claims raised below could have been raised before, Petitioner argues ineffective assistance of post-conviction counsel as good cause to justify the re-raising of them. Pet. at 13 – 14. Ineffective assistance of post-conviction counsel can certainly constitute good cause to excuse the procedural bars. See McNelton, 115 Nev. 296, 416 n.5, 990 P.2d 1263, 1276 n.5 (1999); Crump, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). Here, however, Petitioner's allegation of ineffective assistance of post-conviction counsel must fail. Because none of the claims addressed in this section are meritorious, Petitioner has failed to establish that he was

prejudiced (1) by post-conviction counsel's failure to raise the claims and/or (2) by post-conviction counsel's "fail[ure] to adequately plead" these claims. Id. at 14.

**A. Petitioner's Cumulative Error Claim Must Fail**

Claim 21 states that "Thomas's convictions and death sentences are invalid under federal constitutional guarantees of due process, equal protection, effective assistance of counsel, fair tribunal, impartial jury, reliable sentence, and freedom from cruel and unusual punishment because of the cumulative effect of the errors in this case." Pet. at 180. Further, Petitioner claims that "[e]ach of the errors discussed in this petition independently mandates relief . . . [but] when considered cumulatively, the aggregate effect of those violations rendered the trial fundamentally unfair and a violation of due process." Id.

This Court should note that Petitioner raised his cumulative error claim in his appeal from the first trial and it was rejected by the Nevada Supreme Court. See Ex. 3 at 57. While Petitioner did not allege a cumulative error claim in his direct appeal from the penalty retrial, the Nevada Supreme Court concluded, "Thomas's penalty hearing, while not free from error, was fair. We conclude that none of the arguments on appeal establish reversible error." Ex. 19 at 19. This determination is the law of the case and cannot be reconsidered by this Court. See Pellegrini, 117 Nev. at 879, 34 P.3d at 532 (citing McNelton v. State, 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief.").[27]

To the extent Petitioner argues cumulative error as good cause to excuse any of his procedurally defaulted claims,[28] the Court should reject such an attempt to establish good cause for the very same reason—that is, because this Court is bound by the Nevada Supreme Court's previous determinations that there was no prejudicial error. In Rippo, 368 P.3d at 750, 132 Nev. Adv. Rep. 11 (2016), the Nevada Supreme Court rejected a similar claim that "cumulative error" constituted good cause to overcome the procedural bars. In rejecting the

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[27] See Footnote 1.

[28] The Petition includes a "Statement with Respect to Claims Re-Raised in the Instant Petition" in which it appears that Petitioner attempts to set out a blanket allegation of good cause insofar as he explains why he is re-raising "the grounds raised on direct appeal to the Nevada Supreme Court." Pet. at 13. There he argues that it is doing it, in part, "because [he] is entitled to a cumulative consideration of the constitutional errors which infected his conviction and death sentence." Id.

claim, the Nevada Supreme Court found that the assertion of "cumulative error" as good cause, "ignore[d] [the] prior determination that there was no error with respect to the claims that previously were rejected on appeal on their merits." Id. Similarly, this Court should reject Petitioner's attempt to argue cumulative error as good cause because this Court is bound by the Nevada Supreme Court's determinations that there was no error, or alternatively, no prejudicial error, and that cumulative error review did not warrant a new trial.

To the extent Petitioner seeks to include the new ineffective-assistance-of-counsel errors he raises in the instant Petition, this Court should note that the Nevada Supreme Court has yet to endorse application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell, 125 Nev. at 259, 212 P.3d at 318. Nevertheless, even where available, a cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See e.g., Harris By and through Ramseyer, 64 F.3d at 1438. In fact, logic dictates that there can be no cumulative error where the defendant fails to demonstrate any single violation of Strickland. See Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("[W]here individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F. Supp. 2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-53 (5th Cir. 2005)). Because Petitioner previously has not demonstrated, and again fails to demonstrate, that any claim warrants relief under Strickland, there is nothing to cumulate. Therefore, Petitioner's cumulative error claim should be denied.

Alternatively, Petitioner fails to demonstrate cumulative error sufficient to warrant reversal. In addressing a claim of cumulative error, the relevant factors are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). As far as the issue of guilt is concerned, the Nevada Supreme Court commented on the overwhelming evidence of guilt in this case, in its November 25, 1998, Opinion affirming the judgment of conviction and sentences of death. Ex. 5 at 17 – 24. In that same Opinion, the Nevada Supreme Court

stated:

> The State presented substantial evidence detailing Thomas' violent past, lack of conformance with society's laws, and criminal behavior . . . the sentence of death was not excessive considering Thomas' strong propensity toward violence and the brutal murders of two men who happened to be at the wrong place at the wrong time.

Id. at 27 – 28. Finally, as to the quantity and character of the errors alleged by Petitioner, this Court should find that Petitioner has failed to establish that the errors, even when aggregated, deprived him of a reasonable likelihood of a better outcome at trial. Therefore, even if counsel was in any way deficient, there is no reasonable probability that Petitioner would have received a better result, but for the alleged deficiencies.

**B. Petitioner's Claim that His Conviction and Death Sentences are Invalid because Sentencing and Appellate Review were Conducted before Elected Judges Must Fail**

Claim 22 states that "Thomas's convictions and death sentences are invalid under the federal constitutional guarantees of due process of the law, equal protection of the law, a reliable sentence,, and international law because Thomas's capital trial, sentencing, and review were on direct appeal were conducted before state judicial officers whose tenure in office was not dependent on good behavior but rather was dependent on popular election and who failed to conduct fair and adequate appellate review." Pet. at 182. Petitioner contends that the system of elected judges in Nevada is unconstitutional because judges face the possibility of removal if they make a controversial decision.

This claim has been raised in prior proceedings and rejected by the Nevada Supreme Court. This claim was raised in Petitioner's first Petition for Writ of Habeas Corpus and the appeal from the denial of that Petition. See Exs. 11 – 13. The Nevada Supreme Court rejected this claim. Accordingly, the Court should find that Claims 22 is barred under the law of the case. See Pellegrini, 117 Nev. at 879, 34 P.3d at 532 (citing McNelton, 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief.").

In McConnell v. State, 125 Nev. 243, 256, 212 P.3d 307, 316, the Nevada Supreme Court rejected such a claim. In McConnell, the petitioner raised "an ineffective-assistance

claim based on appellate counsel's failure to argue that it was prejudicial to have elected judges and justices preside over his trial and appellate review because elected judges are beholden to the electorate and therefore cannot be impartial." 125 Nev. at 256, 212 P.3d at 316. The Court denied the petitioner's claim on two grounds. Id. First, the Court explained that the petitioner "failed to substantiate this claim with any specific factual allegations demonstrating *actual* judicial bias." Id. (emphasis added). The Court further held that the "argument is unpersuasive and would not have had a reasonable probability of success." Id.

Here, Petitioner has failed to demonstrate that any proceeding was impacted by judicial bias related to an election but is instead raising a generalized argument that an elected judiciary cannot be fair. Petitioner's allegation that Justice Becker was biased because she lost her re-election and planned to work at the Clark County District Attorney's Office amounts to nothing more than mere speculation. Pet. at 187. Therefore, Whipple could not be ineffective in failing to raise this claim. As the Court in McConnell rejected the argument that an elected judiciary cannot be fair, this Court should similarly reject Petitioner's claim.

**C. Petitioner's Claim that the Death Penalty is Unconstitutional Must Fail**

Claim 23 states that "Thomas's convictions and death sentences are invalid under federal constitutional guarantees of due process, confrontation, effective counsel, equal protection, trial before an impartial jury, freedom from cruel and unusual punishment, and a reliable sentence because Nevada's death penalty is unconstitutional." Pet. at 189. Petitioner raises 4 specific allegations to support this claim. First, Petitioner claims that lethal injection is unconstitutional in all circumstances." Id. Next, Petitioner alleges that "Nevada's death penalty scheme does not narrow the class of persons eligible for the death penalty." Id. at 210. Petitioner claims that the death penalty is cruel and unusual." Id. Finally, Petitioner claims that executive clemency is unavailable. Id. at 211.

Claims 23(B) and (C) have been raised in prior proceedings and rejected by the Nevada Supreme Court. Claim 23(B) was raised in Petitioner's second Petition for Writ of Habeas Corpus and the appeal from the denial of that Petition. See Exs. 17 – 19. The Nevada Supreme Court rejected this claim stating, "Thomas provides no reason for this court to depart from its

previous holdings that Nevada's death penalty scheme is constitutional." Ex. 19 at 14. As to Claim 23(C), not only did the Supreme Court find that the death penalty is not cruel and unusual punishment, it found that, here, "the death penalty was not excessive punishment." Ex. 5 at 26 – 27. Accordingly, the Court should find that Claims 23 (B) and (C) are barred under the law of the case. See Pellegrini, 117 Nev. at 879, 34 P.3d at 532 (citing McNelton, 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief.").[29]

Claims 23(A) and (D) have not been raised in prior proceedings. This Court should find that they are waived under NRS 34.810(1)(b)(2). See Franklin, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal to the Nevada Supreme Court. However, Petitioner failed to raise them. Moreover, Petitioner has failed to demonstrate good cause for the failure to present these grounds earlier. Thus, this Court should find that Claim 23(A) and (D) have been waived. Therefore, Whipple could not be ineffective in failing to raise this claim. Notwithstanding this, the State will briefly respond to each of the allegations.[30]

**1. Petitioner's Allegation that Lethal Injection is Unconstitutional in All Circumstances Must Fail**

Petitioner alleges that "execution by lethal injection is unconstitutional in all circumstances . . . [and] can never satisfy the demands of the Eighth Amendment." Pet. at 189. Petitioner acknowledges that there is Supreme Court authority to the contrary. Id. Petitioner then alleges that "lethal injection, as administered in the State of Nevada, violates the Cruel and Unusual Punishment Clause." Id. at 198. Petitioner acknowledges that "lethal injection in Nevada can be administered in a constitutional manner." Id. Petitioner claims that "he is without sufficient information to fully and fairly plead this claim." Id.

First, this is not a cognizable claim in a Petition for Writ of Habeas Corpus and must be denied. In McConnell v. State, the Nevada Supreme Court found that the district court did not err in rejecting this claim without an evidentiary hearing, as it is not cognizable in a state habeas petition. 125 Nev. 243, 248-249, 212 P.3d 307, 311 (2009). The Court reasoned:

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[29] See Footnote 1.

[30] See supra pg. 6 – 9.

> [W]e conclude that a challenge to the lethal injection protocol in Nevada does not implicate the validity of a death sentence because it does not challenge the death sentence itself but seeks to invalidate a particular procedure for carrying out the sentence. In Nevada, the method of execution--"injection of a lethal drug"--is mandated by statute. NRS 176.355(1). But the manner in which the lethal injection is carried out--the lethal injection protocol--is left by statute to the Director of the Department of Corrections. NRS 176.355(2)(b) (providing that the Director shall "[s]elect the drug or combination of drugs to be used for the execution after consulting with the State Health Officer"). Because the lethal injection protocol is not mandated by statute, granting relief on a claim that a specific protocol is unconstitutional would not implicate the legal validity of the death sentence itself. Rather, while granting relief on such a claim would preclude the Director from using the particular protocol found to be unconstitutional, the Director would be free to use some other protocol to carry out the death sentence. Because McConnell's challenge to the lethal injection protocol would not preclude his execution under current law using another protocol, we conclude that the challenge to the lethal injection protocol does not implicate the validity of the death sentence and therefore falls outside the scope of a post-conviction petition for a writ of habeas corpus. *Accord Ex parte Alba,* 256 S.W.3d 682, 685-86 (Tex. Crim. App. 2008) (reasoning that because the specific mixture used for lethal injection is not mandated by statute in Texas and any challenge to the current protocol would not eliminate the petitioner's death sentence, challenge to lethal injection protocol was not cognizable in state habeas petition). Accordingly, the district court did not err in rejecting this claim without conducting an evidentiary hearing.

Id. Thus, this claim is inappropriate for consideration on collateral review. But, the challenge to the lethal injection protocol is meritless. As noted above, the death penalty in and of itself does not violate the Eighth and Fourteenth Amendments. The United States Supreme Court has consistently found that the death penalty does not constitute cruel and unusual punishment. See e.g., Kennedy v. Louisiana, 554 U.S. 407, 420, 128 S. Ct. 2641, 2650 (2008) (citing Gregg, 428 U.S. at 153, 96 S. Ct. at 2009). The Nevada Supreme Court has found likewise. See e.g., Maestas v. State, 128 Nev. 124, 142 n.14, 275 P.3d 74, 86 n.14 (2012).

Nor does the method of lethal injection constitute cruel and unusual punishment. The United States Supreme Court has affirmed the use of lethal injection to carry out a sentence of death. Baze v. Rees, 553 U.S. 35, 63, 128 S. Ct. 1520, 1538 (2008) (plurality opinion). The Supreme Court of Nevada has likewise found lethal injection to comport with the requirements of the Eighth Amendment. McConnell, 120 Nev. at 1056, 102 P.3d at 616; State v. Haberstroh, 119 Nev. 173, 188, 69 P.3d 676, 686 (2003). Therefore, Petitioner's contentions, even if not cognizable on habeas, are meritless, as the procedures involved in Nevada's lethal injection

protocol are not "*sure or very likely* to cause serious illness and needless suffering," and do not give rise to "sufficiently *imminent* dangers." Baze, 553 U.S. at 50, 128 S. Ct. at 1531.

**2. Petitioner's Allegation that Nevada's Death Penalty Scheme Does Not Narrow the Class of Persons Eligible for The Death Penalty Must Fail**

Petitioner alleges that "Nevada's death penalty scheme does not narrow the class of persons eligible for the death penalty." Pet. at 210. Petitioner argues that Nevada's death penalty scheme does not narrow the class of persons eligible because it permits broad imposition of the death penalty for virtually all first-degree murderers. Id.

The Nevada Supreme Court has repeatedly concluded that Nevada's death penalty scheme sufficiently narrows the class of people eligible for the death penalty. See Thomas v. State, 122 Nev. 1361, 1373, 148 P.3d 727, 735-36 (2006); Weber v. State, 121 Nev. 554, 585, 119 P.3d 107, 128 (2005); Leonard v. State, 117 Nev. 53, 82-83, 17 P.3d 397, 415-16 (2001); Middleton v. State, 114 Nev. 1089, 1116-17, 968 P.2d 296, 314-15 (1998). Moreover, the Nevada scheme has been held to properly serve its constitutional narrowing function on numerous occasions. See Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983); Servin v. State, 117 Nev. 775, 785-786, 32 P.3d 1277, 1285 (2001); Gallego v. State, 117 Nev. 348, 370-371, 23 P.3d 227, 242 (2001); Deutscher v. State, 95 Nev. 669, 676, 601 P.2d 407, 412 (1979).

Accordingly, this Court should reject Petitioner's allegation that Nevada's death penalty scheme does not narrow the class of persons eligible for the death penalty.

**3. Petitioner's Allegation that The Death Penalty Is Cruel and Unusual Punishment Must Fail**

Petitioner alleges that "[t]he death penalty is cruel and unusual in all circumstances." Pet. at 210. This allegation has been consistently rejected by both the Nevada Supreme Court and the United States Supreme Court.

The Nevada Supreme Court has held that the death penalty does not violate the prohibition against cruel and unusual punishment found in either the United States Constitution or the Nevada Constitution. See Bishop v. State, 95 Nev. 511, 517-18, 597 P.2d

273, 276-77 (1979). The United States Supreme Court has likewise upheld the death penalty. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909 (1976). Additionally, the Nevada death penalty scheme has been repeatedly held to be constitutional and not cruel and/or unusual punishment under either the Nevada or United States constitutions. See, e.g., Colwell v. State, 112 Nev. 807, 814-815, 919 P.2d 403, 408 (1996). As the Nevada Supreme Court explained in Colwell:

> Finally, Colwell's counsel claims that the death penalty is cruel and unusual punishment in all circumstances in violation of the Eighth Amendment and the Nevada Constitution. Colwell's counsel concedes that the United States Supreme Court and this court have repeatedly upheld the general constitutionality of the death penalty under the Eighth Amendment. *See, e.g.*, *Bishop*, 95 Nev. at 517-18, 597 P.2d at 276-77. Colwell's counsel merely desires to preserve his argument should this court change its mind. We are not so inclined. We note that this court has also held that the death penalty is not unconstitutional under the Nevada Constitution. *Id.* Accordingly, we conclude that Colwell's counsel's claim on this issue lacks merit.

112 Nev. at 814-815, 919 P.2d at 408. Because the death penalty is indeed constitutional, Petitioner's claim that the death penalty constitutes cruel and unusual punishment in all circumstances necessarily fails.

**4. Petitioner's Allegation that Executive Clemency is Unavailable Must Fail**

Petitioner next alleges that Nevada's death penalty scheme is unconstitutional for failing to have a "mechanism to provide for clemency in capital cases." Pet. at 211. This allegation must fail.

The statutory procedures for administering a grant of clemency do not implicate a constitutionally protected interest. See Niergarth v. State, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989); see generally Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 280-81 (1998) (noting that clemency is a matter of grace).

The United States Supreme Court has also made it clear that there is no constitutional right to a clemency hearing. See Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464, 101 S. Ct. 2460 (1981) ("Unlike probation, pardon and commutation decisions have not traditionally been the business of the courts; as such, they are rarely, if ever, appropriate subjects for judicial review . . . [A]n inmate has no 'constitutional or inherent right' to commutation of his sentence."); see Joubert v. Nebraska Bd. of Pardons, 87 F.3d 966, 968 (8th

Cir.1996) ("It is well-established that prisoners have no constitutional or fundamental right to clemency."), cert. denied, 518 U.S. 1035, 117 S.Ct. 1 (1996).

Moreover, Nevada's clemency scheme was upheld in Colwell, 112 Nev. at 812. As the Court in Colwell stated, "NRS 213.085 does not completely deny the opportunity for 'clemency,' as Colwell's counsel contends, but rather modifies and limits the power of commutation. Accordingly, Colwell's counsel's claim lacks merit." Id. Accordingly, Petitioner's claim is must fail.

**D. Petitioner's Violation of International Law Claim Must Fail**

Claim 24 states that "Thomas's convictions and death sentences are invalid under federal constitutional guarantees of due process, confrontation, effective counsel, equal protection, trial before an impartial jury, freedom from cruel and unusual punishment, and a reliable sentence because the proceedings against Thomas violate international law." Pet. at 213. Petitioner claims "[b]oth the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognize the right to life . . . and the United States Government and the State of Nevada are requires to abide by norms of international law." Id.

This claim has not been raised in prior proceedings. This Court should find that it is waived under NRS 34.810(1)(b)(2). See Franklin, 110 Nev. at 752, 877 P.2d at 1059. These allegations could have been raised on direct appeal to the Nevada Supreme Court. However, Petitioner failed to raise them. Moreover, Petitioner has failed to demonstrate good cause for the failure to present this ground earlier. Thus, this Court should find that Claim 24 has been waived. Notwithstanding this, the State will briefly respond to the allegations.

This Court should deny Claim 24. As discussed above, the United States Supreme Court and Nevada Supreme Court have repeatedly found the death penalty to be constitutional. The Nevada Supreme Court has held that the death penalty does not violate the prohibition against cruel and unusual punishment found in either the United States Constitution or the Nevada Constitution. See Bishop v. State, 95 Nev. 511, 517-18, 597 P.2d 273, 276-77 (1979). The United States Supreme Court has likewise upheld the death penalty. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909 (1976). Additionally, the Nevada death penalty scheme has been

repeatedly held to be constitutional and not cruel and/or unusual punishment under either the Nevada or United States constitutions. See, e.g., Colwell v. State, 112 Nev. 807, 814-815, 919 P.2d 403, 408 (1996). Accordingly, Petitioner's claim is must fail.

**E. Petitioner's Claim that He is Ineligible for Execution Must Fail**

Claim 27 states that "Thomas's death sentences are invalid under federal constitutional guarantees of due process, effective counsel, equal protection, trial before an impartial jury, freedom from cruel and unusual punishment, and a reliable sentence because Thomas suffers from borderline intellectual functioning and because of his youth at the time of the offense." Pet. at 230. Petitioner claims that he is ineligible for the death penalty because he has borderline intellectual functioning, because of his youth, and because of the cumulative effect of both. Id.

This claim has been raised in prior proceedings and rejected by the Nevada Supreme Court. Claim 27 was raised in Petitioner's second Petition for Writ of Habeas Corpus and the appeal from the denial of that Petition. See Exs. 17 – 19. The Nevada Supreme Court rejected this claim. Accordingly, the Court should find that Claims 27 is barred under the law of the case. See Pellegrini, 117 Nev. at 879, 34 P.3d at 532 (citing McNelton, 115 Nev. at 414-15, 990 P.2d at 1275) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief.").

Petitioner's reliance on Roper, 543 U.S. 551, 125 S. Ct. 1183, and Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002), is misguided.[31] In Atkins, the United States Supreme Court determined that the execution of mentally retarded individuals constituted cruel and unusual punishment in violation of the Eighth Amendment. The Court concluded that although the intellectual deficiencies of mentally retarded criminals did "not warrant an exemption from criminal sanctions"—including life imprisonment—such criminals "should be categorically excluded from execution." Id. at 318, 122 S. Ct. at 2250. The Court explained that part of the basis for the holding was that there was a "serious question" as to whether the execution of

[31] Because Roper utilized the reasoning employed in Atkins to reach the conclusion that the "Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed," 543 U.S. at 578, 125 S. Ct. at 1200, the State will focus its analysis on Atkins in explaining why Petitioner cannot avail himself of this case and its progeny.

mentally retarded offenders would serve the deterrence or retribution justifications of the death penalty. Id. at 318–319, 122 S. Ct. at 2250-51. Second, there was an enhanced risk in the case of mentally retarded offenders "that the death penalty w[ould] be imposed in spite of factors which may call for a less severe penalty," both because of "the possibility of false confessions" by mentally retarded defendants and because of the "lesser ability of mentally retarded defendants to make a persuasive showing of mitigation." Id. at 320, 122 S. Ct. at 2251.

The Court in Atkins left "'to the states[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" Id. at 317, 122 S. Ct. at 2250 (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986) (which left to the states ways to enforce the constitutional restriction upon insane persons)). Although the Court declined to mandate a definition of mental retardation, it noted that existing state definitions generally conformed to clinical definitions set forth by the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association ("APA"). The Court did not hold or suggest that such clinical definitions were to limit the states or the consideration of whether an individual is mentally retarded for the purposes of determining whether a person may receive the death penalty.

In response to Atkins, the Nevada Legislature enacted NRS 174.098 in 2003 which sets forth a procedure for determining whether someone is "intellectually disabled" for death penalty purposes.[32] NRS 174.098(1) allows a defendant to file a motion to declare that he is intellectually disabled in cases where the death penalty is sought. NRS 174.098(2) provides that the Court "[s]tay the proceedings" and "[h]old a hearing … to determine whether the defendant is intellectually disabled." According to NRS 174.098(7), "'intellectually disabled' means significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." Thus, in order to prove intellectual disability, NRS 174.098(7) requires that Petitioner satisfy the following three elements: (1) that he has significant subaverage general intellectual functioning; (2) the concurrent existence of deficits in adaptive behavior; *and* (3) that these conditions were

[32] The 2013 amendment to NRS 174.098 substituted "intellectually disabled" for "mentally retarded" throughout the section and substituted "intellectual disability" for "mental retardation" in subsection (2)(a).

manifested during the Petitioner's developmental period. Pursuant to NRS 174.098(5)(b), Petitioner bears the burden of proving these elements by a preponderance of the evidence.

Even accepting as true the findings made by the experts who examined Petitioner, this Court should reject Petitioner's argument that he suffered from impairments akin to those identified in Roper and Atkins. In Atkins, the U.S. Supreme Court ruled that it is cruel and unusual to execute mentally retarded defendants, not defendants with a mental illness. Therefore, even assuming Petitioner really does suffer from borderline intellectual functioning, Atkins does not support the position advanced by Petitioner. Moreover, Petitioner has failed to prove by a preponderance of the evidence that he has significant subaverage general intellectual functioning, which exists concurrently with deficits in adaptive behavior and that these conditions were manifested during his developmental period. See Ex. 206 Accordingly, this Court should deny Petitioner's claim that mental illness renders him ineligible for the death penalty.

## CONCLUSION

Based on the foregoing, the State respectfully requests that this Court order Defendant's Petition for Writ of Habeas Corpus be denied.

DATED this 26th day of March, 2018.

Respectfully submitted,

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

BY */s/ Steven S. Owens*
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**CERTIFICATE OF ELECTRONIC FILING**

I hereby certify that service of State's Response to Third Petition for Writ of Habeas Corpus and Motion to Dismiss, was made this 26th day of March, 2018, by Electronic Filing to:

JOANNE L. DIAMOND
Email: Joanne_Diamond@fd.org

RANDOLPH M. FIEDLER
Email: Randolph_Fiedler@fd.org

*/s/ E.Davis*

Employee for the District Attorney's Office

SSO/Stephanie Getler/ed

# EXHIBIT 1

# EXHIBIT 1

DP HABEAS,HABEAS

# United States District Court
## District of Nevada (Las Vegas)
## CIVIL DOCKET FOR CASE #: 2:17-cv-00475-RFB-VCF

Thomas v. Filson et al
Assigned to: Judge Richard F. Boulware, II
Referred to: Magistrate Judge Cam Ferenbach
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 02/14/2017
Jury Demand: None
Nature of Suit: 535 Death Penalty - Habeas Corpus
Jurisdiction: Federal Question

**Petitioner**

**Marlo Thomas**

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V.

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*Warden*

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**Respondent**

**Adam Paul Laxalt**

represented by **Adam P. Laxalt**
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*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

**Jeffrey M Conner**
(See above for address)
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

| Date Filed | # | Docket Text |
|---|---|---|
| 02/14/2017 | 1 | PETITION for Writ of Habeas Corpus - Death Penalty (Filing fee $ 5 receipt number 0978-4479917), filed by Marlo D. Thomas.(Diamond, Joanne) (Entered: 02/14/2017) |
| 02/14/2017 | 2 | EXHIBIT(s) *1-17* to 1 Petition for Writ of Habeas Corpus - Death Penalty ; filed by Petitioner Marlo D. Thomas. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17) (Diamond, Joanne) (Entered: 02/14/2017) |
| 02/14/2017 | 3 | EXHIBIT(s) *18-33* to 1 Petition for Writ of Habeas Corpus - Death Penalty ; filed by Petitioner Marlo D. Thomas. (Attachments: # 1 Exhibit 18, # 2 Exhibit 19, # 3 Exhibit 20, # 4 Exhibit 21, # 5 Exhibit 22, # 6 Exhibit 23, # 7 Exhibit 24, # 8 Exhibit 25, # 9 Exhibit 26, # 10 Exhibit 27, # 11 Exhibit 28, # 12 Exhibit 29, # 13 Exhibit 30, # 14 Exhibit 31, # 15 Exhibit 32, # 16 Exhibit 33)(Diamond, Joanne) (Entered: 02/14/2017) |
| 02/14/2017 | 4 | MOTION/APPLICATION for Leave to Proceed in forma pauperis by Petitioner Marlo D. Thomas. (Diamond, Joanne) (Entered: 02/14/2017) |
| 02/14/2017 | 5 | MOTION for Appointment of Counsel by Petitioner Marlo D. Thomas. (Diamond, Joanne) (Entered: 02/14/2017) |
| 02/14/2017 | | Case assigned to Judge Richard F. Boulware, II and Magistrate Judge Cam Ferenbach. (TR) (Entered: 02/15/2017) |
| 05/16/2017 | 6 | |

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| | | ORDER. IT IS ORDERED that 4 petitioner's Application to Proceed *in Forma Pauperis* is GRANTED IN PART AND DENIED IN PART. Petitioner is granted leave of court to proceed *in forma pauperis*. Payment of the filing fee for this action is waived.<br>IT IS FURTHER ORDERED that 5 petitioner's Motion for Appointment of Counsel is GRANTED. The Federal Public Defender for the District of Nevada is appointed to represent petitioner.<br>IT IS FURTHER ORDERED that the Clerk of the Court shall electronically serve a copy of this order on the Federal Public Defender for the District of Nevada.<br>IT IS FURTHER ORDERED that the Clerk of the Court shall add Adam Paul Laxalt, Attorney General of the State of Nevada, as counsel for respondents.<br>IT IS FURTHER ORDERED that the Clerk of the Court shall electronically serve upon respondents a copy of the habeas corpus petition in this case, and a copy of this order.<br>See Order for further details/deadlines. Signed by Judge Richard F. Boulware, II on 5/16/17. (Copies have been distributed pursuant to the NEF - MR) (Entered: 05/17/2017) |
| 05/23/2017 | 7 | NOTICE of Appearance by attorney Jeffrey M Conner on behalf of Respondents Timothy Filson, Adam Paul Laxalt. (Conner, Jeffrey) (Entered: 05/23/2017) |
| 06/16/2017 | 8 | NOTICE *of Conditional Acceptance of Appointment of Counsel For Petitioner and Disclosure of Conflict* by Marlo Thomas. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Anthony, David) (Entered: 06/16/2017) |
| 07/14/2017 | 9 | ORDER. The Court sets the following schedule for further proceedings in this action: if necessary, petitioner shall file and serve an amended petition for a writ of habeas corpus within 60 days after the entry of this order. See Order for additional deadlines.<br>Signed by Judge Richard F. Boulware, II on 7/14/17. (Copies have been distributed pursuant to the NEF - ADR) (Entered: 07/17/2017) |
| 08/01/2017 | 10 | MOTION to Partially Waive Local Rule IA 10-3(e) by Petitioner Marlo Thomas. Responses due by 8/15/2017. (Diamond, Joanne) (Entered: 08/01/2017) |
| 08/01/2017 | 11 | AMENDED PETITION for Writ of Habeas Corpus *Pursuant to 28 U.S.C. Sec. 2254 by a Person in State Custody*, filed by Marlo Thomas. No changes to parties. (Diamond, Joanne) (Entered: 08/01/2017) |
| 08/01/2017 | 12 | EXHIBIT(s) to 11 Amended Petition for Writ of Habeas Corpus ; filed by Petitioner Marlo Thomas. (Attachments: # 1 Exhibit 17, # 2 Exhibit 34, # 3 Exhibit 35, # 4 Exhibit 36, # 5 Exhibit 37, # 6 Exhibit 38, # 7 Exhibit 39, # 8 Exhibit 40, # 9 Exhibit 41, # 10 Exhibit 42, # 11 Exhibit 43, # 12 Exhibit 44, # 13 Exhibit 45, # 14 Exhibit 46, # 15 Exhibit 47, # 16 Exhibit 48 Part 1, # 17 Exhibit 48 Part 2, # 18 Exhibit 48 Part 3, # 19 Exhibit 49, # 20 Exhibit 50) (Diamond, Joanne) (Entered: 08/01/2017) |
| 08/01/2017 | 13 | EXHIBIT(s) *51-64* to 11 Amended Petition for Writ of Habeas Corpus ; filed by Petitioner Marlo Thomas. (Attachments: # 1 Exhibit 52, # 2 Exhibit 53, # 3 Exhibit 54, # 4 Exhibit 55 Part 1, # 5 Exhibit 55 Part 2, # 6 Exhibit 55 Part 3, # 7 |

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| | | Exhibit 55 Part 4, # 8 Exhibit 55 Part 5, # 9 Exhibit 55 Part 6, # 10 Exhibit 56 Part 1, # 11 Exhibit 56 Part 2, # 12 Exhibit 57, # 13 Exhibit 58, # 14 Exhibit 59, # 15 Exhibit 60 Part 1, # 16 Exhibit 60 Part 2, # 17 Exhibit 61, # 18 Exhibit 62, # 19 Exhibit 63, # 20 Exhibit 64)(Diamond, Joanne) (Entered: 08/01/2017) |
| 08/01/2017 | 14 | EXHIBIT(s) *65-83* to 11 Amended Petition for Writ of Habeas Corpus ; filed by Petitioner Marlo Thomas. (Attachments: # 1 Exhibit 66, # 2 Exhibit 67, # 3 Exhibit 68, # 4 Exhibit 69, # 5 Exhibit 70, # 6 Exhibit 71, # 7 Exhibit 72, # 8 Exhibit 73, # 9 Exhibit 74 Part 1, # 10 Exhibit 74 Part 2, # 11 Exhibit 75, # 12 Exhibit 76, # 13 Exhibit 77 Part 1, # 14 Exhibit 77 Part 2, # 15 Exhibit 78, # 16 Exhibit 79, # 17 Exhibit 80, # 18 Exhibit 81, # 19 Exhibit 82, # 20 Exhibit 83) (Diamond, Joanne) (Entered: 08/01/2017) |
| 08/01/2017 | 15 | EXHIBIT(s) *84-102* to 11 Amended Petition for Writ of Habeas Corpus ; filed by Petitioner Marlo Thomas. (Attachments: # 1 Exhibit 85, # 2 Exhibit 86, # 3 Exhibit 87, # 4 Exhibit 88, # 5 Exhibit 89, # 6 Exhibit 90, # 7 Exhibit 91, # 8 Exhibit 92, # 9 Exhibit 93, # 10 Exhibit 94, # 11 Exhibit 95, # 12 Exhibit 96, # 13 Exhibit 97, # 14 Exhibit 98, # 15 Exhibit 99, # 16 Exhibit 100, # 17 Exhibit 101, # 18 Exhibit 102 Part 1, # 19 Exhibit 102 Part 2, # 20 Exhibit 102 Part 3, # 21 Exhibit 102 Part 4, # 22 Exhibit 102 Part 5, # 23 Exhibit 102 Part 6, # 24 Exhibit 102 Part 7)(Diamond, Joanne) (Entered: 08/01/2017) |
| 08/01/2017 | 16 | EXHIBIT(s) *103-121* to 11 Amended Petition for Writ of Habeas Corpus ; filed by Petitioner Marlo Thomas. (Attachments: # 1 Exhibit 104, # 2 Exhibit 105, # 3 Exhibit 106, # 4 Exhibit 107, # 5 Exhibit 108, # 6 Exhibit 109, # 7 Exhibit 110, # 8 Exhibit 111, # 9 Exhibit 112, # 10 Exhibit 113, # 11 Exhibit 114 Part 1, # 12 Exhibit 114 Part 2, # 13 Exhibit 114 Part 3, # 14 Exhibit 115, # 15 Exhibit 116, # 16 Exhibit 117, # 17 Exhibit 118, # 18 Exhibit 119, # 19 Exhibit 120, # 20 Exhibit 121)(Diamond, Joanne) (Entered: 08/01/2017) |
| 08/01/2017 | 17 | EXHIBIT(s) *122-140* to 11 Amended Petition for Writ of Habeas Corpus ; filed by Petitioner Marlo Thomas. (Attachments: # 1 Exhibit 123, # 2 Exhibit 124, # 3 Exhibit 125 Part 1, # 4 Exhibit 125 Part 2, # 5 Exhibit 126, # 6 Exhibit 127, # 7 Exhibit 128, # 8 Exhibit 129 Part 1, # 9 Exhibit 129 Part 2, # 10 Exhibit 130, # 11 Exhibit 131, # 12 Exhibit 132, # 13 Exhibit 133, # 14 Exhibit 134, # 15 Exhibit 135, # 16 Exhibit 136, # 17 Exhibit 137, # 18 Exhibit 138, # 19 Exhibit 139, # 20 Exhibit 140 Part 1, # 21 Exhibit 140 Part 2)(Diamond, Joanne) (Entered: 08/01/2017) |
| 08/01/2017 | 18 | EXHIBIT(s) *141-161* to 11 Amended Petition for Writ of Habeas Corpus ; filed by Petitioner Marlo Thomas. (Attachments: # 1 Exhibit 142, # 2 Exhibit 143, # 3 Exhibit 144, # 4 Exhibit 145, # 5 Exhibit 146, # 6 Exhibit 147, # 7 Exhibit 148, # 8 Exhibit 149, # 9 Exhibit 150, # 10 Exhibit 151, # 11 Exhibit 152, # 12 Exhibit 153, # 13 Exhibit 154, # 14 Exhibit 155, # 15 Exhibit 156, # 16 Exhibit 157, # 17 Exhibit 158, # 18 Exhibit 159, # 19 Exhibit 160, # 20 Exhibit 161) (Diamond, Joanne) (Entered: 08/01/2017) |
| 08/01/2017 | 19 | EXHIBIT(s) *162-181* to 11 Amended Petition for Writ of Habeas Corpus ; filed by Petitioner Marlo Thomas. (Attachments: # 1 Exhibit 163, # 2 Exhibit 164, # 3 Exhibit 165, # 4 Exhibit 166, # 5 Exhibit 167, # 6 Exhibit 168, # 7 Exhibit 169, # 8 Exhibit 170, # 9 Exhibit 171, # 10 Exhibit 172, # 11 Exhibit 173, # 12 Exhibit 174, # 13 Exhibit 175, # 14 Exhibit 176, # 15 Exhibit 177, # 16 Exhibit |

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| | | 178, # 17 Exhibit 179, # 18 Exhibit 180, # 19 Exhibit 181 Part 1, # 20 Exhibit 181 Part 2)(Diamond, Joanne) (Entered: 08/01/2017) |
| 08/01/2017 | 20 | EXHIBIT(s) *182-202* to 11 Amended Petition for Writ of Habeas Corpus ; filed by Petitioner Marlo Thomas. (Attachments: # 1 Exhibit 183, # 2 Exhibit 184, # 3 Exhibit 185, # 4 Exhibit 186, # 5 Exhibit 187, # 6 Exhibit 188, # 7 Exhibit 189, # 8 Exhibit 190, # 9 Exhibit 191, # 10 Exhibit 192, # 11 Exhibit 193, # 12 Exhibit 194, # 13 Exhibit 195, # 14 Exhibit 196, # 15 Exhibit 197, # 16 Exhibit 198, # 17 Exhibit 199, # 18 Exhibit 200, # 19 Exhibit 201, # 20 Exhibit 202) (Diamond, Joanne) (Entered: 08/01/2017) |
| 08/01/2017 | 21 | EXHIBIT(s) *203-226* to 11 Amended Petition for Writ of Habeas Corpus ; filed by Petitioner Marlo Thomas. (Attachments: # 1 Exhibit 204, # 2 Exhibit 205, # 3 Exhibit 206, # 4 Exhibit 207, # 5 Exhibit 208, # 6 Exhibit 209, # 7 Exhibit 210, # 8 Exhibit 211, # 9 Exhibit 212, # 10 Exhibit 213, # 11 Exhibit 214, # 12 Exhibit 215, # 13 Exhibit 216, # 14 Exhibit 217, # 15 Exhibit 218, # 16 Exhibit 219, # 17 Exhibit 220, # 18 Exhibit 221, # 19 Exhibit 222, # 20 Exhibit 223, # 21 Exhibit 224, # 22 Exhibit 225, # 23 Exhibit 226)(Diamond, Joanne) (Entered: 08/01/2017) |
| 08/08/2017 | 22 | ORDER. IT IS ORDERED that 10 petitioner's Motion to Partially Waive Local Rule IA 10-3(e) is DENIED as unnecessary and moot. Signed by Judge Richard F. Boulware, II on 8/8/17. (Copies have been distributed pursuant to the NEF - MR) (Entered: 08/09/2017) |
| 09/29/2017 | 23 | FIRST MOTION to Extend Time re: 11 AMENDED PETITION, filed by Respondents Timothy Filson, Adam Paul Laxalt. (Conner, Jeffrey) . (Entered: 09/29/2017) |
| 10/26/2017 | 27 | MOTION for Stay and Abeyance, filed by Petitioner Marlo Thomas. (Diamond, Joanne) (Entered: 10/26/2017) |
| 11/09/2017 | 28 | MOTION to Extend Time regarding discovery/nondispositive matter (First Request) re 27 Motion to Stay by Respondents Timothy Filson, Adam Paul Laxalt. (Conner, Jeffrey) (Entered: 11/09/2017) |
| 11/14/2017 | 29 | ORDER. IT IS ORDERED that 23 respondents' Motion for Enlargement of Time is GRANTED. Respondents' response to petitioner's amended petition will be suspended pending the resolution of the motion for stay.<br>IT IS FURTHER ORDERED that 28 respondents' Motion for Enlargement of Time is GRANTED. Respondents will have until and including 12/14/2017, to respond to 27 petitioner's motion for stay. Signed by Judge Richard F. Boulware, II on 11/14/2017. (Copies have been distributed pursuant to the NEF - MR) (Entered: 11/15/2017) |
| 12/14/2017 | 30 | SECOND MOTION to Extend Time re 27 MOTION for Stay and Abeyance, by Respondents Timothy Filson, Adam Paul Laxalt. (Conner, Jeffrey) Modified on 12/19/2017 to correct docket entry relationship (TR). (Entered: 12/14/2017) |
| 12/14/2017 | 31 | MOTION Motion for Reconsideration by Respondents Timothy Filson, Adam Paul Laxalt. Responses due by 12/28/2017. (Conner, Jeffrey) (Entered: 12/14/2017) |
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| 12/19/2017 | 32 | RESPONSE to 31 Motion by Petitioner Marlo Thomas. Replies due by 12/26/2017. (Diamond, Joanne) (Entered: 12/19/2017) |
| 12/20/2017 | 33 | ORDER. IT IS ORDERED that 30 respondents' Motion for Enlargement of Time is GRANTED in part. Respondents' response to 27 petitioner's motion for stay is due by 1/9/2018. Signed by Judge Richard F. Boulware, II on 12/19/2017. (Copies have been distributed pursuant to the NEF - MR) (Entered: 12/20/2017) |
| 12/26/2017 | 34 | REPLY to Response to 31 Motion by Respondents Timothy Filson, Adam Paul Laxalt. (Conner, Jeffrey) (Entered: 12/26/2017) |
| 01/09/2018 | 35 | RESPONSE to 27 Motion to Stay Case by Respondents Timothy Filson, Adam Paul Laxalt. Replies due by 1/16/2018. (Conner, Jeffrey) (Entered: 01/09/2018) |
| 01/10/2018 | 36 | CERTIFICATE OF SERVICE for 35 Response by Respondents Timothy Filson, Adam Paul Laxalt. (Conner, Jeffrey) (Entered: 01/10/2018) |
| 01/16/2018 | 37 | First MOTION to Extend Time (First Request) re 27 **MOTION for Stay and Abeyance** ~~35 Response~~ by Petitioner Marlo Thomas. (Diamond, Joanne) Modified on 1/17/2018 to correct docket entry relationship (TR). (Entered: 01/16/2018) |
| 01/18/2018 | 38 | ORDER Granting 37 Motion to Extend Time re 27 Motion for Stay and Abeyance (First Request). Replies due by 2/6/2018. Signed by Judge Richard F. Boulware, II on 1/18/2018. (Copies have been distributed pursuant to the NEF - MR) (Entered: 01/18/2018) |
| 02/06/2018 | 39 | NOTICE *of Appearance* by Marlo Thomas. (Diamond, Joanne) (Entered: 02/06/2018) |
| 02/06/2018 | 40 | REPLY to Response to 27 Motion to Stay Case by Petitioner Marlo Thomas. (Diamond, Joanne) (Entered: 02/06/2018) |

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SAO
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DISTRICT COURT
CLARK COUNTY, NEVADA

MARLO THOMAS,

Petitioner,

v.

TIMOTHY FILSON, et al.,

Respondents.

Case No. 96C136862-1
Dept. No. XXIII

Death Penalty Habeas Corpus Case

**STIPULATION AND ORDER TO MODIFY BRIEFING SCHEDULE**

Date of Hearing: 7/25/18
Time of Hearing: 11:00am

## STIPULATION

Petitioner Marlo Thomas, through his counsel Joanne L. Diamond, Assistant Federal Public Defender, and Respondent Timothy Filson, through his counsel Steven S. Owens, Chief Deputy District Attorney, hereby stipulate as follows:

Thomas's Reply to the State's Response and Motion to Dismiss, currently scheduled to be filed on May 21, 2018, is rescheduled to be filed on June 4, 2018.

Respondent's Reply, currently scheduled to be filed on June 25, 2018, is rescheduled to be filed on July 9, 2018.

The argument on the Motion to Dismiss, currently scheduled for July 9, 2018, is reset to July 23, 2018, or the Court's earliest availability thereafter.

DATED this 17th day of May, 2018.

RENE VALLADARES
Federal Public Defender

*/s/ Joanne L. Diamond*

JOANNE L. DIAMOND
Nevada Bar No. 14139C
Assistant Federal Public Defender
Attorneys for Petitioner

Dated this 17th day of May, 2018

STEVEN B. WOLFSON
Clark County District Attorney

*/s/ Steven S. Owens*

STEVEN S. OWENS
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Chief Deputy District Attorney
Attorneys for Respondent

**ORDER**

This Court having considered the Stipulation of the parties above and good cause appearing,

IT IS HEREBY ORDERED that Petitioner's Reply to the State's Response and Motion to Dismiss shall be filed on or before June 4, 2018. Respondent's Reply will be filed on or before July 9, 2018.

IT IS FURTHER ORDERED that the parties appear before this Court for argument on the Motion to Dismiss on July 25, 2018 at 11:00 am.

DATED this 22nd day of May, 2018.

HON. STEFANY A. MILEY
DISTRICT COURT JUDGE

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Case No. 96C136862-1
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**REPLY TO RESPONSE; OPPOSITION TO MOTION TO DISMISS**

Death Penalty Habeas Corpus Case

Date of Hearing: July 25, 2018
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## POINTS AND AUTHORITIES

Thomas's Petition demonstrates—through twenty-eight claims of error—why his convictions and death sentences are unconstitutional. The State argues this Court lacks jurisdiction to correct these constitutional violations and Thomas's claims are procedurally defaulted. The State's arguments fail.

### I. Under the applicable legal standards, Thomas's Petition cannot be dismissed.

In reviewing a Motion to Dismiss, this Court is required to liberally construe Thomas's Petition and accept all the factual allegations as true. *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. ___, 327 P.3d 518, 520 (2014); *see also Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990) ("For purposes of the motion, the allegations of the non-moving party must be accepted as true while the allegations of the moving party which have been denied are assumed to be false."). This Court can dismiss Thomas's Petition only if "it appears beyond a doubt that [he] could prove no set of facts which, if accepted by the trier of fact, would entitle him to relief." *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. ___, 291 P.3d 114, 117 (2012) (citations omitted).

This Court is obligated to grant an evidentiary hearing "when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). This standard merely requires "something more than a naked allegation" to merit an evidentiary hearing. 118 Nev. at 354, 46 P.3d at 1230 (internal citations omitted); *see also Means v. State*, 120 Nev. 1001, 1018, 103 P.3d

25, 36 (2004); *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 226 (1984). A claim is "belied by the record" only if it is affirmatively repelled by the record, as opposed to a claim that is subject to factual dispute. *See Mann*, 118 Nev. at 354, 46 P.3d at 1230. Where resolution of a question of procedural default requires a factual inquiry, the petitioner is entitled to an adequate hearing on the issue, both under state law, *see Crump v. Warden*, 113 Nev. 293, 305, 934 P.2d 247, 254 (1997), and under federal due process principles.

**II. Thomas can overcome the procedural bars.**

A showing of good cause and prejudice overcomes the procedural bars in both NRS 34.726 and NRS 34.810. *See Rippo v. State*, 132 Nev. __, 368 P.3d 729, 736-38 (2016), *reh'g denied* (May 19, 2016), *cert. granted on other grounds, judgment vacated sub nom*, *Rippo v. Baker*, 137 S. Ct. 905 (2017); *see also Pellegrini v. State*, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001). A showing of good cause and prejudice can also overcome the laches provision of NRS 34.800. *See State v. Eighth Judicial Dist. Court (Riker),* 121 Nev. 225, 239, 112 P.3d 1070, 1079 (2005) (holding State's invocation of NRS 34.800 would be meritless because petitioner established good cause and prejudice); *see also Reberger v. State*, 388 P.3d 961, 2017 WL 176594 at *2 n.3 (Nev. 2017).

"A showing of good cause for the delay in raising a claim has two components: (1) that the delay was not the petitioner's fault and (2) that 'dismissal of the petition as untimely will unduly prejudice the petitioner.'" *See Rippo*, 368 P.3d at 738 (quoting NRS 34.726(1)).

### A. Thomas can show good cause for not raising his claims sooner.

Thomas can satisfy the good cause requirement because an "impediment external to the defense" prevented him from raising his claims sooner. *See Rippo*, 368 P.3d at 738; *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *Murray v. Carrier*, 477 U.S. 478, 492 (1986); *Evans v. State*, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001), *overruled in part on other grounds by Lisle v. State*, 131 Nev. __, 351 P.3d 725 (2015). "'A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default.'" *Rippo*, 368 P.3d at 738 (quoting *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003)). Thomas raised all the claims in the Petition within a reasonable time after their bases became available. *See Rippo*, 368 P.3d at 739-40. To the extent any claims should have been raised in prior post–conviction proceedings, the ineffective assistance of initial post-conviction counsel—compounded by impediments caused by the post-conviction courts and the State's violation of *Brady*—is a qualifying impediment.

The State argues Thomas relies on "bold, naked allegations" insufficient to establish good cause. *See* Mot. at 9, 19-20, 21. The State misrepresents the Petition: Thomas has supported his claims with specific factual allegations not belied by the record that, if true, entitle him to relief. *See* Section I., above.

#### 1. Ineffective assistance of initial post-conviction counsel constitutes good cause.

In death penalty cases, ineffective assistance of initial post-conviction counsel constitutes good cause and prejudice to overcome procedural bars. *Crump*, 113 Nev.

at 304-05, 934 P.2d at 254 ("If Crump can prove that [counsel] committed an error which rises to the level of ineffective assistance, then Crump will have established 'cause' and 'prejudice'."); *see Rippo*, 368 P.3d at 741 (adopting *Strickland* standard where there is a statutory right to effective assistance of counsel). Thomas has alleged ineffective assistance by first post-conviction counsel, David Schieck, and second post-conviction counsel, Brett Whipple. The allegations are timely because the Petition was filed within one year after the Nevada Supreme Court issued its remittitur ending the initial post-conviction proceedings. *Rippo*, 368 P.3d at 740; *see* Ex. 144 (Remittitur); *see also* Pet. (stamp-filed October 20, 2017).

**a. David Schieck's ineffectiveness constitutes good cause.**

The State argues Thomas's allegations against Schieck cannot establish good cause because they are procedurally defaulted. *See* Mot. at 24-25. According to the State, Thomas should have raised those allegations after the guilt-trial proceedings instead of waiting until the whole initial post-conviction (guilt and penalty) was complete. The State's argument misapplies *Rippo*. *See* Mot at 25.

*Rippo* held allegations of ineffectiveness by initial post-conviction counsel are timely raised if the petition raising them "is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after [the Nevada Supreme Court] issues its remittitur." *Rippo*, 368 P.3d at 740. By the State's logic, to be timely under *Rippo*, the allegations against Schieck should have been raised within one year of remittitur after the first post-conviction. That remittitur issued in March

2004. *See* Ex. 138. But, as the State notes, Schieck represented Thomas until January 2008. Mot. at 25.

Schieck could not have raised his own ineffectiveness while continuing to represent Thomas. The Supreme Court has recognized an attorney cannot be expected "to denigrate [his] own performance." *Christeson v. Roper*, 135 S. Ct. 891, 894 (2015). And "'a significant conflict of interest' arises when an attorney's 'interest in avoiding damage to [his] own representation'" is at odds with the interests of his client. *Id.* (quoting *Maples v. Thomas*, 565 U.S. 266, 285 n.8 (2012) (alteration in original)); *see also Nika v. State*, 120 Nev. 600, 606-07, 97 P.3d 1140, 1145 (2004) (requiring counsel in ongoing representation to simultaneously "defend their own conduct" in earlier proceedings places counsel and client "in an untenable position").

If Schieck's effectiveness had to be challenged by March 2005, separate counsel should have been appointed to initiate a second post-conviction proceeding raising guilt-phase claims—and alleging Schieck's ineffectiveness as good cause and prejudice—simultaneously to the penalty retrial. A further round of post-conviction litigation focusing on the penalty retrial and Whipple would follow later. That is exactly the sort of "piecemeal litigation that would further clog the criminal justice system" the Court in *Rippo* sought to avoid. *Rippo*, 368 P.3d at 739. Any suggestion Thomas should have pursued such a course of action is also foreclosed by *Nika*. *See also* Rules of Practice of the Eighth Judicial District Court, Rule 3.70 (documents "delivered to the clerk of the court by a defendant who has counsel of record will not be filed").

To escape this conclusion, the State suggests allegations against Schieck had to be made within one year after the Nevada Supreme Court issued remittitur *on the second direct appeal*—because that is when his representation ended—and that Whipple should have made them. Mot. at 25; *see also id.* at 30. But that is not what *Rippo* says. *Rippo* held "a post-conviction counsel claim reasonably become[s] available" at "the conclusion of the *postconviction proceedings* in which the ineffective assistance allegedly occurred." *Rippo*, 368 P.3d at 733 (emphasis added); *see also id.* at 738. Either the allegations against Schieck were defaulted in 2005 after the district court failed to appoint separate counsel to vindicate Thomas's rights under *Crump*—constituting a qualifying impediment that is itself good cause—or they are timely now. There is no third option under *Rippo*.

Citing generally to Exhibits 21-23, the State argues Whipple alleged ineffective assistance of post-conviction counsel against Schieck. *See* Mot. at 25; *see also id.* at 5-6, 17, 22. A review of those pleadings reveals no such allegations. This is unsurprising. Whipple did not consider the guilt trial or Schieck's performance as post-conviction counsel within the scope of his representation:

> 3. My task was to look only at potential ineffective assistance of counsel claims from Marlo's penalty retrial. His first trial was not part of my post-conviction review.

Ex. 244 at ¶3 (Declaration of Bret Whipple). Whipple also expressed this understanding in the introduction to the Amended Petition he filed:

> 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.

Ex. 22 at 5.

Whipple was explicit that his representation did not extend to guilt-trial claims. If this Court accepts the State's argument that his failure to raise the claims procedurally defaulted them, *see* Mot. at 17, a *Strickland* analysis is inappropriate: Whipple cannot be ineffective in a matter where he did not act as counsel. Instead, this Court must find Thomas "was left unrepresented at a critical time for his state postconviction petition," and—because he believed he was represented by Whipple—"lacked a clue of any need to protect himself pro se." *Maples*, 565 U.S. at 271. Whipple's abandonment of Thomas constitutes good cause to overcome any procedural default because, "[i]n these circumstances, no just system would lay the default at [Thomas's] death-cell door." *Id.*

**(1) Schieck was ineffective under *Strickland*.**

Schieck alleged trial counsel were ineffective for inadequately investigating and preparing for the guilt phase. *See* Ex. 11 at 8 ("no proper investigation was conducted before either the trial or penalty hearing and therefore the testimony presented was virtually unopposed . . . and does not accurately present the facts of the case."); Ex. 11 at 57 ("THOMAS received ineffective assistance of counsel from attorneys that had 14 other pending murder cases and did not prepare the case for trial or penalty hearing."). The only extra-record evidence supporting this claim was an affidavit by Thomas. *See* Ex. 11 at 57 ("As set forth in the affidavit of THOMAS

attached hereto"); *see also id.* at 63 ("The affidavit of THOMAS attached hereto spells out the witnesses that should have been called and who, for the most part were not even interviewed by counsel."), 73-76. Thomas's affidavit listed the names David Hudson, Ann Thomas, Paul Thomas, Vincent Diggs, DeDe Thomas, Johnnie Thomas, Sherman Nash, and Bobby Lewis. *Id.* at 74-75. No declarations from these witnesses were proffered. Nothing suggests Schieck even spoke to them.

*Strickland* requires that reasonable investigation occur before counsel can make a strategic choice regarding which issues to pursue. *Strickland v. Washington*, 466 U.S. 668, 691 (2015). Under the Nevada Indigent Defense Standards of Performance, ADKT 411 (2008), post-conviction counsel is required to "secure the services of investigators or experts where necessary to develop claims to be raised in the post-conviction petition." Standard 3-9(f). This rule recognizes the importance of investigating, developing, and presenting extra-record evidence where there is an allegation that trial or direct appeal counsel was ineffective, to satisfy the prejudice prong of *Strickland*, 466 U.S. at 669-700. *See Wilson v. State*, 105 Nev. 110, 113-15, 771 P.2d 583, 584-86 (1989).

Thomas attached to his current Petition declarations from David Hudson, Ann Thomas, and Paul Thomas (actually Paul Hardwick, Jr). *See* Exs. 35 (Declaration of Antionette Thomas), 38 (Declaration of David Hudson), and 155 (Declaration of Paul Hardwick, Jr.). A comparison of Thomas's affidavit and the information these witnesses would have given Schieck illustrates his ineffectiveness under *Strickland*:

| THOMAS'S AFFIDAVIT | ANTIONETTE THOMAS DEC. |
| --- | --- |
| "Ann Thomas was interviewed by Mr. LaPorta on the weekend prior to the penalty hearing and told that he would not call her as a witness because she had been arrested one time." Ex. 11 at 75. | "Marlo told me that his mom, Georgia, didn't love him and treated him different from his brothers." Ex. 35 at ¶2.<br><br>"Marlo drank a lot of alcohol when he was a teenager. . . . Marlo was probably around fourteen when he was drinking and smoking weed." Ex. 35 at ¶4.<br><br>"There was a lot of gang activity in our neighborhoods growing up. . . . When Marlo was nine or ten, I remember him being chased by gang members when he crossed territory lines." Ex. 35 at ¶5.<br><br>"When I was fifteen, my friend, Nechelle Wilson, was killed, Marlo had been dating Nechelle. . . . Marlo was crushed when she died. . . . After Nechelle's death, Marlo started going to jail more and distanced himself from the family." Ex. 35 at ¶6. |
| | **DAVID HUDSON DEC.** |
| "David Hudson was my cousin and would have offered favorable character evidence at the penalty hearing." Ex. 111 at 74-75 | "A lot of times there was no food." Ex. 38 at ¶2.<br><br>"When new apartment complexes were built, we ate tar from the pavement and sometimes the roof." Ex. 38 at ¶3.<br>"Many nights [Marlo and his brothers] went to bed hungry." Ex. 38 at ¶5. |

| | |
|---|---|
| | "Marlo didn't get whippings from Georgia, he took beatings." Ex. 38 at ¶7. |
| | "Bobby Lewis . . . was not a father figure and not a good man. . . . Bobby physically and verbally abused Georgia." Ex. 38 at ¶8. |
| | "It is a well-known family secret that my maternal grandfather molested my mother and her sisters, including Georgia. The molestation affected my mom and every one of my aunties emotionally, physically, and mentally." Ex. 38 at ¶10. |
| | **PAUL HARDWICK, JR. DEC.** |
| "Paul Thomas was my younger brother by eight years and was not interviewed by anyone." Ex. 11 at 75. | "Marlo seemed slower than the average child and had some disabilities." Ex. 155 at ¶3. |
| | "[M]any times there was no food in the house. We ate . . . syrup sandwiches, mayo sandwiches, and ketchup sandwiches." Ex. 155 at ¶4. |
| | "My mom beat the mess out of Marlo. She beat him with anything: extension cords, wooden kitchen spoons, pots, pans, and iron skillets. I saw her throw fold up kitchen chairs at him. . . . I saw bruises and marks on Marlo's body after these beatings. There were welts on his back from being beaten with an extension cord. . . . It made him bitter and hard. He told me he hated our mother." Ex. 155 at ¶5. |
| | "Mom hated Bobby and because she hated him she took it out on Darrell and Marlo. It got worse for Marlo |

once Darrell was out of the house." Ex. 155 at ¶7.

"[Mom] told me [Bobby] was very abusive and beat her all the time. Bobby did the same thing to her that she did to Marlo, he hit her with anything. He choked her and beat her like a man with his fist. Sometimes she was beaten so bad, she couldn't go to work." Ex. 155 at ¶8.

"[One time Bobby] was beating her and the next thing she remembered was waking up in bed not knowing how she got there. Mom told me she was glad Bobby was locked up because if not, she would have probably killed him." Ex. 155 at ¶9.

Bobby Lewis was deceased by the time undersigned counsel were appointed, *see* Ex. 105, but Thomas attached to the Petition numerous declarations from witnesses who knew him:

**THOMAS'S AFFIDAVIT**

"Bobby Lewis, my biological father was in prison at Indian Springs and was never interviewed by my attorneys. He is in prison for murder, however, I believed that he could have provided insight into my childhood that could have been helpful at the penalty hearing." Ex. 11 at 75.

**VIRGIE ROBINSON DEC.**

"I met Bobby through my daughter's boyfriend . . . and moved in with him two months later. . . . A month after I moved in with him, Bobby [beat] me for the first time." Ex. 46 at ¶2.

"[One time] Bobby was drunk. He wanted to make love but I just wanted to go to bed and sleep. Bobby jumped on me and forced me to have sex with him." Ex. 46 at ¶3.

"Bobby beat me with his fist upside my head, hit me in my face, and

choked me. I have problems with my head and neck now." Ex. 46 at ¶5.

"Before dating Bobby, I dated a guy called Otis. . . . One night, I went to the club where Otis worked as a cook and was talking to him. Bobby came in the bar and shot Otis in the eye." Ex. 46 at ¶7.

"The last time Bobby hurt me, he went to jail. I was at my sister['s] house and Bobby jumped through the front window, breaking the glass. Bobby was holding a sawed-off shotgun. He . . . took me to an empty house. . . . Bobby raped me and kept me in the empty house all night." Ex. 46 at ¶10.

**JOHNNY HUDSON DEC.**

"Bobby was abusive; emotionally, psychologically, and physically. I saw Bobby pick Marlo up and throw him into a wall. Marlo was about eight at the time. His imprint was left in the wall where the sheetrock busted. Marlo got up real slow. I also saw Bobby knock the hell out of Marlo with his fist, sending him over Georgia's couch." Ex. 62 at ¶6.

"Bobby beat the crap out of Georgia. They were always fighting. I saw Bobby hit Georgia, Georgia hit back, him hit her again, then Georgia go get a skillet and knock the mess out of him. . . . Sometimes they fought in front of the kids, including Marlo; they saw and heard it." Ex. 62 at ¶7.

"The whole family saw Bobby get arrested for his last charge. . . .

[P]olice stormed the house. They had guns drawn at the front and back door waiting on Bobby to surrender. Marlo cried as they put Bobby in the car. When Bobby went to prison, it had a deep impact on Marlo." Ex. 62 at ¶8.

"When Marlo was sent to Southern Desert Correctional Center, Bobby and I were there. Marlo saw his dad every day and they spent time together." Ex. 62 at ¶9.

MATTHEW YOUNG DEC.

"I heard my aunts talk about how [Bobby] physically abused Georgia and talked down to her. The police were called a couple of times on Bobby for beating Georgia. Bobby called Georgia a fat bitch and told her she would never amount to anything. Marlo told me he was angry with Bobby for saying those things to his mom." Ex. 63 at ¶11.

DARRELL THOMAS DEC.

"Dad was a fighter and a tough guy. He was a mean person. He denied Marlo because of Marlo's light complexion." Ex. 37 at ¶3.

"[W]hen we lived in Gerson Park, Larry and I were sleeping and we heard Dad knock out all the windows in our apartment. Mom didn't let him in so he took a stick and broke all the wi[n]dows from the outside." Ex. 37 at ¶5.

**CHARLES NASH. JR. DEC.**

> "Bobby was always drunk. He was real abusive and took his problems out on Marlo. Bobby hit Marlo in the head with his hands. He hit him with extension cords and tree branches." Ex. 36 at ¶2.
>
> "I saw Marlo with a black eye and bruises on his legs and arms. He had a big knot on his head once. Marlo told me the injuries were from Bobby hitting him." Ex. 36 at ¶3.
>
> "[Marlo] hated Bobby for what he did to him and he hated going home. Marlo didn't have a childhood because of the abuse." Ex. 36 at ¶5.

If Schieck had interviewed these witnesses and conducted necessary follow up investigation, he would have developed the information in the declarations submitted with the current Petition. In light of the information obtained, effective post-conviction counsel would have retained an appropriate mental health expert to evaluate Thomas. But Schieck conducted no extra-record investigation; he relied solely on Thomas's affidavit. And he failed even to consult with a mental health expert.

At the post-conviction evidentiary hearing, the court asked Schieck how trial counsel should have defended Thomas's case:

THE COURT: Now, Mr. Shieck, how do you prepare to defend a case where your client gives a nonsuppressible videotaped confession to the offense to the police department?

MR. SHIECK: Well, Your Honor –

THE COURT: What kind of rabbits are there in hats to pull out to counter that type of State's evidence?

1/22/02 TT at 12. Schieck's answer demonstrates he was on notice that a first-phase mental state defense was critical in this case:

. And my recollection is the statements of Mr. Thomas in this case were not confessing to first degree murder, rather that he in fact acted in a self-defense capacity at the time of the commission of the acts.

1/22/02 TT at 13.

Schieck's ineffectiveness in failing to develop and present the evidence in Claim Thirteen is good cause to overcome any procedural default of that claim. *See* Pet. at 98-124; *see also* Ex. 205 (Declaration of Dr. Thomas F. Kinsora); Ex. 183 (Declaration of Dr. Richard G. Dudley, Jr.). Schieck's failure to raise any other guilt-trial claims in the Petition overcomes the default of those claims, too.

**b. Bret Whipple's ineffectiveness constitutes good cause.**

The State concedes Thomas has timely raised allegations of ineffectiveness by Whipple, but argues they lack merit and cannot establish good cause. *See* Opp. at 26. The State is wrong.

One of the basic functions of a post-conviction petition is to show, by reference to evidence outside the trial record, what a competent investigation would have produced. *See, e.g.*, *In re Marquez*, 822 P.2d 435, 446 (Cal. 1992) ("To determine whether prejudice has been established, we compare the actual trial with the hypothetical trial that would have taken place had counsel competently investigated and presented the . . . defense"). Whipple's initial Amended Petition raised only record-based claims. *See* Ex. 22 at 10-18. Citing to the guilt-trial testimony of Dr. Kinsora, it also suggested avenues of investigation and requested funds from the court to pursue them. *See* Ex. 22 at 5, 6, 8, 9, 10.

After receiving funds for a neuropsychological evaluation, Whipple filed a Supplemental Petition. *See* Ex. 23 at 4. Dr. Jonathan Mack's report was attached as the sole exhibit. *See* Ex. A to Ex. 23. The supplement raised various ineffective assistance claims; all concerned counsel's failure to present evidence of Thomas's impaired intellectual functioning. *See* Ex. 23 at 4, 5, 10.

Dr. Mack's report discussed Thomas's social history at length. It contained a mountain of "red flags" for further investigation. *Rompilla v. Beard*, 545 U.S. 374, 392 (2005). If Whipple had followed those leads, he would have developed the compelling mitigation proffered in Claim Fourteen. *See* Pet. at 128-62. Instead, he ignored them and conducted no follow-up investigation. Whipple's failure to conduct further investigation in such circumstances was unreasonable under *Strickland*.

Whipple had tunnel vision. He was singularly focused on Thomas's intellectual impairments, specifically exemption from the death penalty under *Atkins*:

> 4. The real issue that stood out to me was Marlo's low IQ. My goal was to find a reasonable and realistic way to get his IQ score below 70 so he would be ineligible for the death penalty under Atkins v. Virginia. My understanding of low IQ is that it is more than just a number, it's an impairment. 70 is a bright line rule but it doesn't have to be. I wanted to present it to the Nevada Supreme Court in a way that they would accept Marlo is ineligible for the death penalty because of his impairment.

Ex. 244 at ¶4. But as the Nevada Supreme Court noted, "While [Whipple] initially claimed in the proceedings below that [Thomas] is intellectually disabled and therefore could not be sentenced to death . . . he never requested an evidentiary hearing on the issue and later acknowledged he is not intellectually disabled but is merely close to the line." Ex. 26 at 2 (Order of Affirmance).

With the *Atkins* claim "abandoned," *id.*, the Court considered the one extra-record ineffectiveness claim Whipple actually developed: counsel's failure to present evidence of borderline intellectual functioning. *See* Ex. 26 at 2-3. The Court found "[s]imilar evidence was presented at the first penalty hearing," suggesting retrial counsel "made a strategic decision to take a different approach[.]" Ex. 26 at 4. The Court denied the claim. *See* Ex. 26 at 6.

**(1) Whipple's funding request was deficient.**

The post-conviction court denied investigative funds because Whipple "[sought] to begin the investigation anew rather than looking into whether or not the Defendant's representation at time of trial actually fell below the standard of care." Ex. 251 at 6. The court reached this conclusion because Whipple's funding request was deficient. He did not tell the court that, as post-conviction counsel, he had a duty to "continue an aggressive investigation of all aspects of the case." American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.15.1(c) (2003 rev.) (2003 ABA Guidelines).

And Whipple did not cite Nevada's own Indigent Defense Standards of Performance, requiring post-conviction counsel to "secure the services of investigators or experts where necessary to develop claims to be raised in the post-conviction petition." Standard 3-9(f); *see Wilson*, 105 Nev. at 113-15, 771 P.2d at 584-86. And he did not explain the only way to prove trial counsel were ineffective was for *him* to conduct a full investigation. *See Martinez v. Ryan*, 566 U.S. 1, 13 (2012) ("Ineffective-assistance claims often depend on evidence outside the trial record."); *United States v. Benford*, 574 F.3d 1228, 1231 (9th Cir. 2009) ("ineffectiveness of counsel claims usually cannot be advanced without the development of facts outside the original record."); *United States v. Laughlin*, 933 F.2d 786, 788 (9th Cir. 1991) (the effectiveness of defense counsel "is more appropriately reserved for habeas corpus proceedings, where facts outside the record, but necessary to the disposition of the claim, may be fully developed."); *Nika*,

120 Nev. at 606, 97 P.3d at 1144-45 (post-conviction counsel needs "to investigate possible avenues of relief."); *Rippo*, 368 P.3d at 739 (post-conviction counsel needs "to investigate additional claims that may not appear from the record.").

The principle that strategic choices depend on reasonable investigation is a central tenet of capital defense representation. *See Strickland*, 466 U.S. at 691 ("strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"); *see also Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) ("counsel must, at a minimum, *conduct a reasonable investigation* enabling him to make informed decisions about how best to represent his client") (emphasis in original). In his request for funds, Whipple acknowledged that a comprehensive investigation was a prerequisite to making any strategic decisions in the case:

> 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.

Ex. 248 at 10; *see also* Ex. 252 at 4 (same).

Whipple was right: his failure to investigate the mitigation evidence in Claim Fourteen was neither reasonable nor strategic. *See Correll v. Ryan*, 539 F.3d 938, 948 (9th Cir. 2008) ("An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all."). The leads were all contained in Dr. Mack's report. And most of Thomas's family and friends lived locally. *See* Ex. 34 at ¶1; Ex. 35 at ¶1; Ex.

36 at ¶1; Ex. 37 at ¶1; Ex. 38 at ¶1; Ex. 40 at ¶1; Ex. 41 at ¶1; 42 at ¶1; Ex. 44 at ¶1; Ex. 45 at ¶1; Ex. 58 at ¶1; Ex. 62 at ¶1; Ex. 63 at ¶1; Ex. 153 at ¶1; Ex. 154 at ¶1; Ex. 155 at ¶1; Ex. 199 at ¶1; Ex. 226 at ¶1; Ex. 227 at ¶1; Ex. 245 at ¶1.

If Whipple had conducted a constitutionally adequate investigation, he would have discovered that a legacy of intergenerational trauma from poverty, violence, and sexual abuse infected every aspect of Thomas's childhood. Had he then presented this information to an appropriate mental health expert, Whipple would have learned how the combined effects of Thomas's intellectual impairments and extremely traumatic upbringing not only mitigated the appropriate penalty, but negated his ability to form the necessary intent to commit first degree murder. *See* generally Ex. 183 (Declaration of Dr. Richard G. Dudley, Jr.); *see also* Ex. 205 (Declaration of Dr. Thomas F. Kinsora) at ¶¶9-10.

Whipple could have picked up the phone, got in his car, and conducted much of the investigation himself, without incurring expenses that could only be satisfied by the court's approval of funds. He "simply failed to make the effort to investigate." *Nealy v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985) (finding deficient performance for failure to investigate where counsel "did not testify that such efforts would have been fruitless, nor did he claim that the decision not to investigate was part of a calculated trial strategy."). "Because the failure to conduct a reasonable investigation lacked a strategic rationale, [Whipple's] representation was ineffective." *Daniels v. Woodford*, 428 F.3d 1181, 1206 (9th Cir. 2005). His ineffectiveness is good cause to excuse any procedural default.

**2. Limitations placed on the prior state post-conviction proceedings constitute good cause.**

The factual and legal bases supporting Thomas's claims were not reasonably available earlier, in part, because of rulings by the post-conviction courts. *See* Pet. at 14. This "impediment external to the defense" constitutes good cause. *See Hathaway*, 119 Nev. 248 at 252, 71 P.3d at 506 (quoting *Murray*, 477 U.S. at 488); *see also Rippo*, 368 P.3d at 738.

**a. Schieck was denied an adequate evidentiary hearing.**

In his Supplemental Petition, Schieck argued he was entitled to an evidentiary hearing "so that counsel can explain any cause or strategy that existed" for the "errors and failures" alleged. Ex. 11 at 12. Schieck also proffered Thomas's affidavit naming eight family-member witnesses and outlining their testimony. Ex. 11 at 13; *see* Ex. 11 at 74-75.

The court granted an evidentiary hearing but unreasonably limited it to three of Thomas's claims. All alleged ineffective assistance of counsel. *See* 9/20/01 Minute Order; *see also* 1/22/02 TT at 2-3. The first two were record-based. The third, Claim Ten of Schieck's Petition, alleged counsel were unprepared for trial. To prove Claim Ten, Schieck should have been allowed to call the witnesses noticed in Thomas's affidavit. The court elected to hear only from counsel and did not permit Schieck to call the mitigation witnesses. *See* 9/20/01 Minute Order; *see generally* 1/22/02 TT; 3/14/02 TT.

At the hearing, Schieck noted Claim Ten alleged counsel's failure to prepare for both phases of trial. *See* 1/22/02 TT at 3-4. The court refused to consider the

guilt-phase allegations, concluding counsel were prepared because they announced ready at calendar call. *See* 3/14/02 TT at 4-8. Schieck objected: "just because counsel . . . comes to court and . . . declares ready for trial doesn't mean they have actually done what they need to do[.]" 1/22/02 TT at 8. The court retorted, "You can call Mr. Thomas [to] tell us what things . . . didn't get done in preparation for trial." *Id.* The court's dismissal of the guilt-phase part of Claim Ten was in error.

The court's rulings contributed to Schieck's failure to develop Claim Thirteen in the first post-conviction proceeding and are good cause to overcome any procedural default of that claim. The limitation of the hearing to just three claims is good cause for Thomas's failure to develop any other guilt-trial claims raised in the current Petition.

The State argues the issue of the limited evidentiary hearing is barred by law of the case because the Nevada Supreme Court found the post-conviction court did not err in denying the guilt-phase claims. *See* Mot. at 6 (citing Ex. 15 at 6). If Schieck had conducted an adequate investigation, Thomas would have been able to demonstrate that the limitations placed on the post-conviction proceedings were prejudicial. This Court has jurisdiction to consider this issue cumulatively with the post-conviction court's other erroneous rulings to find good cause.

**b. Whipple was denied funding and an evidentiary hearing.**

Whipple was clear he would be "per se ineffective" for making any strategic decisions without a comprehensive social history investigation. Ex. 248 at 10.

Despite the deficiencies in his request, *see* Section II.A.1.b.(1), above, the court should have granted the funds.

The basis for the court's denial—that Whipple "[sought]to begin the investigation anew rather than looking into whether or not the Defendant's representation at time of trial actually fell below the standard of care"—demonstrated a fundamental lack of understanding of post-conviction counsel's function. Ex. 251 at 6; *see* Section II.A.1.b.(1), above. The denial of funds was in error and is good cause to overcome any procedural default of Claim Fourteen and other claims based on the evidence developed in association with Claim Fourteen.

Whipple also asked the court for an evidentiary hearing to develop issues raised in his Petition, including failure to investigate and present mitigating evidence. *See* Ex. 23 at 10. Based solely on the trial record, the court found counsel were not ineffective, denied a hearing, and dismissed the Petition. *See* Ex. 24 at 2 ("review of the record indicates that David Schieck's performance was not deficient. . . . Rather, [it] indicate[s] that decisions made by Mr. Schieck . . . were strategic").

The flaw in the court's approach was explained by the Fifth Circuit in *Trevino v. Davis*, 829 F.3d 328 (5th Cir. 2016). The district court in *Trevino* suggested post-conviction counsel "could not have rendered ineffective assistance for failing to assert a claim based on his trial counsel's failure to investigate because there was no record evidence of what mitigating evidence his trial counsel failed to discover." 829 F.3d at 348. That reasoning, the Court found, poses "a serious danger" that "trial counsel's failure to investigate (and put into the record)

mitigation evidence could insulate state habeas counsel from an ineffective assistance claim simply because the evidence was missing." *Id.* at 349.

The court's denial of an evidentiary hearing prevented Whipple from developing and presenting Claim Fourteen, and is good cause to excuse any procedural default of any penalty retrial claims raised in the current Petition.

The State argues this claim of good cause is barred by law of the case. Mot. at 6. In doing so, the State misrepresents the Nevada Supreme Court's opinion affirming denial of the second post-conviction to suggest it considered this issue. *See id.* It did not. The Court's finding that "the newly-offered evidence is simply not enough to have changed the jury's calculus" supports the conclusion that the post-conviction court's erroneous rulings rendered Whipple ineffective. *See id.* (quoting Ex. 26 at 6).

**3. The State's *Brady* violation constitutes good cause.**

The State violated *Brady* by withholding material statements by codefendant Kenya Hall. *See* Pet. at 60-61; Ex. 246 at ¶8 (Declaration of Kenya Hall); *see also* Ex. 245 at ¶33 (Declaration of Angela Love Thomas). The statements are material because they impeach the State's trial narrative that Thomas was a bad person and constitute affirmative mitigating evidence. *See* Ex. 246 at ¶7. The *Brady* violation overcomes any procedural default of Claim Six(C) because the second and third components—(1) that the State withheld (2) material evidence—parallel the good cause and prejudice showing. *See Lisle v. State*, 131 Nev. __, 351 P.3d 725, 728 (2015); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

#### 4. Thomas's innocence of the death penalty constitutes good cause.

Procedural default will be excused if failure to consider a claim "amounts to a fundamental miscarriage of justice." *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537 (internal quotation makes omitted). "[T]his standard can be met where the petitioner makes a colorable showing he is . . . ineligible for the death penalty." *Id.* Thomas has made a colorable showing that, in light of the compelling mitigation evidence presented in the Petition—and the fact that two out of four aggravators alleged cannot constitutionally be applied to Thomas—no reasonable juror would have found him death eligible, *see id.*, especially if instructed on the correct burden of proof under *Hurst*. *See* Claims Five(C), Nine, Fourteen, and Twenty-Five; *see also Leslie*, 118 Nev. at 783, 59 P.3d at 447 (acknowledging responsibility to consider all mitigating evidence when reweighing aggravators). Thomas can similarly make a colorable showing that his youth at the time of the crimes and borderline intellectual functioning render him ineligible for the death penalty. *See* Claim Twenty-Seven.

Providing only a general citation to documents from the *second direct appeal*, the State argues this claim was raised in the *second post-conviction* proceedings. Mot. at 9. As explained in Section III.J., below, Whipple unsuccessfully tried to raise an *Atkins* claim in the second post-conviction proceedings. But he did not allege any of the other components of this claim of good cause and it is not barred by law of the case.

**5. *Hurst*'s recent issuance constitutes good cause.**

Good cause to overcome procedural default exists when "a federal court concludes that a determination of [the Nevada Supreme Court] is erroneous." *Evans*, 117 Nev. at 644, 29 P.3d at 521. *Hurst* effectively overruled that Court's decisions in *McConnell v. State*, 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009), and *Nunnery v. State*, 127 Nev. 749, 770-76, 263 P.3d 235, 250-53 (2011). And Thomas raised his *Hurst* Claim within a reasonable time after it became available. *See Rippo*, 368 P.3d at 739-40. This constitutes good cause to overcome any procedural bars to Claim Five(C).

The State argues Thomas "cannot show that Mr. Whipple was ineffective in not raising that Mr. Schieck was ineffective in not raising [the *Hurst* claim]." Mot. at 33-34. But it is the issuance of *Hurst* that establishes good cause; Thomas is not alleging initial post-conviction counsel should have raised a claim that was unavailable to them. The State then relies on *Jeremias v. State*, 134 Nev. Adv. Op. 8, 412 P.3d 43, 53–54 (2018), to suggest *Hurst* itself is not good cause because it "made no new law relevant to Nevada." Mot. at 33 (citing *Jeremias*). But *Jeremias* was wrongly decided.[1] Thomas makes these arguments to preserve them for appellate review.

*Jeremias* held *Hurst* was an application of *Ring*, 536 U.S. 584. *Jeremias*, 412 P.3d at 53. It was not. The claim in *Ring* was "tightly delineated," 536 U.S. at 597

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[1] *Jeremias* was issued March 1, 2018, and a petition for rehearing was denied on April 27, 2018. Remittitur has been stayed in that case pending the filing of a petition for a writ of certiorari to the Supreme Court of the United States. NRAP 41(b)(3)(B).

n.4, and left open whether the Sixth Amendment and Due Process Clause apply to the outweighing determination, *see id*. *Hurst* answered that question: a jury must find beyond a reasonable doubt *all* conditions precedent to the imposition of a death sentence. *See Hurst*, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."); *id*. at 621 (Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt"). Nevada requires the outweighing determination to be resolved against the defendant as a condition precedent to death eligibility. *See Hollaway*, 116 Nev. at 745, 6 P.3d at 996. Under *Hurst*, that determination must be made by a jury beyond a reasonable doubt.[2]

The Court found, under *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016), the weighing determination presented "inherently a moral question which could not be reduced to a cold, hard factual determination," and *Nunnery* remained good law. *Id*. But *Carr* considered an Eighth Amendment challenge to an instruction that failed to tell jurors mitigating circumstances did not need to be proven beyond a

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[2] In rejecting this argument, *Jeremias* relied in part on *Ex parte Bohannon*, 222 So.3d 525, 532 (Ala. 2016), *cert. denied sub nom*, *Bohannon v. Alabama*, 137 S. Ct. 831 (2017). *See Jeremias*, 412 P.3d at 53. *Bohannon* analyzed *Hurst* and concluded that it was "consistent with the Sixth Amendment" for Alabama judges to determine if aggravating circumstances outweigh mitigating circumstances. 222 So.3d at 532. *Bohannon* also concluded *Hurst* did not invalidate the Alabama practice of juries "recommending" sentences, but leaving the final authority with the judge. *Id*. at 534. But in April of 2017, Alabama governor Kay Ivey signed into law a bill requiring juries, not judges, to have the final say on whether to impose the death penalty. *See* Kent Faulk, *Alabama Gov. Kay Ivey signs bill: Judges can no longer override juries in death penalty cases*, http://www.al.com/news/birmingham/index.ssf/2017/04/post_317.html (Apr. 11, 2017). Moreover, Alabama's former death-penalty scheme included outweighing as part of the selection phase, not the eligibility phase. *See Bohannon*, 222 So.3d at 532. Nevada courts should not rely on legislatively overwritten case law from another jurisdiction to overlook *Hurst*'s unique application to Nevada.

reasonable doubt. *Id.* at 642–44. It was not a Sixth Amendment challenge to a weighing instruction. And *Carr*'s dicta—that it may not be possible to apply a standard of proof to a selection-phase determination—ignores Kansas's own statutes which already required the jury to make that finding. *See State v. Robinson*, 303 Kan. 11, 329-30, 363 P.3d 875, 1079-80 (2015) ("The Kansas death sentencing scheme requires that the jury make two findings beyond a reasonable doubt in arriving at a death sentence . . . . 'the existence of such aggravating circumstance is not outweighed by any mitigating circumstances found to exist.'"), *overruled on other grounds by State v. Cheever*, 306 Kan. 760, 402 P.3d 1126 (2017); *see also Carr*, 136 S. Ct. at 642 (prefacing dicta by recognizing Court was approaching issue "in the abstract, and without reference to our capital-sentencing case law").

*Jeremias* conflated *Lisle's* Eighth Amendment analysis (whether weighing narrows the class of people subject to the death penalty) with the Sixth Amendment analysis required by *Hurst* (whether weighing is necessary to subject the defendant to greater punishment than a guilty verdict alone). *Jeremias* assumes if a weighing instruction narrows the class of defendants under the Eighth Amendment, it necessarily meets the Sixth Amendment's requirement that a jury decide death eligibility. But these are two different inquiries. Nevada's death-penalty scheme must satisfy both; relying on one to justify the other is circular.

Because *Jeremias* was wrongly decided, it does not alter the fact that *Hurst* overruled *McConnell* and *Nunnery*, and is good cause for Thomas's failure to present Claim Five(C) sooner. *See Evans*, 117 Nev. at 644, 29 P.3d at 521.

**B. Thomas can show prejudice because his claims have merit.**

Whether Thomas can show good cause and prejudice "is intricately related to the merits of his claims." *Bennett v. State*, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995); *accord Rippo*, 368 P.3d at 740 ("A showing of undue prejudice necessarily implicates the merits of the postconviction-counsel claim").

**1. Claim Two, shackling, has merit.**

Thomas alleged, in Claim Two, his death sentences are unconstitutional because he and his witnesses appeared shackled before the jury. Pet. at 22-26. The State argues this claim is waived under NRS 34.810(1)(b)(2) because it could have been raised on direct appeal. *See* Opp. at 26. Thomas can demonstrate good cause for his failure to raise this claim earlier because Schieck, as second direct appeal counsel, was ineffective. *See* Pet. at 26; NRS 34.810(3)(a). Thomas has shown prejudice under NRS 34.810(3)(b) because, if Schieck had raised this issue, there is a reasonable possibility the results of the direct appeal proceeding would have been different. *See Evitts v. Lucey*, 469 U.S. 387, 397 (1985).

Thomas's allegation that his physical restraints were visible to the jury is supported by an on-the-record exchange between the trial court and counsel. *See* 10/31/05 TT at 7-9. The State's argument that it is "mere speculation" whether any juror saw the restraints creates a factual dispute that should be resolved at an evidentiary hearing. Opp. at 27; *see Mann*, 118 Nev. at 354, 46 P.3d at 1230.

The State argues Thomas cannot show prejudice from the shackling of his witnesses because the jurors knew from testimony that the witnesses were incarcerated felons. Opp. at 28-29. The Ninth Circuit has made clear that prisoner status, of itself, is insufficient to warrant shackling. *See Wilson v. McCarthy*, 770 F.2d 1482, 1485 (9th Cir. 1985). The court's affirmation of the shackling decision in *Wilson* does not defeat Thomas's claim. *See* Opp. at 28. There, the trial court held a hearing, stated its reasons on the record, and took steps to reduce the possibility of prejudice. *See Wilson*, 770 F.2d at 1485. None of that happened here. It was not clear in *Wilson* that jurors even saw the shackles; if they did, any view would have been "brief." *See id.* at 1484-86. Thomas's jurors saw his witnesses shackled from the moment they were escorted into the courtroom, throughout their testimony, and as they were escorted out. *See* Ex. 87 at ¶7; 167 at ¶12; Ex. 187 at ¶9.

The State tries to distinguish *Wilson* because the witnesses were shackled at a guilt trial. *See* Mot. at 28. Prejudice from unnecessary restraints is as much a concern at the penalty phase of a capital trial. *See Deck v. Missouri*, 544 U.S. 622, 632 (2005) ("Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the severity and finality of the sanction, is no less important than the decision about guilt." (internal quotation marks omitted)). The State also argues this Court need not follow *Wilson* because Nevada courts are not bound by Ninth Circuit precedent. *See* Opp. at 28. Whether or not Nevada courts are bound by *Wilson*, this Court is certainly required to follow the Supreme Court in *Deck*.

The State defeats its own argument that Thomas failed to specify which witnesses were shackled and at what part of the penalty retrial by recognizing Thomas was referring to the incarcerated selection-phase witnesses. *See* Opp. at 27-28; *see also* Pet. at 23; 11/05/05 TT at 6-45. The State then misrepresents the factual basis for Thomas's claim as limited only to the declaration of juror Don McIntosh (Ex. 187). Thomas also relied on declarations from juror Adele Bayse (Ex. 87) and retrial counsel's investigator, Maribel Yanez (Ex. 167).

The State attempts to preclude, under NRS 50.065(2), McIntosh's statement that it "would have been more believable" if Thomas's witnesses were not shackled. Opp. at 27 (quoting Ex. 187 at ¶9). McIntosh's statement does not concern his mental processes or its effect on the verdict. *See* NRS 50.065(2). Even if this Court agrees with the State, it must consider the remainder of McIntosh's declaration, plus the declarations of Bayse and Yanez, to find the witnesses were seen shackled and then evaluate the resulting prejudice to Thomas. *See*, *e.g.*, *Vanisi v. Baker*, 405 P.3d 97, 2017 WL 4350947 at *6 n.6 (Nev. 2017) ("in evaluating prejudice, courts use an objective measure and do not consider the deliberative process of the sitting jury.").

**2. Claim Seven, Rule 250 violation, has merit,**

In Claim Seven, Thomas alleged the State and trial court violated his federal liberty interest in the proper application of Rule 250. Thomas set forth in detail in his Petition the facts and law establishing the merits of Claim Seven. *See* Pet. at 63-70.

The State argues, because Thomas was originally sentenced to death, he was on notice that the State continued to seek the death penalty when the Nevada Supreme Court remanded to the district court "for a new penalty hearing[.]" Mot. at 35-36. But, in Nevada, whenever a defendant has been found guilty of first degree murder, "whether or not the death penalty is sought, the court shall conduct a separate penalty hearing." NRS 175.552(1). It is the Notice of Intent to Seek the Death Penalty that provides the requisite notice to the defendant. If the State had not violated Rule 250, the trial court had intervened, or trial counsel had objected, Thomas would not have been eligible for death.

Instead of addressing the merits of Thomas's claim that the State failed to show good cause for its late notice of additional aggravation, the State argues Thomas has failed "to allege any specific facts to prove this claim and does not cite to anything in the record." Mot. at 36. The State is wrong. Thomas cited to the original Notice of Intent to Seek the Death Penalty, Ex. 127, and the Notice of Evidence in Support of Aggravating Circumstances, Ex. 213.

The State's argument that Thomas was not prejudiced by the improper admission of his bad prison conduct is belied the Nevada Supreme Court's opinion on the second direct appeal. The Court noted Thomas "had a lengthy prison disciplinary record and criminal history, and each incident presented revealed Thomas's capacity for threatening and potentially dangerous behavior." Ex. 19 at 11. And it relied on this "extensive disciplinary record in prison, including numerous attempted and completed assaults on prison staff and a threat to kill a

guard" to find the death sentences were not excessive. *Id.* at 18. If the Nevada Supreme Court found this evidence so compelling, so did the jurors.

**3. Claim Ten, fair cross-section, has merit.**

In Claim Ten, Thomas alleged his death sentences are invalid because he was sentenced by a jury that was not drawn from a fair cross-section of the community. A jury selected from a fair cross-section of the defendant's community is "fundamental to the jury trial guaranteed by the Sixth Amendment." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *see Holland v. Illinois*, 493 U.S. 474 (1990); *Duren v. Missouri*, 439 U.S. 357 (1979).

Nevada has also recognized the fair cross-section principle in jury selection. In *Evans v. State*, the Nevada Supreme Court stated the fair-cross-section requirement mandates that "'the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.'" 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996) (quoting *Taylor*, 419 U.S. at 530). The Nevada Supreme Court has stressed the importance of jury commissioners being "cognizant of the makeup of their community." *Williams v. State*, 121 Nev. 934, 942, 125 P.3d 627, 632 (2005). The Court further noted that, "without knowledge of the composition of the jury pool and jury lists, an assertion that they provide juries comprising a fair cross section of the community is mere speculation." *Id.* at n.18.

The State argues, regardless of whether distinctive groups were underrepresented on Thomas's jury, Thomas has cannot show systematic exclusion of those groups. Mot. at 38-39. The State's argument fails. At the time of Thomas's

trial, the jury selection process in Clark County was susceptible to abuse and not racially neutral. The jury pool was selected by use of a computer program, with the database drawn only from lists the Nevada Department of Motor Vehicles (DMV) compiled. *See* Ex. 253 (John S. DeWitt, Ph.D., *Jury Composition Preliminary Study, Eighth Judicial District* (1992)) at 4. Those lists had the names of Clark County residents with driver's licenses, as well as residents with DMV-issued identification cards. This excluded almost ten percent of the jury-eligible population from possible service. *Id.* at 17, 20.

Exclusive use of the DMV list may have exacerbated the under-representation of racial minorities, because economic and other factors can affect their ability to obtain driver's licenses or ID cards. *Id.* at 20. Rules of Practice of the Eighth Judicial District Court, Rule 6.10 required the use of the DMV list and "such other lists as may be authorized by the chief judge," and, in 2002, the Nevada Supreme Court recognized the need to use three or more source lists in selecting prospective jurors. *See* Ex. 254 (Jury Improvement Commission Report (2002)) at 10, 28, 29; *see also Williams*, 121 Nev. at 942 n.18, 125 P.3d at 632 n.18.

The venire from which Thomas's jury was drawn was less inclusive and less representative than constitutionally required. The computer selection program failed to generate names randomly, created a list that lacked a fair cross-section of the community, and systematically discriminated on the basis of race. Once the names were selected by the program, the jury commissioner of the Eighth Judicial District Court mailed summonses to those persons. *See* Ex. 253 at 17. On

information and belief, one-quarter of the summonses were returned as undeliverable, and more than twenty-percent of the remaining summonses mailed out failed to generate any response from the individuals summoned. *See id.* at 21. While nearly one-half of the total available jury pool was effectively eliminated in this process, the Jury Commissioner's office did not take further steps to identify non-respondents or to ascertain correct addresses for undeliverable summonses. *See id.* at n.13.

The failure to follow up on the non-responses exacerbated exclusion of racial minorities from jury pools. For example, summonses to low-income minorities, who do not have permanent addresses, are more likely to be returned as undeliverable. Poor minorities may fail to retain a jury summons from fear of any contact with the justice system or a belief that members of minority groups would be excluded as a matter of course from participating in a system perceived as disproportionately involving members of their own communities as defendants.

After individuals report to the Jury Commissioner in response to the summons, the Jury Commissioner had absolute discretion to excuse those persons over the telephone. *See id.* at 18. On information and belief, at the time of Thomas's trial, over sixty percent of those persons who responded to a summons were either disqualified or excused from serving, temporarily or permanently. *See id.* at 22. These persons did not reach the stage of appearing for assignment to a venire.

Eighth Judicial District Court Rule 6.50 permits the court administrator to excuse from service potential jurors summoned by the court on the basis of "child

care problems or severe economic hardship," problems which, again, fall disproportionately on African Americans and other minorities to the extent they comprise a less affluent segment of the community. *See id.* at n.14.

African Americans and other racial minorities were under-represented in Clark County venires at and near the time of Thomas's trial. The statistical analyses set forth here, as well as the Eighth Judicial District Court's process for identifying potential jurors at the time of Thomas's trial, indicate that such under-representation was due to the systematic exclusion of African Americans and other racial minorities from lists and pools of potential jurors.

Thomas's trial, conviction, and death sentencing by a jury selected in a racially discriminatory manner is prejudicial per se. The use of a nearly all-white jury also exacerbated the prejudicial effect of other trial errors. The totality of these constitutional violations prejudicially affected the fairness of the proceedings. At the very least, the data creates a factual dispute that must be resolved at an evidentiary hearing.

**4. Claim Thirteen, ineffective assistance of guilt-trial counsel, has merit.**

In Claim Thirteen, Thomas alleged his convictions and death sentences are invalid because of ineffective assistance of counsel at his guilt trial, primarily counsel's failure to investigate and present a first-phase mental state defense. Courts have routinely found counsel "prejudicially ineffective" under *Strickland* "where there was some evidence of the defendant's mental impairments in the record, but counsel failed to investigate and present a mental impairment defense

to the charge." *Hernandez v. Chappell*, 878 F.3d 843, 856 (9th Cir. 2017); *see also Jennings v. Woodford*, 290 F.3d 1006, 1019 (9th Cir. 2002) (counsel ineffective for "failure to investigate psychiatric evidence and possible medical defenses" which may have negated mental state necessary for first degree murder conviction); *Miller v. Terhune*, 510 F. Supp. 2d 486, 505 (E.D. Cal. 2007) ("evidence of intoxication would have likely created a reasonable doubt about petitioner's intent to 'undermine confidence in the outcome.'" (citations omitted)).

First trial counsel retained Dr. Thomas Kinsora to testify at the penalty phase but the social history information they gave him was inadequate. *See* Ex. 205 (Declaration of Dr. Thomas F. Kinsora) at ¶9 ("The full picture of Mr. Thomas's history was unknown to me until I read Dr. Dudley's declaration; none of Mr. Thomas's lawyers had provided me with most of the information contained in it."). If trial counsel had had properly prepared Dr. Kinsora, he could have testified effectively at the guilt-phase in support of a mental state defense. *See*, *e.g.*, *Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997) (counsel ineffective for failing to provide mental health expert with readily available significant evidence related to mental state at time of crime, including long history of severe childhood abuse and in utero exposure to toxins).

As discussed in Section II.A.1.a.(1), above, despite being on notice that a first-phase mental state defense was critical in this case, Schieck failed to investigate and present any evidence of Thomas's state of mind, or even to allege trial counsel were ineffective for not raising a state-of-mind defense. Trial counsel's complete

failure to properly investigate and present evidence of Thomas's psychological and social history in support of a state-of-mind defense was deficient performance that severely prejudiced Thomas.

Trial counsel were also ineffective during voir dire, see *Virgil v. Dretke*, 446 F.3d 598 (5th Cir. 2006) (reversing conviction after finding deficient performance and prejudice from counsel's failure to challenge or strike biased jurors during voir dire); for failing to make necessary objections, *see* 2003 ABA Guideline 10.8, Commentary ("One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review." (internal quotation marks omitted)); and for failing to adequately prepare to cross-examine codefendant Hall, *see* *Reynoso v. Giurbino*, 462 F.3d 1099, 1110 (9th Cir. 2006).

The State has not disputed the merits of Claim Thirteen and this Court should grant relief.

### C. Claim Fourteen, ineffective assistance of penalty retrial counsel, has merit.

In Claim Fourteen, Thomas alleged his death sentences are unconstitutional because of ineffective assistance at the penalty retrial. The State argues Claim Fourteen is procedurally defaulted and Thomas has not shown good cause and prejudice to excuse it because he failed to allege ineffectiveness by Whipple. *See* Mot. at 40-41. As the State acknowledges, Thomas generally alleged ineffective assistance of post-conviction counsel as good cause in the introduction to his Petition. *See* Pet. at 15. More importantly, at the Petition stage, Thomas was

required only to allege "the facts which [he relied] upon to support [his] grounds for relief." NRS 34.735(2). Ineffective assistance of post-conviction counsel is not a ground for relief. Rather, it is a mechanism to overcome the procedural default of an underlying claim. *See Rippo*, 368 P.3d at 733, 737 (discussing ineffective assistance of post-conviction counsel as cause to excuse other defaulted claims). Procedural default only became an issue when the State raised it in the Motion to Dismiss, and Thomas appropriately addresses it here in his Opposition. *See* Section II.A.1.b., above.

The State agrees Whipple failed to raise the allegations in Claims Fourteen(C) (failure to object and request a mistrial after the prosecutor displayed highly prejudicial images to the jury) and (D) (failure to make an opening statement at the start of the selection phase). *See* Mot. at 42. The State provides no authority or analysis for its' argument that Whipple—and retrial counsel—were not ineffective for these failures. *See id.* As discussed in Section III.E.1., below, the prejudicial nature of the PowerPoint display was evident to trial counsel, and they had no strategic reason for failing to object.

Trial counsel's failure to make an opening statement fell below the standard of practice for counsel in any criminal case, let alone a capital case. *See*, *e.g. Rudin v. State*, 120 Nev. 121, 147, 86 P.3d 572, 589 (2004) (Rose, J., dissenting) ("The opening statement of a criminal case is extremely important in asserting a successful defense. In fact, studies have repeatedly shown that the impression a juror has after opening statements usually carries with him or her to become the

verdict in the case."). Thomas was prejudiced by counsel's failure. The jurors did not receive counsel's guidance on what the selection phase would consist of, or why they should vote for life. They were not warned that most of Thomas's selection-phase witnesses would be incarcerated felons and why they should not allow that to diminish the mitigating effect of their testimony.

The State then misrepresents that Whipple raised Claims Fourteen(A) and (B). *See* Mot. at 42. He did not. Claim Fourteen(A) alleged ineffective assistance for failure to object to Thomas and his witnesses appearing shackled in front of the jury. Whipple alleged only trial court error for shackling Thomas. *See* Ex. 22 at 15. And while Whipple alleged retrial counsel were ineffective at the penalty phase, he focused exclusively on the failure to present evidence of intellectual impairment. *See* Section II.A.1.b., above. The rich, compelling mitigation story detailed in Claim Fourteen(B) was missing entirely.

It is unclear why, given the wealth of information available, Whipple elected to focus only on an *Atkins* claim, especially after Dr. Mack reported Thomas was *not* intellectually disabled. *See* Ex. 237 at ¶3; *see also Vanisi*, 2017 WL 4350947 at *2 (finding post-conviction counsel's "decision to pursue a competency motion, to the exclusion of investigating mitigation evidence to support the ineffective-assistance-of-trial-counsel claim, was objectively unreasonable."). Whipple was confirmed as counsel on January 7, 2009. *See* Ex. 255. He filed an Amended Petition in July 2010. *See* Ex. 22. Mack recalls evaluating Thomas in April 2012. *See* Ex. 237 at ¶2. He provided Whipple with a draft report in August 2012. *Id.* at ¶3. The report

contained a wealth of information regarding Thomas's social history. *See* Ex. 23. The Supplemental Petition—with Mack's report as the sole exhibit—was filed on March 31, 2014. *See* Ex. 23. After learning Thomas was not intellectually disabled, Whipple had ample time—*almost two years*—to properly investigate the leads in the report. There simply can be no strategic reason why Whipple failed to speak to Thomas's family and friends, most of whom were right here in Las Vegas. *See* Section II.A.1.b.(1), above.

Time and time again courts have found counsel's failure to investigate and present readily available mitigation evidence "sufficient to undermine confidence in the result of a sentencing proceeding, [rendering] counsel's performance prejudicial." *Lambright v. Schriro*, 490 F.3d 1103, 1121 (9th Cir. 2007); *see also Rompilla*, 545 U.S. 374. In *Wiggins v. Smith*, 539 U.S. 510, 512 (2003), the Supreme Court underscored the powerful impact "privation and abuse" of the kind experienced by Thomas can have on a jury. *Id.* It is imperative to cast as wide a net as possible to discover such evidence, especially when counsel has been put on notice regarding its existence. *See Doe v. Ayers*, 782 F.3d 425, 435 (9th Cir. 2015) ("if what counsel knows or should know suggests that further investigation might yield more mitigating evidence, counsel must conduct that investigation"); *see also* 2003 ABA Guideline 10.7, Commentary ("penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." (internal quotation marks omitted)).

These principles were firmly established by the time of Thomas's 2005 penalty retrial. As the Ninth Circuit noted that same year: "The Supreme Court has conveyed a clear, and repeated, message about counsel's sacrosanct duty to conduct a full and complete mitigation investigation before making tactical decisions, even in cases involving [ ] egregious circumstances." *Earp v. Ornoski*, 431 F.3d 1158, 1175 (9th Cir. 2005). The obligations of post-conviction counsel in vindicating a capital defendant's Sixth Amendment rights under these principles was equally well-established by the time of Whipple's appointment.

Guidelines promulgated by the American Bar Association (ABA)—recognized by the Supreme Court as "valuable measures of the prevailing professional norms of effective representation," *see Padilla v. Kentucky*, 559 U.S. 356, 367 (2010)—note post-conviction proceedings require extensive investigation as well as the development and presentation of a robust evidentiary record. The ABA Standards for Criminal Justice, Prosecution Function and Defense Function (ABA 3d ed. 1993) (ABA Standards) instruct, when investigation reveals trial counsel provided ineffective assistance, post-conviction counsel "should not hesitate to seek relief on that ground." ABA Standard 4-8.6(a); *see also* ABA Guideline 10.15.1 & Commentary (recognizing "collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation" and should "litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation").

Extra-record evidence is virtually always required to demonstrate prejudice from ineffective assistance of trial counsel. *See*, *e.g.*, *Strickland*, 466 U.S. 668; *Wiggins*, 539 U.S. 510. This is why many jurisdictions, including Nevada, require these claims to be brought in post-conviction proceedings. *See Pellegrini*, 117 Nev. at 882, 34 P.3d at 534 ("Ineffective assistance of counsel claims are properly raised for the first time in a timely first post-conviction petition."); *see also Martinez*, 566 U.S. at 11-13 (recognizing many state courts appropriately defer ineffective assistance of trial counsel claims to post-conviction proceedings because such claims "often require investigative work" and "depend on evidence outside the trial record"). Whipple's failure to conduct an adequate investigation into Thomas's life history forecloses any suggestion that he acted strategically. *See*, *e.g.*, *Ryan*, 539 F.3d at 948.

Thomas is entitled to an evidentiary hearing at which to develop and present evidence supporting Claim Fourteen. A hearing is required "when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." *Mann*, 118 Nev. at 354, 46 P.3d at 1230. The State concedes Thomas has met that standard. *See* Mot. at 41 ("There is no denying that in the instant Petition, Petitioner has set out detailed factual allegations in support of his claim that trial counsel were ineffective during the second penalty hearing."); *see also id.* (describing Claim Fourteen as containing "exceptionally detailed allegations impugning Mr. Schieck's effectiveness as counsel"). Because

there is no dispute between the parties as to Thomas's entitlement to a hearing, this Court must grant one.

**1. Claim Seventeen, guilt-trial prosecutorial misconduct, has merit.**

In Claim Seventeen, Thomas alleged his convictions and death sentences are invalid because of prosecutorial misconduct at the guilt trial. *See* Pet. at 169-71. The prosecutor made comments that "were completely irrelevant to the issues in the case, and could only have impermissibly served to inflame the emotions of the jury," constituting misconduct. *McGuire v. State*, 100 Nev. 153, 156-57, 677 P.2d 1060, 1063 (1984). *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 478 (2008) (quoting *Collier v. State*, 101 Nev. 473, 479, 705 P.2d 1126, 1130 (1985)) ("A prosecutor may not 'blatantly attempt to inflame a jury.'"); *Floyd v. State*, 118 Nev. 156, 174, 42 P.3d 249, 261 (2002) ("We caution prosecutors to refrain from inflammatory rhetoric.") *overruled on other grounds by Grey v. State*, 124 Nev. 110, 178 P.3d 154 (2008); *see also Viereck v. United States*, 318 U.S. 236, 247-48 (1943) (misconduct for prosecutor to make closing remarks that were "wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice."); *United States v. Weatherspoon*, 410 F.3d 1142, 1149 (9th Cir. 2005) ("We have consistently cautioned against prosecutorial statements designed to appeal to the passions, fears and vulnerabilities of the jury . . . .").

The prosecutor shifted the jury's attention from the facts of the individual case before it to a general societal consideration by conflating justice with finding

Thomas guilty. 6/18/97 TT at IV-59. *See Viereck*, 318 U.S. at 247 and n.3; *United States v. Leon-Reyes*, 177 F.3d 816, 822 (9th Cir. 1999). The Supreme Court has held it is error for a prosecutor "to try to exhort the jury to 'do its job'; that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice." *United States v. Young*, 470 U.S. 1, 18 (1985); *accord Evans v. State*, 117 Nev. 609, 633, 28 P.3d 498, 515 (quoting *Young*, 470 U.S. at 18); *see also United States v. Mandelbaum*, 803 F.2d 42, 44 (1st Cir. 1986) (finding prosecutor's exhortation to the jury to "[d]o your duty and return a verdict of guilty" was improper).

The prosecutor misstated the mens rea required for first degree murder. 6/18/97 TT at IV-52. *See Boyde v. California*, 494 U.S. 370, 384 (1990) (prosecutorial arguments that misstate the law can constitute prejudicial misconduct). And the prosecutor argued facts not presented or supported by the evidence. 6/18/97 TT at IV-53. *See Rose v. State*, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007) (improper for prosecutor to refer to facts not in evidence); *see also United States v. Wiedyk*, 71 F.3d. 602, 610 (6th Cir. 1995) (citation omitted).

The State has not disputed the merits of Claim Seventeen. Because this pervasive prosecutorial misconduct rendered Thomas's convictions and death sentences unconstitutional, this Court should relief.

**2. Claim Nineteen, ineffective assistance of first direct appeal counsel, has merit.**

In Claim Nineteen, Thomas alleged his convictions and death sentences are invalid because of ineffective assistance by first direct appeal counsel. Thomas set

forth in detail in his Petition the facts and law establishing the merits of Claim Nineteen. *See* Pet. at 176-77.

The State reiterates its' argument that all guilt-trial claims are procedurally defaulted and Schieck's ineffectiveness cannot establish good cause to overcome the default. *See* Mot. at 20; *see also* Mot. at 11 n.1. For the reasons discussed in Section II.A.1.a., above, the State's argument fails. The ineffective assistance of first direct appeal counsel warrants relief independently and also provides good cause to overcome the procedural default of any record-based guilt-trial claims.

The State has not disputed the merits of Claim Nineteen and this Court should grant relief.

**3. Claim Twenty, ineffective assistance of second direct appeal counsel, has merit.**

In Claim Twenty, Thomas alleged his death sentences are invalid because of ineffective assistance by second direct appeal counsel, David Schieck. Appellate counsel have an obligation to raise meritorious claims on behalf of their clients. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *see also Smith v. Robbins*, 528 U.S. 259, 285 (2000) (appellate counsel ineffective where "counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them."). Thomas set forth in detail in his Petition the meritorious claims and theories of relief Schieck failed to raise, and on which an impartial appellate court would have reversed Thomas's sentences. *See* Pet. at 178-79.

The State argues Schieck was not ineffective for failing to raise the claims in the Petition because he elected to raise only the strongest issues that were most

likely to succeed. *See* Mot. at 48. This is pure conjecture. Thomas had a right to effective assistance of counsel on appeal. The only way for this Court to determine whether Thomas received effective assistance is to hold a hearing at which Schieck can explain why he failed to raise all potentially meritorious issues. The Court can then evaluate if his actions were reasonable and strategic under *Strickland*.

**a. Claim Twenty-Four, violation of international law, has merit.**

In Claim Twenty-Four, Thomas alleged his convictions and death sentences are invalid because the proceedings against him violate international law. Thomas set forth in detail in his Petition the facts and law establishing the merits of Claim Twenty-Four. *See* Pet. at 189-212.

The State argues Thomas's claim must fail because the Nevada Supreme Court and United States Supreme Court have repeatedly found the death penalty constitutional, and the Nevada death penalty scheme has been upheld. *See* Mot. at 58-59. Thomas alleged in Claim Twenty-Three that the death penalty in general and Nevada death penalty scheme specifically are unconstitutional. Moreover, the rulings of domestic courts—even the United States Supreme Court—do not alter the fact that Thomas's rights have been violated under *international* law.

**4. Claim Twenty-Six, juror misconduct at the penalty retrial, has merit.**

In Claim Twenty-Six, Thomas alleged his death sentences are invalid due to juror misconduct and bias at the penalty retrial. Thomas set forth in detail in his Petition the facts and law establishing the merits of Claim Twenty-Six. *See* Pet. at 218-229. The allegations in Claims Twenty-Six(A) and (B) are record-based and

should have been brought on direct appeal. *See* Pet. at 218-22. Whipple was ineffective for failing to allege Schieck was ineffective for not raising them.

The State is incorrect that subclaims (C)-(G) could have been raised on direct appeal. Mot. at 46. These subclaims are based on juror declarations resulting from extra-record investigation; Schieck was required to raise only record-based claims on direct appeal. It was Whipple who should have investigated and presented this evidence in the initial post-conviction proceedings. The State's argument that this information "was not available" to Whipple, Mot. at 46, fails: he was obligated to interview the jurors as part of a constitutionally adequate post-conviction investigation.[3]

The State argues the juror declarations supporting Thomas's allegations are inadmissible under NRS 50.065(2). Mot. at 46. That provision is designed to protect a juror's *internal* deliberative processes. Claim Thirteen(C) is based entirely on admissible evidence of *extrinsic* information received by the jurors, i.e. that Thomas had previously been sentenced to death. *See Meyer v. State*, 119 Nev. 554, 562, 80 P.3d 447, 454 (2003) ("Where the misconduct involves extrinsic information or contact with the jury, juror affidavits or testimony establishing the fact that the jury received the information or was contacted are permitted.").

[3] Part of subclaim (F) is a record-based allegation of ineffective assistance of counsel. Schieck was not required to bring an ineffectiveness claim on direct appeal and could not have alleged his own ineffectiveness. *See* Section II.A.1.a., above.

The extraneous prejudicial information introduced into the jury room by juror Cunningham, discussed in subclaim (D), is similarly admissible. *See Bushnell v. State*, 95 Nev. 570, 574, 599 P.2d 1038, 1041 (1979) ("Nevada law allows juror testimony regarding objective facts or overt conduct constituting juror misconduct."); *see also id.* at 575 ("as testimony regarding an objective fact constituting juror misconduct, the affidavit was competent evidence impeaching the verdict.").

The statements supporting the allegations of misconduct in subclaims (E) and (F) concern the jurors' eligibility to even sit on a capital case, and have no bearing on their deliberative processes. The allegations in subclaim (G) involve juror statements that they made up their mind to vote for death *before deliberations*. These statements are not prohibited by NRS 50.065(2), which is intended to protect a juror's thought processes *during deliberations*. *See Maestas v. State*, 128 Nev. 124, n.13, 275 P.3d 74, n.13 (2012) ("intrinsic misconduct is difficult to prove because of the restriction on juror affidavits or testimony *that delve into the jury's deliberative process*." (emphasis added) (internal quotation marks omitted)).

Because all the challenged statements are admissible, and the State has not disputed the merits of the allegations supported by the juror affidavits, this Court should grant relief.

**5. Claim Twenty-Eight, juror misconduct at the guilt trial, has merit.**

In Claim Twenty-Eight, Thomas alleged his death sentences are invalid because of juror misconduct and bias at the guilt trial. Thomas set forth in detail in

his Petition the facts and law establishing the merits of Claim Twenty-Eight. *See* Pet. at 234-41. The State has not disputed the merits of Claim Twenty-Eight and this Court should grant relief.

## III. This Court has jurisdiction over Thomas's claims.

The State argues, under the law-of-the-case doctrine, this Court lacks jurisdiction over Claims One, Three, Four, Five(A), Six(A) and (B), Eight, Nine, Eleven, Twelve, Fifteen(A), (B), and (C), Sixteen, Eighteen(A) and (B), Twenty-One, Twenty-Two, Twenty-Three(B) and (C), Twenty-Five, and Twenty-Seven. Mot. at 10, 11, 12-16, 18-19, 29, 32-33, 34, 36-38, 43-45, 50, 52, 53-54, 59. The law-of-the-case doctrine is inapplicable: most claims in the instant Petition have never been presented to the Nevada Supreme Court, and this Court reviews all claims—old and new—for cumulative error. The cumulative error claim pleaded in Claim Twenty-One has never been previously raised or adjudicated.

### A. Claim Three, *Roper* violation, is new.

Thomas alleged, in Claim Three(A), the admission of his juvenile convictions and childhood bad acts violated the Eighth Amendment under *Roper v. Simmons*, 543 U.S. 551 (2005). Pet. at 27-33. The State argues this claim was raised in the second direct appeal. Mot. at 29. But that brief argued only that the use of the juvenile history was cumulative and "questionably relevant." Ex. 17 at 33.[4] It did not raise a *Roper* claim. In Claim Three(B), Thomas argued retrial and second direct appeal counsel were ineffective for failing to raise a *Roper* challenge.

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[4] Exhibits 1-247 were filed with the Petition; Exhibits 248-55 are being filed with this Opposition.

Second post-conviction counsel, Bret Whipple, should have raised the substantive claim, Three(A), and the ineffective assistance component, Three(B), in the second post-conviction proceeding. Because all prior state counsel were ineffective, Claims Three(A) and (B) have never been presented to the Nevada Supreme Court.

**1. Claim Three has merit.**

Contrary to the State's argument, the Nevada Supreme Court did not consider Claim Three on direct appeal. *See* Mot. at 31 (citing Ex. 19 at 8). It considered the improper admission of statements about Thomas's juvenile behavior on the basis they were not proper rebuttal. *See* Ex. 19 at 8. The Court's finding that this unrelated error was minimal is irrelevant to this Court's review of Claim Three.

The State's reliance on the Nevada Supreme Court's opinion in *Johnson v. State*, 122 Nev. 1344, 148 P.3d 767 (2006), is misplaced. Johnson's juvenile history was admitted only at the *selection* phase of his capital trial. Thomas's conviction for robbery with a deadly weapon—committed when he was seventeen years old—was used as a prior violent felony to make him *eligible* for the death penalty. *See* Exs. 127 (Notice of Intent to Seek the Death Penalty), 141 (Special Verdict).

The Nevada Supreme Court in *Johnson* found significant that, "Because [Johnson's juvenile record] was admitted only during the selection phase of his hearing, there are no concerns that it may have improperly influenced the jury's weighing of aggravating and mitigating circumstances." *Johnson*, 122 Nev. at 1354. For Thomas, the juvenile record *was* an aggravating circumstance. This violates

*Roper*'s holding that the Eighth Amendment precludes reliance on criminal acts committed before the age eighteen as a basis for the imposition of a death sentence because a "juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Roper*, 543 U.S. at 573; *see also Graham v. Florida*, 560 U.S. 48 (2010) (Eighth Amendment prohibits imposition of life without parole sentence on juvenile offender for non-homicide offenses.); *Miller v. Alabama*, 567 U.S. 460 (2012) (mandatory life imprisonment without parole for juveniles violates the Eighth Amendment's prohibition on cruel and unusual punishments).

The use of Thomas's juvenile criminal history at the selection phase was far more pervasive and prejudicial than that considered by the Court in *Johnson*. *Compare* Pet. at 27-36 *with Johnson*, 122 Nev. at 1354. Moreover, the Nevada Supreme Court's finding that use of a juvenile record at the selection phase is relevant to a defendant's character, *Johnson*, 122 Nev. at 1354, directly contravenes *Roper*, which was based in part on the fact that the "character of a juvenile is not as well formed as that of an adult." *Roper*, 543 U.S. at 570.

**B. Claim Five, erroneous penalty retrial instructions, is new.**

In Claim Five, Thomas alleged his death sentences are unconstitutional because of deficient jury instructions at his penalty retrial. Claim Five(A) (failure to give lack of premeditated intent instruction) was raised on direct appeal, but this Court must consider the prejudicial impact of the instructional errors cumulatively. *See Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) ("[A] single instruction to a jury

may not be judged in artificial isolation, but must be viewed in the context of the overall charge." (citation omitted)).

Claim Five(A) cannot be segregated from the new allegations contained in Claims Five(B) (failure to give emotional disabilities as mitigation instruction) and (C) (failure to instruct on outweighing beyond a reasonable doubt), as the Sate urges, especially since the State has not disputed the merits of Claim Five(B).

**1. Claim Five has merit.**

The State argues Claim Five(C) is meritless. *See* Mot. at 33-34. Thomas addresses the State's argument as part of his good cause allegation in Section II.A.5., above.

**C. Claims Six(A) and (B), confrontation violations, are new.**

Thomas alleged, in Claim Six(A), trial court error at the guilt trial for lack of notice Kenya Hall would not testify against him. Thomas was excluded from a pretrial hearing where Hall changed his position, and was not told until minutes before jury selection. Pet. at 54-56. Thomas also argued counsel should have sought a mistrial when the State introduced Hall's preliminary hearing testimony at the guilt phase. Pet. at 56.

Contrary to the State's argument, none of these issues were raised on direct appeal. *See* Mot. at 13 (Thomas "raised the same Confrontation issue on direct appeal"). The direct appeal brief raised only trial court error for admitting Hall's testimony at the *penalty phase*. *See* Ex. 3 at 16-22.

David Schieck should have raised Claim Six(A) in the first post-conviction proceeding, and argued first trial and direct appeal counsel were ineffective for

failing to raise it. Because all prior state counsel were ineffective, Claim Six(A) has never been presented to the Nevada Supreme Court.

In Claim Six(B), Thomas alleged trial court error at the penalty retrial for allowing a law enforcement officer to repeat Hall's out of court statements; admitting Hall's preliminary hearing testimony, and the prior testimony of Barbara Smith, Emma Nash, Loletha Jackson, Alkareem Hanifa, Marty Neagle, Margaret Wood, and Roger Edwards; allowing the introduction of various juvenile petitions and other reports charging violent and non-violent offenses, without calling the authors; and allowing multiple witnesses to introduce and read from documents they did not author. Pet. at 56-59. Thomas further alleged guilt-trial counsel were ineffective for not moving to compel Hall as a witness. Pet. at 60.

The State argues Thomas raised this issue on direct appeal. Mot. at 34. But the brief alleged only trial court error for admitting Hall's out of court statement and preliminary hearing testimony, plus a juvenile certification order. Ex. 17 at 23-26. It did not address the multitude of other confrontation violations, or the failure to move to compel Hall's testimony.

Schieck should have raised the guilt-trial counsel ineffectiveness component of Claim Six(B) in the first post-conviction proceeding. Whipple should have raised the remainder of Claim Six(B) in the second post-conviction proceeding, and argued retrial and second direct appeal counsel were ineffective for failing to raise it. Because all prior state counsel were ineffective, Claim Six(B) has never been presented to the Nevada Supreme Court.

**1. Claim Six has merit.**

Thomas set forth in detail in his Petition the facts and law establishing the merits of Claim Six. *See* Pet. at 53-62. The State relies on the Nevada Supreme Court's description of the evidence in aggravation to argue Thomas cannot demonstrate prejudice from the confrontation violations. *See* Mot. at 34-35. But much of the evidence that aggravated Thomas's case is the subject of the confrontation violations raised in Claim Six. The improperly admitted evidence cannot be used to defeat the prejudice from its own improper admission.

**D. Claim Nine, invalid avoid or prevent lawful arrest aggravator, is new.**

In Claim Nine, Thomas alleged the avoid or prevent lawful arrest aggravating circumstance, as applied to him, is unconstitutional. Pet. at 74-87. The State argues this claim was considered by the Nevada Supreme Court as part of its mandatory review on direct appeal. Mot. at 37-38. The State is wrong. The Court considered the sufficiency of the evidence to support the jury's finding of the aggravator, and not the constitutionality of the aggravator itself. *See* Ex. 5 at 27; Ex. 19 at 16.

Whipple should have raised Claim Nine in the second post-conviction proceeding, and argued retrial and second direct appeal counsel were ineffective for failing to raise it. Because all prior state counsel were ineffective, Claim Nine has never been presented to the Nevada Supreme Court.

**1. Claim Nine has merit.**

Thomas set forth in detail in his Petition the facts and law establishing the merits of Claim Nine. *See* Pet. at 74-87. The State has not disputed the merits of Claim Nine and this Court should grant relief.

**E. Claim Eighteen, penalty retrial prosecutorial misconduct, is new.**

In Claim Eighteen, Thomas alleged prosecutorial misconduct at his penalty retrial. Pet. at 172-75. The State argues subclaims (A) and (B) are barred by law of the case because they were raised on direct appeal. The State is wrong: this Court must consider all evidence of prosecutorial misconduct cumulatively to assess its prejudicial effect. *See, e.g., Jimenez v. State*, 112 Nev. 610, 619-20, 918 P.2d 687, 693 (1996); *Jackson v. Brown*, 513 F.3d 1057, 1071, 1076 (9th Cir. 2008).

Whipple should have raised Claim Eighteen in the second post-conviction proceeding, and argued retrial and second direct appeal counsel were ineffective for failing to raise it. Because all prior state counsel were ineffective, Claim Eighteen has never been presented to the Nevada Supreme Court.

**1. Claim Eighteen has merit.**

In Claim Eighteen(B), Thomas challenged improper prosecution arguments. The Nevada Supreme Court agreed the portion in subclaim (B)(1) was improper. *See* Ex. 19 at 9. The allegations in subclaim (B)(2) are new. The Nevada Supreme Court has found "arguments asking jurors to place themselves in the place of the victim," as alleged in subclaim B(2), "are exceedingly improper in and of themselves." *Jacobs v. State*, 101 Nev. 356, 359, 705 P.2d 356, 359 (1985) (internal quotation marks omitted). Indeed, such an argument is so prejudicial that courts

refer to it as the "golden rule argument." *See, e.g.*, *Lioce v. Cohen*, 124 Nev. 1, 22-23, 174 P.3d 970, 984 (2008); *Government of the Virgin Islands v. Mills*, 821 F.3d 448, 458 (3rd Cir. 2016); *Forrestal v. Magendantz*, 848 F.2d 303, 309 (1st Cir. 1988). This Court must consider the allegations in (B)(1) and (2) together to determine "whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting [sentence] a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (*quoting Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)).

Regarding Claim 18(C), the State argues the probative value of the photographs in the PowerPoint displayed during the prosecutor's closing argument was not substantially outweighed by the danger of unfair prejudice. Mot. at 44. This is belied by the record. Dan Albregts, Thomas's second chair counsel at the penalty retrial, was "so taken aback" by the prejudicial display that he could not collect himself to make an objection. *See* Ex. 164 at ¶4. The propriety of PowerPoint, "as an advocate's tool . . . . depends on content and application. . . . [A] PowerPoint may not be used to make an argument visually that would be improper if made orally." *Watters v. State*, 129 Nev. 886, 891, 313 P.3d 243 (2013) (reversing conviction due to PowerPoint presentation during opening statement that includes a slide of the defendant's booking photo with the word "GUILTY" across it); *see also Sipsas v. State*, 102 Nev. 119, 124, n.6, 716 P.2d 231, 234 n.6 (1986) ("A photograph lends dimension to otherwise non-dimensional testimonial evidence. That an erroneous admission of a photograph would cause undue prejudice is certain. The extent of

that prejudice is immeasurable."). The PowerPoint display was improper and intended only to inflame the jury.

**F. Claim Twenty-One, cumulative error, is new.**

Thomas alleged in Claim Twenty-One cumulative error invalidates his convictions and death sentences. Pet. at 180-81. The State argues law of the case because cumulative error was raised in the first direct appeal. Mot. at 50. But the claim in the Petition is different. Thomas alleged multiple errors at the guilt trial—most notably claims of ineffective counsel—that were not before the Nevada Supreme Court when it considered cumulative error on direct appeal. Schieck should have raised these claims in the first post-conviction proceeding, and a cumulative error claim supporting them. Because Schieck was ineffective, the cumulative error challenge to Thomas's convictions has never been presented.

The State concedes Schieck, as second direct appeal counsel, failed even to allege cumulative error from the penalty retrial. To argue the Nevada Supreme Court considered this challenge to the death sentences, the State relies on the finding that "Thomas's penalty hearing, while not free from error, was fair." Mot. at 50 (quoting Ex. 19 at 19). To the extent the Court previously considered cumulative error, it does not preempt this Court's jurisdiction over Claim Twenty-One. Thomas alleged multiple errors from the penalty retrial—most notably claims of ineffective counsel—which were not before the Nevada Supreme Court on direct appeal. Whipple should have raised these claims in the second post-conviction proceeding, and a cumulative error claim supporting them. Because Whipple was ineffective,

the cumulative error challenge to Thomas's death sentences has never been presented.

**1. Claim Twenty-One has merit.**

Thomas set forth in detail in his Petition the facts and law establishing the merits of Claim Twenty-One. *See* Pet. at 180-81. The State argues claims previously denied by the Nevada Supreme Court cannot be considered as part of this Court's cumulative error review. *See* Mot. at 50-51. But constitutional errors that may be harmless in isolation can have the cumulative effect of rendering a trial fundamentally unfair. *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); *Parle v. Runnels*, 505 F.3d 922, 927-28 (9th Cir. 2007). The Nevada Supreme Court has long engaged in cumulative error analysis in habeas cases. *See, e.g. Evans v. State*, 117 Nev. 609, 647-48, 28 P.3d 498, 524 (2001). Even though that Court previously rejected some of Thomas's arguments, this Court should consider both the merits of the arguments, and the effect of the errors alleged, in the context of Thomas's entire Petition.

The State questions whether this Court can consider Thomas's ineffective assistance of counsel claims in its cumulative error analysis. *See* Mot. at 51. It can: *Strickland* prejudice may result from one deficiency or the cumulative impact of multiple deficiencies. *See Daniels v. Woodford*, 428 F.3d 1181, 1210 (9th Cir. 2005); *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003) ("Separate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance. They are, in other

words, not separate claims, but rather different aspects of a single claim of ineffective assistance of trial counsel." (internal citations omitted)).

The State argues the "overwhelming evidence" of Thomas's guilt means he cannot show cumulative error sufficient to reverse his convictions. Mot. at 51. The State misses the point. Thomas set forth in great detail in Claim Thirteen why trial counsel should have raised a first phase mental state defense demonstrating Thomas could not form the requisite intent for first degree murder. A first phase mental state defense was viable regardless of the weight of evidence implicating Thomas; it just shows he did not have the requisite intent to commit the crimes charged.

Regarding the penalty retrial cumulative error allegation, the State simply cites to the Nevada Supreme Court's *first direct appeal* opinion finding the death sentences were not excessive. *See* Mot. at 51-52. But that is not the penalty phase at issue here. Because the State has not disputed the merits of the penalty retrial cumulative error allegation, this Court should grant relief.

**G. Claim Twenty-Two, elected judges, is new.**

Thomas alleged, in Claim Twenty-Two, his proceedings were unfairly overseen by elected judges—one of whom had a conflict of interest—who failed to conduct adequate appellate review. Pet. at 182-88. The State argues this claim was raised by Schieck in the first post-conviction proceeding. Mot. at 52. Schieck challenged the fairness and adequacy of the Nevada Supreme Court's appellate review, but made no allegations about the role of elected judges in that process or Justice Becker's conflict. *See* Ex. 11 at 67-68. Schieck should have raised all of the

factual allegations of Claim Twenty-Two, and argued first trial and direct appeal counsel were ineffective for failing to raise them. Because all prior state counsel were ineffective, Claim Twenty-Two has never been presented to the Nevada Supreme Court.

**1. Claim Twenty-Two has merit.**

Thomas set forth in detail in his Petition the facts and law establishing the merits of Claim Twenty-Two. *See* Pet. at 182-88. The State argues the Nevada Supreme Court's decision in *McConnell v. State*, 125 Nev. 243, 256, 212 P.3d 307, 316 (2009), forecloses Thomas's claim. *See* Mot. at 52-53. The State is wrong. The Court in *McConnell* focused on the petitioner's failure "to substantiate his claim with any specific factual allegations demonstrating actual judicial bias." *McConnell*, 125 Nev. at 256, 212 P.3d at 316. Thomas has alleged actual bias by Justice Nancy Becker. This Court cannot rely on *McConnell* to deny Claim Twenty-Two.

**H. Claim Twenty-Three, death penalty is unconstitutional, is new.**

Thomas alleged, in Claim Twenty-Three, his sentences cannot be executed because the death penalty is unconstitutional. As the State notes, Thomas raised the argument in subclaim (B), that the Nevada death penalty scheme is unconstitutional because it fails to sufficiently narrow the class of death-eligible defendants, in his second direct appeal. *See* Mot. at 53-54. But that claim was raised in isolation; this Court must consider it in the context of Thomas's broader challenge to the death penalty in Nevada as pled in Claim Twenty-Three.

In subclaim (C), Thomas alleged the death penalty is a cruel and unusual punishment. The State argues law of the case because the Nevada Supreme Court

found "the sentence of death was not excessive" in light of the aggravating circumstances. Ex. 5 at 26-28. The State is wrong. The Court made no finding that the death penalty is not cruel and unusual, because that claim was not before it. Whipple should have raised Claim Twenty-Three(C) in the second post-conviction proceeding, and argued retrial and second direct appeal counsel were ineffective for failing to raise to before. Because all prior state counsel were ineffective, Claim Twenty-Three(C) has never been presented to the Nevada Supreme Court.

**1. Claim Twenty-Three has merit.**

Thomas set forth in detail in his Petition the facts and law establishing the merits of Claim Twenty-Three. Thomas acknowledges the United States Supreme Court has repeatedly upheld the general constitutionality of the death penalty, as has the Nevada Supreme Court. *See* Mot. at 56-57. Given, however, that the United States Supreme Court's adherence to *stare decisis* has become increasingly tenuous, *see Walton v. Arizona*, 497 U.S. 639, 670 (1990) (Scalia, J., concurring) (overruled by *Ring v. Arizona*, 536 U.S. 584 (2002)), Thomas asserts and preserves the argument that the death penalty is cruel and unusual punishment under the Eighth Amendment and Article I, Section 6 of the Nevada Constitution. *See Gregg v. Georgia*, 428 U.S. 153, 230-31 (1976).

The State relies on the Nevada Supreme Court's holding in *McConnell*, 125 Nev. at 248-49, 212 P.3d at 311, that a challenge to the lethal injection procedure is not cognizable in habeas. Mot. at 54-55. The *McConnell* ruling, however, amounts to an unconstitutional suspension of the writ, Nev. Const. Art. 1 § 5, based upon the construction of the habeas statute. Further, the State has not conceded that

exhaustion of this claim in state proceedings is unnecessary to obtain federal review, see 28 U.S.C. § 2254(b), and has continued to argue that federal courts cannot address a claim that lethal injection is unconstitutional if it is not first raised in state proceedings (and that the claim can be procedurally defaulted if not raised in state court). Until the State ceases to invoke the doctrines of exhaustion and procedural default to attempt to bar this claim because it has not been raised in state court, Thomas must raise it in here.

**I. Claim Twenty-Five, invalid prior violent felony aggravator, is new.**

Thomas argued in Claim Twenty-Five that the prior violent felony aggravator, as applied to him, is unconstitutional. Pet. at 215-17. The State argues the Nevada Supreme Court considered this claim in its mandatory review of the death sentences on both direct appeals. Mot. at 44-45. But the Court only assessed the sufficiency of the evidence to support the jury's finding of the aggravator; its' constitutionality as applied to Thomas was not before the Court. *See* Ex. 5 at 27; Ex. 19 at 16.

Whipple should have raised Claim Twenty-Five in the second post-conviction proceeding, and argued retrial and second direct appeal counsel were ineffective for failing to raise it. Because all prior state counsel were ineffective, Claim Twenty-Five has never been presented to the Nevada Supreme Court.

**1. Claim Twenty-Five has merit.**

Thomas set forth in detail in his Petition the facts and law establishing the merits of Claim Twenty-Five. *See* Pet. at 215-17. The State has not disputed the merits of Claim Twenty-Five and this Court should grant relief.

**J. Claim Twenty-Seven, categorical exemption, is new.**

In Claim Twenty-Seven, Thomas alleged his borderline intellectual functioning and youth at the time of the offenses exempt him from the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002), and *Roper v. Simmons*, 543 U.S. 551, 569 (2005). Pet. at 230-33. Providing only a general citation to documents from the *second direct appeal*, the State argues this claim was raised in the *second post-conviction* proceeding. Mot. at 59.

Whipple alleged variously that Thomas might be intellectually disabled, Ex. 22 at 8; retrial counsel were ineffective for not developing and presenting intellectual disability as mitigation, Ex. 23 at 5-10; and retrial counsel were ineffective for not presenting evidence of borderline intellectual functioning, Ex. 25 at 10-17.[5] He never argued Thomas's impaired intellectual functioning, youth at the time of the offenses, or a combination of those factors, exempted him from the death penalty. *See, e.g.*, Ex. 26 at 2-3 (Nevada Supreme Court Opinion summarizing Whipple's various claims concerning Thomas's intellectual impairments).

Whipple should have raised Claim Twenty-Seven, and argued retrial and second direct appeal counsel were ineffective for failing to raise it. Because all prior state counsel were ineffective, Claim Twenty-Seven has never been presented to the Nevada Supreme Court.

[5] Whipple used the terms "mentally retarded" and "borderline mentally retarded." The currently accepted clinical and legal term is "intellectually disabled" and Thomas uses that here.

**1. Claim Twenty-Seven has merit.**

Thomas set forth in detail in his Petition the facts and law establishing the merits of Claim Twenty-Seven. *See* Pet. at 230-33. The State argues Claim Twenty-Seven fails because Thomas has not shown he is exempt from the death penalty under *Atkin*s. *See* Mot. at 60-61. The State misapprehends Thomas's claim. It is the *rationale* of *Atkins* and *Roper* that exempt him from the death penalty.

While the immediate consequence of the decisions in *Atkins* and *Roper* was to establish a categorical ban on executing certain classes of individuals, the rationale driving those decisions was to bring the imposition of capital punishment in line with a properly individualized assessment of moral culpability. Deficits in reasoning, judgment, and impulse control—which both juveniles and the intellectually disabled possess, through no fault of their own—necessarily affect the degree to which they can be held morally culpable for their actions.

Pointing to scientific and sociological studies, the Court in *Roper* explained "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 554. Similarly, in *Atkins*, the Court focused on the cognitive deficits that diminish the culpability of intellectually disabled individuals. *Atkins*, 536 U.S. at 305. Thomas was twenty-three years old at the time of the crimes. As the Court in *Roper* acknowledged, "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns age of 18." *Roper*, 543 U.S. at 574. Indeed, what science tells us is that full development of the brain is not achieved

until about the age of twenty-five. *See Gall v. United States*, 552 U.S. 38, 58 (2007) (citations omitted).

When Thomas's young age is combined with his borderline intellectual functioning, he becomes the exact person the Eighth Amendment—as interpreted by the Supreme Court in *Atkins* and *Roper*—protects from the death penalty. As a young, intellectually impaired man, Thomas simply does not fall within that narrow category of the worst offenders for which the death penalty is reserved.

### K. This Court must consider all errors cumulatively, including those previously rejected by the Nevada Supreme Court.

Although Claims One, Four, Five(A), Eight, Eleven, Twelve, Fifteen(A), (B), and (C), Sixteen, and Twenty-Three(B) have been previously decided by the Nevada Supreme Court, this Court has jurisdiction to consider them as part of its cumulative review of all errors alleged in the Petition. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) ("The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." (quoting *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002)); *see also Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002) ("For even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal.'" (quoting *United States v. de Cruz*, 82 F.3d 856, 868 (9th Cir. 1996)).

#### 1. The trial court's affirmance of the State's *Batson* violation was error (Claim One).

In Claim One, Thomas alleged the State violated *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986), at Thomas's guilt-trail when it exercised a peremptory

challenge against prospective juror Kevin Evans, the first African American in the venire who was not excused for his views on the death penalty. *See* Pet. at 18-21.

The Supreme Court in *Batson* announced a three-step burden-shifting framework for proving discriminatory use of a peremptory challenge. *Batson*, 476 U.S. at 96-98; *accord Currie v. McDowell*, 2016 WL 3192396, *2 (9th Cir. June 8, 2016); *Kaczmarek v. State*, 120 Nev. 314, 322, 91 P.3d 16, 29 (2004). At step one, "the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Johnson v. California*, 545 U.S. 162, 168 (2005) (internal quotation marks omitted). This burden "is not an onerous one," *Boyd v. Newland*, 467 F.3d 1139, 1151 (9th Cir. 2006), and the Supreme Court has made clear the showing requires less than a preponderance of the evidence. *Johnson*, 545 U.S. at 168. After the defendant has made out a prima facie case, "the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes." *Id.* (internal quotation marks omitted). At step three, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." *Id.* (internal quotation marks omitted).

The State's "race-neutral" reasons for removing Evans focused on his supposed youth—he was twenty-two—and its perception of his "attitude." 6/16/97 TT at I-231, 232. The trial court assumed the role of a second prosecutor and added its own observations—"the earring in his ear…maybe a little immature"—not

articulated by the State. *Id.* at I-233; *see George v. State*, 588 S.E.2d 312, 317 (Ga. 2003) (rejecting State's proffered reasons that included the juror's choice of wearing an earring). The court even volunteered its opinion, presumably based on the judge's experience as a former prosecutor, that "a lot of times prosecutors don't want young men, they want to exclude them, they want older mature people." *Id.* at I-233-34. The court's insertion of its own views into the second step of the *Batson* inquiry was error. *See Williams v. Louisiana*, 136 S. Ct 2156, 2157 (2016) ("The judge is an arbiter not a participant in the judicial process. Allowing the court to provide race-neutral reasons for the State violates [the Constitution].") (internal quotations omitted) (alteration in original); *Johnson v. California,* 545 U.S. 162, 173 (2005) (improper to "rel[y] on judicial speculation to resolve plausible claims of discrimination").

The determination at *Batson*'s third step is made in light of "all of the circumstances that bear upon the issue of racial animosity"—circumstances that include comparing one juror to another to see whether the prosecutor's justifications for striking the minority juror are inconsistent with his decision to keep a white juror on the jury. *Snyder v. Louisiana*, 552 U.S. 472, 483-85 (2008)*; see also Foster v. Chatman*, 136 S. Ct 1737, 1754 (2016) (citing *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005)). Trial counsel offered a comparative juror analysis of the State's complaint that Evans had not previously thought much about the death penalty. 6/16/97 TT at I-233. Thomas also noted in the Petition that one of his

original prosecutors accepted a twenty-one year old white juror for the penalty retrial. *See* Pet. at 19 n.4.

Perhaps most damning in proving purposeful discrimination is the prosecutor's admission that he was watching Evans throughout the voir dire process. The prosecutor even went to the trouble of learning Evans's employer would not pay for jury service and then questioning Evans about his financial ability to sit, something to which no white juror was subjected. *See* Pet. at 20-21.

The problem of racial discrimination in jury selection appears to be endemic to Clark County. Longtime Nevada Supreme Court Justice, Michael A. Cherry—who had years of trial experience in the Clark County courts—observed that Clark County prosecutors "knocked off African Americans consistently" in jury selection. *See* Oral Argument at 36:56, *State v. Keck*, Case No. 61675, 2015 WL 1880587 (Nev. Apr. 21, 2015), available at http://tinyurl.com/hfeoz92;[6] *see also McCarty v. State*, 132 Nev.__, 371 P.3d 1002, 1010 (2016) (granting relief in a capital case on a *Batson* claim arising out of Clark County).

"The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster*, 136 S. Ct. at 1747 (internal quotation marks omitted). A single race-based strike is enough to violate a defendant's equal protection and due process rights. *Gonzalez v. Brown*, 585 F.3d 1202, 1206 (9th Cir. 2009); *see also Powers v. Ohio*, 499 U.S. 400, 409 (1991); *Batson*, 476 U.S. at 95-96.

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[6] The Nevada Supreme Court denied relief in *Keck* because trial counsel failed to preserve the issue. Thomas has preserved his *Batson* claim.

"Discriminatory jury selection in violation of *Batson* generally constitutes 'structural' error that mandates reversal." *Diomampo v. State*, 124 Nev. 414, 423, 185 P.3d 1031, 1037 (2008). A district court's erroneous denial of a *Batson* challenge constitutes structural error, *McCarty*, 371 P.3d 1002, 1010, and Thomas's convictions and death sentences must be set aside.

**2. The guilt-trial jury instructions were erroneous (Claim Four).**

In Claim Four, Thomas alleged his convictions and death sentences are unconstitutional because the jury received deficient instructions at the guilt trial. The Nevada Supreme Court denied this claim on the basis that "no plain or patently prejudicial errors exist." Ex. 5 at 28. But the Court reviewed the claim for plain error because trial counsel failed to preserve it. *See* Ex. 5 at 28 n.5. Counsel were ineffective for failing to do so. If counsel had objected, the burden would have been on the State to prove the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 366 U.S. 18, 24 (1967). Because the ineffectiveness of all prior state counsel overcomes the procedural default of Claim Four, this Court is not bound by the Nevada Supreme Court's finding of no plain error and must review it de novo under the harmless error standard.

Thomas set forth in detail in his Petition the facts and law establishing the merits of subclaims (A) and (B). A discussion of the legal bases for the rest of Claim Four follows:

### a. Equal and exact justice

In subclaim (C), Thomas challenged the "equal and exact justice" instruction. The instruction created a reasonable likelihood that the jury would convict and sentence Thomas based on a lesser standard of proof than the Constitution requires. *See In re Winship*, 397 U.S. 358, 364 (1970); *Sullivan v. Louisiana*, 508 U.S. 275, 279-82 (1993). Thomas acknowledges the Nevada Supreme Court has rejected similar challenges to this instruction. *See*, *e.g.*, *Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998); *Daniel v. State*, 119 Nev. 498, 522, 78 P.3d 890, 906 (2003). None of those decisions addressed *Winship* and *Sullivan* and this Court should do so now.

### b. Reasonable doubt

In subclaim (D), Thomas challenged the reasonable doubt instruction. The "actual, not mere possibility or speculation" language in this instruction is similar to language condemned by the Supreme Court, *see Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (per curiam); and the "govern or control" language, which describes the standard of proof beyond reasonable doubt, essentially reverses the burden of proof, in violation of *Victor v. Nebraska*, 511 U.S. 1, 20 (1994). *See*, *e.g.*, *McAllister v. State*, 88 N.W. 212, 214-15 (Wis. 1901); *Commonwealth v. Miller*, 21 A. 138, 140 (Penn. 1891); *contra Lord v. State*, 107 Nev. 28, 40, 806 P.2d 548, 555-56 (1991); *Ramirez v. Hatcher*, 136 F.3d 1209, 1210-15 (9th Cir. 1998). The characterization of standard of proof as an "abiding conviction of the truth of the charge," cannot be linked to any proper definition of the reasonable doubt standard and, in conjunction

with the language that immediately preceded this statement, provided the State with an impermissibly low standard of proof.

The use of this unconstitutional definition of reasonable doubt impermissibly minimized the standard of proof of beyond a reasonable doubt and is prejudicial per se. *Sullivan*, 508 U.S. at 278-79. Thomas acknowledges the Nevada Supreme Court and the Ninth Circuit have rejected similar challenges to this instruction. *See*, *e.g.*, *Nevius v. McDaniel*, 218 F.3d 940, 944-45 (9th Cir. 2000); *Ramirez v. Hatcher*, 136 F.3d 1209, 1211-13 (9th Cir. 1998); *Canape v. State*, 109 Nev. 864, 871-72, 859 P.2d 1023, 1028 (1993). None of those decisions addressed the authorities upon which Thomas relies, and this Court should do so now.

**c. Lack of unanimity**

In subclaim (E), Thomas alleged his convictions are invalid because the jury was not instructed that its' verdict had to be unanimous as to a theory of first-degree murder. Due process requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. at 365. A defendant's due process rights are violated when inherently different acts are used to define an element of the crime without a requirement the jury agree on the specific act committed. *See Schad v. Arizona*, 501 U.S. 624, 633 (1991). Although the Supreme Court found states may have some flexibility in defining "different course of conduct, or states of mind, as merely alternative means of committing a single offense," this flexibility is not unlimited. *Id.* at 632. When the "difference between means become so important that they may not reasonably be viewed as alternatives to a common end," due process requires

the "separate theories of crime [] be treated as separate offenses subject to separate jury findings." *Id.* at 634. In an effort to make this distinction, the Supreme Court in *Schad* directed courts to consider factors like "the moral and practical equivalence of the different" acts that may satisfy the element of a single offense. *Id.* at 637.

The Court clarified the matter of unanimity in *Richardson v. United States*, 526 U.S. 813, 817 (1999), holding where a statute creates specific and required elements of a crime, as in premeditated murder or felony murder, the jury must be unanimous as to each and every element, not just as to the act of killing. Additionally, in Nevada, unanimity is required in all criminal cases. *See* NRS 175.481. Unanimity in this context means that each and every juror agrees the defendant committed the same, single, specific criminal act, as well as each statutory element enumerated.

Thomas's right to due process was violated because the trial court allowed the jury to convict him of capital murder under materially different and morally inequivalent acts and mental states, without requiring a consensus as to the theory under which Thomas was guilty. Unlike premeditated murder, felony murder does not require the defendant commit the killing or even intend to kill, so long as the defendant is involved in the underlying felony. *See Evans v. State*, 113 Nev. 885, 944 P.2d 253 (1997), citing NRS 200.030(1)(a)). On the other hand, felony murder—but not premeditated murder—requires proof the defendant had the requisite intent to commit and did commit the underlying felony. *See*, *e.g.*, *Leslie v. Warden*, 118 Nev. 773, 59 P.3d 440 (2002) (noting Nevada felony murder requires the intent to

commit the underlying felony). The different theories under which Thomas was charged possessed no elements in common except the fact of a murder. Based on the instructions given in this case, the jury was free to convict Thomas based on a finding that he murdered the victims without proof beyond a reasonable doubt of all underlying elements.

Thomas acknowledges the Nevada Supreme Court has ruled on several occasions that a jury need not be unanimous in determining under which theory of criminality the State proved its case. *See*, *e.g.*, *Walker v. State*, 113 Nev. 853, 944 P.2d 762 (1997); *Evans*, 113 Nev. 885, 944 P.2d 253. Nonetheless, Nevada's statute defining first degree murder sets forth two separate offenses and as a matter of due process, fundamental fairness, and the right to a jury trial under the federal and state constitutions, this Court should find the failure to give a unanimity instruction was error.

**d. Malice**

In subclaim (F), Thomas argued the malice instructions provided for an impermissible and unconstitutional presumption that deprived Thomas of his rights to a fair trial, equal protection, due process of law, and to be free from cruel and unusual punishment. *See Yates v. Evatt*, 500 U.S. 391, 400-02 (1991). The implied malice instruction required the jury to find malice "when no considerable provocation appears." Ex. 71 at 24 (Inst. 21). In other words, the mandatory presumption of malice applies when there is nothing more than proof of a killing. These predicate facts—which do not constitute facts at all but the absence of such—are not "so closely related to the ultimate fact to be presumed that no rational jury

could find those facts without also finding the ultimate fact." *Yates*, 500 U.S. at 406 n.10. A jury could, in fact, find a killing without also finding that it was committed with malice.

In addition, the alternative predicate facts of an "abandoned and malignant heart" are so vague as to be devoid of content and perjorative, and they allow a finding of malice simply on the ground that the defendant is a bad man. *See United States v. Hinckle*, 487 F.2d 1205, 1207 (D.C. Cir. 1973) ("Juries are to determine whether specific acts have been committed with requisite culpability, not whether defendants have generally depraved, wicked and malicious spirits."); *People v. Phillips*, 414 P.2d 353 (Cal. 1966) (disapproving language on non-constitutional grounds); *cf. Dixon v. United States*, 548 U.S. 1, 7 (2006) (noting vagueness of "evil mind" mental state). A reasonable juror—the standard by which the constitutionality of an instruction is judged, *see*, *e.g.*, *Boyde v. California*, 494 U.S. 370, 382 (1990) (effect of language of instruction on reasonable juror)—would also have understood the "abandoned and malignant heart" language to require an objective, rather than subjective, standard in determining whether Thomas acted with conscious disregard of life, thereby entirely obliterating the line which separates murder from involuntary manslaughter. Either way, the language in the jury instruction improperly lowered the State's burden of proof and requires reversal of Thomas's convictions. *See Winship*, 397 U.S. at 364.

### 3. It was error to admit cumulative, inadmissible, or improper evidence at the penalty retrial (Claim Eight).

In Claim Eight, Thomas alleged his death sentences are invalid because cumulative evidence, evidence of prior bad acts, and other inadmissible or improper evidence was admitted at the penalty retrial. Thomas set forth in detail in his Petition the facts and law establishing the merits of Claim Eight. *See* Pet. at 72-73.

Regarding Claim 8(A), the State cites to the Nevada Supreme Court's findings that the jury was entitled to know about Thomas's lengthy prison disciplinary record, and this evidence was not cumulative. *See* Mot. at 37 (quoting Ex. 19 at 11). But as detailed in Claim Seven, Thomas's prison disciplinary record should never have been admitted because the State violated the notice provision of Rule 250. *See* Section II.B.2., above. This Court cannot, then, follow the Nevada Supreme Court's finding of no error. The Nevada Supreme Court found Fred Dixon's victim impact statement—the subject of Claim Eight(B)— was improper, but not reversible error. This Court must cumulate the prejudice from the errors in Claims 18(A) and (B) and find Thomas is entitled to relief.

### 4. It was error to death qualify the jury (Claim Eleven).

In Claim Eleven, Thomas alleged his convictions are invalid because he was convicted by a death-qualified jury. Thomas set forth in detail in his Petition the facts and law establishing the merits of Claim Eleven. *See* Pet. at 90-91. The State stands on the Nevada Supreme Court's denial of this claim on the basis that "no plain or patently prejudicial errors exist." Mot. at 14 (quoting Ex. 5 at 28). But the Court reviewed the claim for plain error because trial counsel failed to preserve it.

*See* Ex. 5 at 28 n.5. Counsel were ineffective for failing to do so. If counsel had objected, the burden would have been on the State to prove the error was harmless beyond a reasonable doubt. *See Chapman*, 366 U.S. at 24. Because the ineffectiveness of all prior state counsel overcomes the procedural default of Claim Eleven, this Court is not bound by the Nevada Supreme Court's finding of no plain error and must review the claim de novo under the harmless error standard.

**5. It was error for the jury to convict Thomas on insufficient evidence (Claim Twelve).**

In Claim Twelve, Thomas alleged his convictions and death sentences are invalid because the evidence adduced at trial was insufficient to support his convictions. If, after reviewing all the evidence and considering it in the light most favorable to the prosecution, no rational juror could have found the essential elements of a crime beyond a reasonable doubt, conviction of that crime is unconstitutional. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Under this standard, Thomas's convictions were supported by insufficient evidence and are unconstitutional.

**6. The trial court committed error at the guilt-trial (Claim Fifteen).**

In Claim Fifteen, Thomas alleged his convictions are invalid because of trial court errors at the guilt trial. As the State notes, Thomas raised Claims Fifteen(A) (failure to grant a mistrial after "back in jail" comment), (B) (admission of gruesome photographs), and (C) (admission of enlarged autopsy diagram) in the first direct appeal. *See* Mot. at 18-19. The Nevada Supreme Court found no error from Claims

Fifteen(B) and (C). The Court agreed the "back in jail" comment, Claim Fifteen (A), was error but found it harmless. *See* Ex. 5 at 15-17.

In Claim Fifteen(D), Thomas alleged the trial court improperly signaled its approval of a prosecution witness's testimony. Although in his Petition Thomas inadvertently stated Claim Fifteen(D) was raised on direct appeal, it was raised for the first time in the current Petition. The State's argument that Thomas cannot show good cause for his failure to raise Claim 15(D) earlier fails. *See* Mot. at 19. Schieck should have raised Claim Fifteen(D) in the first post-conviction proceeding and alleged ineffective assistance of first direct appeal counsel for not raising it.

It was error for the trial court to comment on the testimony in a manner that bolstered the witness's credibility. *See*, *e.g.*, *United States v. Cisneros*, 491 F.2d 1068 (5th Cir. 1974). The Supreme Court has "emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence should be so given as not to mislead, and especially that it should not be one-sided[,]" because "his lightest word or intimation is received with deference, and may prove controlling." *Quercia v. United States*, 289 U.S. 466, 470 (1933) (internal quotation marks omitted). It is clear that a prosecutor may not bolster his own witness. *See Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 188 (2005); *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992) (quoting *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980)). A trial court bolstering a prosecution witness is even more prejudicial.

With the addition of Claim Fifteen(D), the matrix of Thomas's trial court error claim has changed. This Court must consider all Thomas's claims of trial court error cumulatively. *See Daniels*, 428 F.3d at 1214 (noting importance of considering cumulative effect of multiple errors "and not simply conducting a balkanized, issue-by-issue harmless error review.").

**7. The trial court committed error at the penalty retrial (Claim Sixteen).**

In Claim Sixteen, Thomas alleged his death sentences are invalid because of trial court errors at the penalty retrial. Thomas set forth in detail in his Petition the facts and law establishing the merits of Claim Sixteen. *See* Pet. at 167-68.

## IV. Laches should not bar consideration of Thomas's claims.

### A. Any delay is not attributable to Thomas.

The State argues laches applies because the time elapsed since Thomas's convictions and death sentences were entered and affirmed on direct appeal exceeds five years. *See* Mot. at 4, 22-23, 49. The State's argument ignores the fact that a sentence is critical component of a final valid judgment of conviction. Until Thomas's death sentences were affirmed on the second direct appeal, there was no final judgment from which an appeal could be taken. Given the unique procedural history of Thomas's case, the State's reasoning would render *Crump*'s protections meaningless. *See Crump*, 113 Nev. at 304-05, 934 P.2d at 254. And it directly conflicts with *Rippo*'s holding that petitioners have one year to file a petition challenging the effectiveness of their initial post-conviction counsel. *Rippo*, 368 P.3d at 739.

The Nevada Supreme Court has acknowledged that delays occurring after the appointment of counsel in a capital habeas case cannot be imputed to the petitioner under NRS 34.800. *See*, *e.g.*, *Bennett*, 111 Nev. at 1103, 901 P.2d at 679 (declining to apply NRS 34.800 when the petitioner "filed his initial petition in a timely manner, and it was only after counsel was appointed that the three-year delay transpired"); *State v. Powell*, 122 Nev. 751, 758-59, 138 P.3d 453, 458 (2006). The rationale for applying the same rule to the statutory laches bar is that such a delay is attributable to the State, *Crump*, 113 Nev. at 302-05, 934 P.2d at 252-54, and the State cannot now profit from a delay for which it is responsible. *Cf. Coleman v. Thompson*, 501 U.S. 722, 754 (1991) ("Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the state, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails).[7]

Any delay in raising Thomas's claims is attributable to the ineffective assistance of prior state counsel and the Nevada Supreme Court's reversal and remand ordering a new penalty phase. *See Thomas v. State*, 120 Nev. 37, 83 P.3d 818 (2004). In *Powell*, the judgment of conviction was entered in 1991 but, because of error by the Nevada Supreme Court, the direct appeal was not resolved until 1997. *See Powell*, 122 Nev. at 758, 138 P.3d at 458. Powell filed a timely habeas

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[7] *Coleman* discusses circumstances where there is a constitutional right to counsel whereas *Crump* concerns a statutory right to counsel under NRS 34.820(1).

petition in 1998 and received partial relief. In 2002, the Nevada Supreme Court reversed and remanded for an evidentiary hearing. *Id.* at 759, 138 P.3d at 458. The State was "not entitled to relief under NRS 34.800," because the record indicated Powell had "not inappropriately delayed" his case." *Id.*

Thomas's case is indistinguishable. His original judgment of conviction was entered in 1997 and the Nevada Supreme Court reversed for a new penalty hearing during the first post-conviction proceeding because counsel ineffectively failed to object to an unconstitutional jury instruction. *Thomas*, 120 Nev. 37, 83 P.3d 818. The new judgment of conviction was not entered until November 2005 and the direct appeal did not conclude until December 2006. *Thomas v. State*, 122 Nev. 1361, 148 P.3d 727 (2006). The post-conviction proceedings did not end until remittitur issued in 2016. *See* Ex. 144. Thomas filed his Petition less than a year later. This Court cannot fault Thomas for delays caused by the Nevada Supreme Court's reversal of his sentences. *Compare* above *with Powell*, 122 Nev. at 758, 138 P.3d at 458 ("The record indicates that Powell has not inappropriately delayed.").

Thomas has been actively litigating his claims of constitutional error for the entire time since his convictions and death sentences became final. Any delay in raising claims in the Petition is the result of initial post-conviction counsel's ineffectiveness—as compounded by the rulings of the post-conviction courts— for failing to raise those claims and allege trial and direct appeal counsel's ineffectiveness for not doing so earlier. Additionally, the laches bar cannot apply to Claim Five(C) because Thomas had no control over the timing of *Hurst*. And the

delay in raising Claim Six(C) is attributable to the State for failing to comply with *Brady*. The requirement of NRS 34.800(1)(a) that a petitioner must have exercised due diligence to investigate the basis of the claim is similar to the "withheld" prong of *Brady* in that any "delay was caused by an impediment external to the defense." *See State v. Huebler*, 128 Nev. __, 275 P.3d 91, 95 (2012); *see also Reberger*, 2017 WL 1765 *2 n.3.

**B. This Court should decline to impose the laches bar.**

The laches bar in NRS 34.800 is discretionary, both on its face and as interpreted by the Nevada Supreme Court. *See* NRS 34.800(1) ("[a] petition *may* be dismissed" under certain circumstances (emphasis added)); s*ee also Robins v. State*, 385 P.3d 57 at *4 n.3 (Nev. 2016) (unpublished), (laches "statute clearly uses *permissive* language"; "the district court could exercise its discretion and decline to dismiss the petition under NRS 34.800."); *Weber v. State*, No. 62473, 2016 WL 3524627, at*3 n.1 (Nev. June 24, 2016) (unpublished) (noting court could have summarily affirmed district court's application of laches but remanding for evidentiary hearing). This Court should decline to impose the laches bar like the Nevada Supreme Court did in these and many other cases. *See Rippo v. State*, 132 Nev. __, 368 P.3d 729, 736 (2016) (declining to apply laches); *Lisle v. State*, 131 Nev. __, 351 P.3d 725, 728-29 (2015) (same); *State v. Bennett*, 119 Nev. 585, 599-604, 81 P.3d 1, 8 (2003) (same); *Rosas v. McDaniel*, No. 57698, 2012 WL 2196321, at *2 (Nev. June 14, 2012) (non-capital); *McNelton v. State*, No. 54925, 2012 WL 1900106, at *2 (Nev. May 23, 2012); *Hogan v. State*, No. 54011, 2012 WL 204641, at *2 (Nev.

Jan. 20, 2012); *Leonard v. State*, No. 51607, 2011 WL 5009403, at *2 (Nev. Oct. 18, 2011).

**C. Thomas can rebut the presumption of prejudice to the State.**

The State argues it is "prejudiced in responding to the petition and in its ability to conduct a retrial of Petitioner due to the long passage of time since the guilt phase jury trial in June of 1997." Mot. at 4; *see also id.* at 49. Thomas can rebut any presumption of prejudice to the State under NRS 34.800(1)(a).

Thomas can rebut the presumption because, as discussed above, his claims are based on "grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." NRS 34.800. *See Crump*, 113 Nev. at 305, 934 P.2d at 354; *see also Riker*, 121 Nev. at 239, 112 P.3d at 1079 (likely State would have been unsuccessful in pleading laches and prejudice "given our determination that [petitioner] had established cause and prejudice under NRS 34.726 for the untimely filing of his petition.").

The State's speculative argument that it would be prejudiced in retrying Thomas is unpersuasive. Mot. at 4. It successfully retried capital defendants decades after the homicides occurred, using transcripts where witnesses were unavailable. *See, e.g., Browning v. State*, 124 Nev. 517, 522, 188 P.3d 60, 64 (2008) (State retried petitioner in 2008 for 1985 murder by reading transcripts of witnesses who had since died); *State v. Haberstroh*, 119 Nev. 173, 177, 69 P.3d 676, 679 (2003), as modified (June 9, 2003) (State retried petitioner in 2001 for 1986 murder). Seven witnesses were unavailable by the time of Thomas's own penalty retrial. The State presented their first trial testimony and was able to obtain death

verdicts. *See* 11/2/05 TT at 11-21 (testimony of Barbara Smith), 21-39 (testimony of Emma Nash), 55-62 (testimony of Loletha Jackson); 11/3/05 TT at 48-56 (testimony of Alkareem Hanifa), 113-32 (testimony of Marty Neagle), 132-46 (testimony of Margaret Wood), 162-201 (testimony of Roger Edwards).

A retrial at this point would be more reliable than Thomas's prior trials. Thomas has developed compelling evidence that he did not possess the requisite intent for a first degree murder conviction, and a compelling life-history narrative in mitigation, that have never been presented because trial counsel were ineffective. *See* Pet. at 98-124 (Claim Thirteen); Pet. at 128-62 (Claim Fourteen); *see also* Ex. 205 (Declaration of Dr. Thomas F. Kinsora); Ex. 183 (Declaration of Dr. Richard G. Dudley, Jr.). Thomas can also make a colorable showing that he is ineligible for the death penalty. *See* Claims Five(C), Nine, Fourteen, and Twenty-Five, and Twenty-Seven; *see also Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. The State has no legitimate interest in upholding an unreliable conviction or death sentence merely because of the passage of time. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (the State is "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal case is not that it shall win the case, but that justice shall be done.").

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## V. This Court should grant the Petition.

For all the above reasons, Thomas urges the Court to deny the State's Motion and grant Thomas's Petition. Alternatively, if this Court is not in a position to grant the Petition without further factual development, it should deny the State's Motion and order discovery and an evidentiary hearing.

DATED this 4th day of June, 2018.

Respectfully submitted

RENE L. VALLADARES
Federal Public Defender

*/s/ Joanne L. Diamond*
JOANNE L. DIAMOND
Assistant Federal Public Defender

*/s/ Jose A. German*
JOSE A. GERMAN
Assistant Federal Public Defender

## CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on June 4, 2018, a true and accurate copy of the foregoing REPLY TO RESPONSE; OPPOSITION TO MOTION TO DISMISS was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

Steven S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

*/s/ Jeremy Kip*
An Employee of the
Federal Public Defender,
District Of Nevada

**EXHS**

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Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

MARLO THOMAS,

Petitioner,

v.

TIMOTHY FILSON, et al.,

Respondents.

Case No. 96C136862-1
Dept. No. XXIII

**EXHIBITS IN SUPPORT OF REPLY TO RESPONSE; OPPOSITION TO MOTION TO DISMISS**

Death Penalty Habeas Corpus Case

248. Request for Funds for Investigative Assistance, *State v. Thomas*, District Court, Clark County, Nevada Case No. C136862C (November 9, 2009)

249. Recorder's Transcript Re: Filing of Brief, *State v. Thomas*, District Court, Clark County, Nevada Case No. C136862 (November 9, 2009)

250. Response to Request for Funds for Investigative Assistance, *State v. Thomas*, District Court, Clark County, Nevada Case No. C136862 (December 8, 2009)

251. Recorder's Transcript re: Status Check: Defendant's Request for Investigative Assistance-State's Brief/Opposition, *State v. Thomas*, District Court, Clark County, Nevada Case No. C136862 (January 19, 2010)

252. Reply to the Response to the Request for Funds for Investigative Assistance, *State v. Thomas*, District Court, Clark County, Nevada Case No. C136862 (December 28, 2009)

253. Jury Composition Preliminary Study, Eighth Judicial District Court, Clark County Nevada, Prepared for Nevada Appellate and Post-conviction Project, by John S. DeWitt, Ph.D.

254. Jury Improvement Commission Report of the Supreme Court of Nevada, October 2002

255. Register of Actions, Minutes, *State v. Thomas*, District Court, Clark County, Nevada Case No. C136862 (January 7, 2009)

**CERTIFICATE OF SERVICE**

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on June 4, 2018, a true and accurate copy of the foregoing EXHIBITS IN SUPPORT OF REPLY TO RESPONSE; OPPOSITION TO MOTION TO DISMISS was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

Steven S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

*/s/ Jeremy Kip*
An Employee of the
Federal Public Defender,
District Of Nevada

# EXHIBIT 248

# EXHIBIT 248

ORIGINAL

FILED IN OPEN COURT
November 9, 2009
STEVEN D. GRIERSON
CLERK OF THE COURT
BY Larry Snyder DEPUTY
Larry Snyder

RQST
BRET O. WHIPPLE
Nevada Bar No. 6168
BRET WHIPPLE, ATTORNEY AT LAW
1100 S. Tenth St.
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STEPHANIE B. KICE
Nevada Bar No. 10105
Attorneys for Defendant
MARLO THOMAS

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| THE STATE OF NEVADA, Plaintiff, vs. MARLO THOMAS, Defendant. | CASE NO.: C136862C<br>DEPT NO.: XXIII |

**REQUEST FOR FUNDS FOR INVESTIGATIVE ASSISTANCE**

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

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

DATED this 9 day of November, 2009.

BRET O. WHIPPLE
Nevada Bar No. 6168
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(702) 257-9500
STEPHANIE B. KICE
Nevada Bar No. 10105
Attorneys for Defendant
MARLO THOMAS

**NOTICE OF REQUEST**

TO: THE STATE OF NEVADA, Plaintiff:

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.

BRET O. WHIPPLE
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Las Vegas, NV 89104
(702) 257-9500
STEPHANIE B. KICE
Nevada Bar No. 10105
Attorneys for Defendant
MARLO THOMAS

**STATEMENT OF FACTS**

Marlo Thomas has been convicted of two counts of first degree capital murder. This honorable court appointed Bret Whipple counsel pursuant to Supreme Court Rule 250 to investigate and file Mr. Thomas' state post conviction petition.

In order to effectively investigate the matters relevant to Mr. Thomas' claims in accordance with the Sixth Amendment to the United States Constitution, it is necessary to fully investigate any and all adaptive deficits that existed before Mr. Thomas was eighteen (18) years of age, have Mr. Thomas examined and evaluated by a competent neuropsychologist for evidence of mental retardation and Fetal Alcohol Syndrome Spectrum Disorder, maternal abandonment, and a number of other mitigating factors that were not presented at his capital sentencing trial.

**POINTS AND AUTHORITIES**

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)). To make a successful claim of ineffective assistance of counsel, a defendant must satisfy both prongs of the Strickland test: first, the defendant must show that counsel's performance fell below an objective standard of reasonableness, and secondly, that the defendant suffered actual prejudice. Strickland v. Washington, 466 U.S. 668 (1984). Under the second prong of Strickland, a defendant must show that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id.

Mr. Thomas has an unusual procedural history that brings him to this court. He has had 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.

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 identified 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.

## I. DR. KINSORA TESTIFIED THAT MR. THOMAS HAD LOW INTELLECTUAL FUNCTIONING

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

intellectual functioning". (II-22).

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

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

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

[2] 7.26 points exactly using 22 years. 7.59 using 23 years.

[3] 9.90 points exactly. 10.35 years using 23 years.

[4] 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.

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

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

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

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

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

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[5] According to Dr. Kinsora, Mr. Thomas' IQ was 79. With the 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.

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

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

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

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

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

Mr. Thomas also struggled with problem solving or reasoning

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

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

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

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

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

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

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

Mr. Thomas felt an acute sense of abandonment from his mother. Dr. Kinsora testified that Mr. Thomas' felt his mother loved his other brothers more than him. He also suffered from very poor peer relations and had a hard time getting 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.

**CONCLUSION**

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

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

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MARLO THOMAS

DISTRICT COURT

CLARK COUNTY, NEVADA

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|---|---|
| THE STATE OF NEVADA,<br><br>Plaintiff,<br><br>vs.<br><br>MARLO THOMAS,<br><br>Defendant. | CASE NO.: C136862C<br>DEPT NO.: XXIII |

**RECEIPT OF COPY**

RECEIPT of the above named defendant's REQUEST FOR FUNDS FOR INVESTIGATIVE ASSISTANCE is hereby acknowledged this _____ day of November, 2009.

By: _____
CLARK COUNTY DISTRICT ATTORNEY

# EXHIBIT A

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

THE COURT: All right, thank you, Mr. Thomas.

Your next witness, please?

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

THE COURT: Dr. Thomas Kinsora?

MS. McMAHON: Pardon me, Your Honor.

(Pause in the proceeding)

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

THOMAS KINSORA, DEFENDANT'S WITNESS, IS SWORN

THE CLERK: Thank you. Please be seated.

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

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

THE COURT: Ms. McMahon?

MS. McMAHON: Thank you, Your Honor.

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DIRECT EXAMINATION

BY MS. McMAHON:

Q Good morning, Dr. Kinsora.

A Good morning.

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

A Yes, it does.

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

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

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

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

Q Dr. Kinsora, how are you currently employed?

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

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

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

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

A Yes, I do.

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

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

Q Can you tell the ladies and gentlemen of the jury

about your background, starting with your education?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q Have you published in your field?

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

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

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

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

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

A Yes, it is.

Q Okay. In fact, you are licensed?

A Yes, I am.

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

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

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

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

A Yes, I have.

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

A Correct.

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

A Yes, I have.

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

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

Q Okay.

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

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

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

MS. McMAHON: Thank you, Your Honor.

BY MS. McMAHON:

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

A Yes, ma'am.

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

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

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

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

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

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

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

A Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A Yes, when he was very young.

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

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

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

A Yes, I did.

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

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

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

A Yes, I did.

Q And the purpose of this testing was?

A Basically to assess his neuropsychological

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

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

(Off-record colloquy)

BY MS. McMAHON:

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

A Yes, I am.

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

A Yes, I did.

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

A Of most of them, yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

him.

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

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

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

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

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

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

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

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

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

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

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

(Off-record colloquy)

BY MS. McMAHON:

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

A Correct.

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

A Yes, I did.

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

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

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

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

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

That was that particular one.

There was also another one I --

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

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

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

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

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

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

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

Q Thank you.

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

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

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

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

related to chronically unstable and antisocial lifestyles.

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

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

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

A Capacity for remorse, correct.

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

A Well --

Q If you can isolate it from the other --

A -- yeah. I mean, it --

Q -- portions of the test?

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

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

Q Okay. Dr. --

A -- the difference there.

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

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

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

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

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

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

A Yes, I did.

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

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

Number one would be an attention deficit hyperactivity disorder, predominantly what we call hyperactive impulsive type. And this is according to his history as well as some of his problems now.

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

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

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

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

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

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

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

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

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

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

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

A You mean in the prison system, or?

Q Outside of the prison system.

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

Q Thank you, Dr. Kinsora.

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

THE COURT: All right.

MS. McMAHON: -- pass the witness.

THE COURT: Cross?

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

CROSS-EXAMINATION

BY MR. SCHWARTZ:

Q Good morning, sir.

A Good morning.

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

A I have -- no, I have a doctorate degree in --
Q So you're not a medical doctor?
A I'm not a medical doctor, no, sir.
Q You're not a neurologist?
A No.
Q Neurosurgeon?
A No.
Q Okay. You hold a degree much like the degree any lawyer practicing in the state of Nevada holds, a doctorate of jurisprudence, you're a doctorate of --
A Of psychology.
Q -- psychology?
Would it be fair to say that psychiatric diagnoses and assessments are subjective in nature?
A No, actually.
Q Okay. Speculative?
A I think that the -- using the qualitative methods that I use, they come as close to science as you probably possibly can get.
Q So you would argue with those who say that it's speculative?
A I -- it depends what kind of psychiatric assessments are being done. If you're using the Rorschach, which is the ink blot test, the traditional ink blot test, or if you're asking the person to draw a picture and then you're making

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

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

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

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

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

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

A Yes, I am.

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

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

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

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

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

A That's correct.

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

"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. During his juvenile years he picked up for" -- "he was picked up for over ten incidences involving battery, two incidents regarding trespassing, evading police officers, vagrancy and prowling, three incidences of grand larceny, possession of a stolen vehicle,

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

Is that correct, sir?

A That's correct.

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

A That's correct.

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

A That's correct.

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

A Correct.

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

A Yes, he does feel like that.

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

A That's true.

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

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

A No.

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

A That's correct.

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

A That's correct.

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

A That's correct.

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

A No.

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

A No.

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

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

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

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

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

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

Q Close?

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

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

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

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

not mentally deficient or retarded," is that correct?

A He's not considered mentally retarded, no.

Q Or mentally deficient?

A Well, mentally deficient is --

Q Well, is that what you --

A -- is the new term.

Q Did you not state that --

A I did state that.

Q -- in your report?

A Right.

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

A That is correct.

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

A That's correct.

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

A How many hours?

Q Yes.

A Somewhere in the neighborhood of ten hours.

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

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

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

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

Q Did the defendant talk about the double murder?

A Somewhat, yes.

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

A No, I didn't.

Q Do you know who they are?

A No, I don't.

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

A Yes, I'm aware of that.

Q He told you that?

A I'm aware of that, yes.

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

A No. No I didn't.

Q Okay.

A But I was aware of that.

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

A No.

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

A No.

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

A No.

Q Do you know who she is?

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

Q But those names don't ring a bell?

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

Q And --

A -- past victims.

Q -- where would you have obtained these reports?

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

Q Okay.

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

necessarily list the victim involved.

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

A No.

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

A That's correct.

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

A No.

Q Did you speak to Correction Officer Leavitt?

A No.

Q Did you speak to Correction Officer Cameron?

A Of course not.

Q How about Officer Kissel?

A No.

Q Officer Neagle?

A No.

Q Officer Johnson?

A No.

Q Officer Thompson?

A No.

Q Officer Edwards?

A No.

Q Officer Boyter?
A No.
Q Officer Sedlacek?
A No.
Q Officer Wheelock?
A No. I spoke to no one else besides those.
Q Are you aware that all those individuals or their reports came before this Court in the last few days?
A I understand that a good portion of them were going to be coming here, yes.
Q Did you look at the photographs of the crime scene?
A No, I didn't.
Q Have you reviewed the preliminary hearing that took place in this case?
A No.
Q Have you reviewed the transcript of Kenya Hall, who was an accomplice in this case, as to what occurred on April the 15th?
A I believe I reviewed a summary of his statements.
Q Have you reviewed the daily transcript that's available to you as this trial proceeds each day?
A No.
Q So you talked to the defendant's mother, the defendant, and you read some reports and administered tests?
A That's correct.

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

A That's correct.

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

A Certainly.

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

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

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

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

Q Okay. So you couldn't be wrong?

A Of course I could be wrong.

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

A Yes, I am aware.

Q That he was capable of handling a job?

A Certainly.

Q And on page 4 of your report do you not indicate, I believe starting with about the third line down, "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 was unjustly treated and falsely accused"?

A That's correct, yes.

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

A That is correct.

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

A Yes, certainly.

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

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

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

A Yes, she did.

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

A No physical characteristics.

Q No --

A He seems to have no --

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

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

A No.

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

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

Q Well --

A -- or sexual abuse --

Q -- it could be physical abuse --

A -- or whatever.

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

A Right.

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

A Correct.

Q These are documented cases.

A Correct.

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

A That is correct.

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

A Correct.

Q You'd never met him prior to that?

A No. No.

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

A He has a decent memory, certainly.

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

A I think --

Q -- more than half?

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

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

A Right, mm-hmm.

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

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

Q So he did well on some of the tests?

A Certainly.

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

patient?

A Probably, yes.

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

A That's correct.

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

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

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

A Of course not.

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

A That's correct.

Q Has that changed?

A Probably not, no.

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

A Something in that order, yes.

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

"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."

Is that correct, sir?

A That's correct.

MR. SCHWARTZ: Court's indulgence.

BY MR. SCHWARTZ:

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

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

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

A Correct.

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

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

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

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

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

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

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

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

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

A Certainly.

Q Okay. Thank you.

MR. SCHWARTZ: Nothing further, Your Honor.

THE COURT: All right. Anything else?

MS. McMAHON: Yes, Your Honor.

//

REDIRECT EXAMINATION

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 Multiphasic 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?

MR. LaPORTA: No, Your Honor.

MS. McMAHON: No, Your Honor.

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

MR. ROGER: No, Your Honor.

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

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

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

MR. ROGER: Yes, Your Honor.

MR. LaPORTA: Yes, Judge.

MS. McMAHON: That's correct.

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

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

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

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

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

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

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

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

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

Response: "Yes."

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

"Yes."

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

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

Answer: "It was in the car."

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

Answer: "Yes."

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

THE COURT: So what is your motion?

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

THE COURT: Mr. Roger.

MR. ROGER: Judge, I'm entitled to argue all inferences from the evidence, and what she did not read to you is a statement that is in the transcript where the -- where Kenya Hall told the highway patrolman at the time of his arrest, this is page 134, line 12, "And then he told the guy to open up the safe. He put the gun in my hand, he told me to get the money and shoot the guy in the back of the head when I leave, like that." Now that's what he told the Highway Patrol trooper. Now he --

THE COURT: And that was in the transcript read to the jury?

MR. ROGER: Yes, sir.

THE COURT: Well, I don't want you to -- I don't want you to go into any quadruple murders, but maybe if you want to allude there could have been a triple murder but perhaps because of that reason.

MR. ROGER: That'd be fine.

THE COURT: That's the order of the Court. All right? Okay?

MS. McMAHON: Thank you, Your Honor.

MR. ROGER: Yes, Your Honor.

THE COURT: All right, bring in the jury.

(Jury reconvened)

THE COURT: All right, counsel stipulate to the

presence of the jury?

MR. ROGER: Yes, Your Honor.

MS. McMAHON: Yes, Your Honor.

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

MS. McMAHON: Thank you.

REDIRECT EXAMINATION (Continued)

BY MS. McMAHON:

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

A That is correct.

Q And you're familiar with that study?

A Yes, I am.

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

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

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

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

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

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

A Correct.

Q Thank you, Dr. Kinsora.

MR. SCHWARTZ: Very briefly, Your Honor.

RECROSS EXAMINATION

BY MR. SCHWARTZ:

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

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

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

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

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

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

A That is correct.

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

A I --

Q You didn't think that was important?

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

Q Did you ask?

A Of course not.

MR. SCHWARTZ: Nothing further.

THE COURT: Anything else?

MS. McMAHON: No, Your Honor.

THE COURT: All right. Thank you, you're excused. Call your next witness.

MS. McMAHON: Thank you. Your Honor, the defense would call Linda Overby.

THE COURT: Is that chart to be admitted?

MS. McMAHON: No, Your Honor, it was simply for demonstrative purposes.

THE COURT: Not marked?

THE CLERK: It's marked.

THE COURT: It's marked as A. Doctor, just a minute.

THE WITNESS: Oh. Do I need to bring it back? Okay.

THE COURT: Well, I don't know.

THE WITNESS: That's fine then. You can --

THE COURT: I mean, seems to me that the clerk marked it as A. Is that right?

MS. McMAHON: That's correct, Your Honor. We had marked it --

THE COURT: You don't have to admit it or not, I don't care.

MS. McMAHON: We had it simply for demonstrative purposes.

THE COURT: All right. Then just put it down there, give it to the clerk at a later time, or whoever you want to.

Please stand up, raise your right hand and be sworn.

LINDA OVERBY, DEFENDANT'S WITNESS, IS SWORN

# EXHIBIT 249

# EXHIBIT 249

TRAN

ORIGINAL

FILED
DEC 18 2009
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

MARLO THOMAS,

Defendant.

CASE NO. C136862

DEPT. NO. XXIII

BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT JUDGE

MONDAY, NOVEMBER 9, 2009

**RECORDER'S TRANSCRIPT RE:**
**FILING OF BRIEF**

APPEARANCES:

For the State: STEVE S. OWENS, ESQ.
Chief Deputy District Attorney

For the Defendant: BRET O. WHIPPLE, ESQ.

STEPHANIE B. KICE, ESQ.

RECORDED BY: DALYNE EASLEY, COURT RECORDER

RECEIVED
DEC 18 2009
CLERK OF THE COURT

MONDAY, NOVEMBER 9, 2009, 9:37 A.M.

* * * * *

MR. WHIPPLE: Good morning, Your Honor.

THE COURT: Good morning. I'm glad you're all here.

MR. WHIPPLE: Your Honor if I might with the Court's permission I'd like to introduce to my right Ms. Stephanie Kice who's assisting me --

THE COURT: Who is it?

MR. WHIPPLE: Stephanie Kice.

THE COURT: Nice to see you.

MR. WHIPPLE: K-I-C-E. She's assisting me on this matter as well, Your Honor.

MS. KICE: Good morning, Your Honor.

THE COURT: Okay, this case has had a long history. So when I went back and looked through this to refresh my recollections a death penalty case it looks like counsel was appointed a while ago by Judge Loehrer, we had a change of counsel, looks like briefs should have been filed almost a year ago. I know that you're new to the case, relatively so.

MR. WHIPPLE: Ideally I would have had this matter filed today. However I have not -- as part of my investigation I've come to learn that my client has a real issue with regard to mental retardation claim. In the first penalty phase he was evaluated by a neuropsychologist and received a number of 79 for his IQ. And as --

THE COURT: 70. Isn't 70 border?

MR. WHIPPLE: 80.

THE COURT: 80?

MR. WHIPPLE: 80 is -- in Atkins v. Virginia that came out in 2002

THE COURT: I couldn't remember whether it was 70 or 80, okay.

MR. WHIPPLE: That creates a real issue so actually what I've got today, and I've not had an opportunity to speak with Mr. Owens and I did not intend to surprise him by any means but this is really just kind of come to fruition over the last few weeks. And what we have today, Your Honor, rather than actually filing the final supplement is actually I'm requesting some additional funds to investigate the issue with regard to the mental retardation claim. And what I have is I have the petition requesting $10,000.00 for a neuropsychologist and $10,000.00 for investigation work. The reason for that is obviously when I put forward the mental retardation claim I need to substantiate it on earlier than just in 2008, 2009. I need to be able to go back and pull medical records and show that in fact this has been an issue that precedes any other appearances before this Court.

So what I've done is I've attached Dr. Kinsora's transcript --

THE COURT: Are those for me to read?

MR. WHIPPLE: It's the original. With the Court's permission can I file these in Open Court, Your Honor?

THE COURT: Yeah. Larry is that fine? Okay. Thank you.

MR. WHIPPLE: And also Your Honor, I had two matters of which to do this I could have filed ex parte request but I chose actually just to do this it's all gonna come out in the open regardless I'm doing it in the open requesting the funds for a neuropsychologist and also for an investigator and obviously we'll end up disclosing all the information to Mr. Owens once it comes in. But clearly I think the ball was potentially dropped in the second penalty hearing because that was after Atkins. They had information that this, you know, this score of 79 existed before Atkins and yet it was never raised in the second penalty hearing. So as part of my job I think

the completely -- you know, to do a complete evaluation I need the additional monies to have that work done.

THE COURT: Okay, any response?

MR. OWENS: Judge, I'd like to take some time to actually look at the case. It may or may not be appropriate at the outset $20,000.00 seems like a lot to chase down this claim if it's based solely on a score of 79.

THE COURT: I thought it was 10.

MR. OWENS: Well 10 for the neuropsychologist which is a little pricey, I think, and 10,000 for an investigation. I'd like to see what prior counsel did in the case in terms of an investigation of school records. Maybe that stuff is already available in counsel's file or already filed with the court. We know that they had at least one expert, I don't know if the State had an expert at trial, I'd like to see what's out there and available that bares on this claim of mental retardation and whether it's really worth $20,000.00 to further pursue it.

THE COURT: Okay, so what would you -- what are you asking me for exactly?

MR. OWENS: Two weeks to respond in writing, Judge.

THE COURT: Well, that seems fine.

MR. WHIPPLE: Absolutely, Your Honor, in fact I'm not anticipating -- by no means am I anticipating a response today. I'm just filing it today and putting everybody on notice.

THE COURT: Okay.

THE CLERK: November 23rd 9:30.

THE COURT: Hold on a second, you're gonna have it -- are you gonna -- when are you gonna have your brief filed so I can read it?

MR. OWENS: I need two weeks just to file the brief.

THE COURT: So we need to go four weeks out for hearing.

MR. WHIPPLE: That's fine.

MR. OWENS: And it won't be long I just want to dig into the record and refresh my memory as to what evidence was presented and what investigation was already done on this issue.

THE COURT: And counsel I may, just to give you a heads up, I do a lot of things written decisions if I am inclined to grant it without additional oral argument I'll probably just issue a minute order so you guys don't have to come back in but we'll see what you have to say.

THE CLERK: December 7th 9:30.

THE COURT: Thank you counsel.

PROCEEDING CONCLUDED AT 9:42 A.M.

* * * * *

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

Dalyne Easley

DALYNE EASLEY
Court Recorder/Transcriber

# EXHIBIT 250

# EXHIBIT 250

ORIGINAL

RSPN
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
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Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

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 Janunary 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

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

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

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

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

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

Mental Retardation

In the Request for Funds, the defense is seeking $10,000 for neuropsychological testing, specifically for mental retardation. Notably, the appropriate procedure for making a claim of mental retardation is to bring a motion to set aside the death penalty pursuant to NRS 175.554(5). Such a post-trial motion is only appropriate if "a prior determination regarding mental retardation has not been made." NRS 175.554(5). In 1996, Thomas asked for and obtained a neuropsychological examination wherein Dr. Thomas Kinsora established Thomas's full scale IQ at 79 and in the 8th percentile, which was 10 points away from being considered mentally retarded. *See* Exhibit 1. Thomas, who was 24 years of age at the time, was diagnosed with "Antisocial Personality Disorder" but not mental retardation. Dr. Kinsora also noted that intellectual assessments during Thomas's childhood "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." Id. at p. 2; *see also* Exhibit 2.

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

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

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

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

Fetal Alcohol Syndrome

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

demonstrated need for such appointment.

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

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

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[1] *See* http://www.cdc.gov/ncbddd/fasd/documents/FAS_guidelines_accessible.pdf

Investigative Expenses

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

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

**CONCLUSION**

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

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

DATED this 8th day of December, 2009.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

**CERTIFICATE OF FACSIMILE TRANSMISSION**

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

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

Eileen Davis

Employee for the District Attorney's Office

SSO/ed



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# OFFICE OF THE DISTRICT ATTORNEY
## CRIMINAL APPEALS UNIT

**DAVID ROGER**
*District Attorney*

**CHRIS OWENS**
*Assistant District Attorney*

**TERESA M. LOWRY**
*Assistant District Attorney*

**MARY-ANNE MILLER**
*County Counsel*

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

## FACSIMILE TRANSMISSION

Fax No. (702) 382-5815

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

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Part 1 of 2

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*** TX REPORT ***
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## CRIMINAL APPEALS UNIT

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**DATE:** December 8, 2009

Part 2 of 2

THOMAS F. KINSORA, PH.D.
*Specializing in Neuropsychology*
1111 Shadow Lane Las Vegas, Nevada 89102
(702) 382-1960 FAX (702) 382-4993

# NEUROPSYCHOLOGICAL ASSESSMENT

**Patient Name:** Thomas, Mario
**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



## HISTORY AND OBSERVATION

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 frquently 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 mothers 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 conductive 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.

## TESTS ADMINISTERED

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

## TEST RESULTS

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 effected 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 effected 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 though 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*
*Juvinile 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.

## SUMMARY AND RECOMMENDATIONS

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 forth 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.

## ICD-9 DIAGNOSTIC IMPRESSIONS

Antisocial Personality Disorder

Thank you for this most interesting referral.

Respectfully Submitted,

T. F. Kinsora PhD

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

9898—500561

CLARK COUNTY SCHOOL DISTRICT
SPECIAL STUDENT SERVICES

CCF-561
6/80

# 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

[X] 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 | 38 | 85 |
| Performance | 40 | 86 |
| Full Scale Score | 78 | 84 |

| Verbal Tests | Scaled Score | Performance Tests | Scaled Score |
|---|---|---|---|
| Information | 6 | Picture Completion | 8 |
| Similarities | 8 | Picture Arrangement | 8 |
| Arithmetic | 8 | Block Design | 9 |
| Vocabulary | 9 | Object Assembly | 10 |
| Comprehension | 7 | Coding | 5 |
| (Digit Span) | | (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 | Math | | 82 | 12 |
| | Reading Recog. | | 72 | 3 |
| | Reading Comp. | | | |
| | Spelling | | 69 | 2 |
| | | | | |
| | | | | |

## OTHER DIAGNOSTIC INSTRUMENTS AND RESULTS

Beery: VMI Age 6-5

Motor Free: Perceptual Age 6-8

Behavior Problem Checklist: Acting out and agressive tendencies

[ ] A. T. Qualified [ ] A. T. Non-Qualified

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

AA7740

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.

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

SP-1

CLARK COUNTY SCHOOL DISTRICT
SPECIAL STUDENT SERVICES

# PSYCHOLOGICAL ADDENDUM

STUDENT I.D. NUMBER: 300128

NAME Thomas, Merlo 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 |
|---|---|---|
| ☐ | Specialized LD | 62 |
| ☑ | Specialized EH/ED | 64 |
| ☐ | Communicatively and Behaviorally Disordered | 64 |
| ☐ | Severe Oral Language Handicapped | 65 |
| ☐ | Multiple Handicapped | 67 |
| ☐ | EMH/TMH | 71 |
| ☐ | Mildly Mentally Handicapped (First Grade) | 72 |

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

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

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9998-500561 CLARK COUNTY SCHOOL DISTRICT CTF-561
SPECIAL STUDENT SERVICES 6/80

# 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 11
Primary Language Spoken
SCHOOL H.M. Smith GRADE 4 Other than English

INITIAL EVALUATION X REEVALUATION
Present Handicapping Condition L.D.

Reason for referral To determine current levels of functioning.

Dates(s) tested 2-2-84 Instruments used SIT, WRAT, PIAT, ERP, Behavior Problem Checklist, CTBS - Bender

WECHSLER INTELLIGENCE SCALES

| | Scaled Score | IQ | Verbal Tests | Scaled Score | Performance Tests | Scaled Score |
|---|---|---|---|---|---|---|
| Verbal | | | Information | | Picture Completion | |
| Performance | | | Similarities | | Picture Arrangement | |
| Full Scale Score | | | Arithmetic | | Block Design | |
| | | | Vocabulary | | Object Assembly | |
| | | | Comprehension | | Coding | |
| | | | (Digit Span) | | (Mazes) | |

OTHER INTELLIGENCE TESTS

| Name of Test | M.A. | I.C |
|---|---|---|
| SIT | 9-4 | 83 |

WIDE RANGE ACHIEVEMENT TEST (JASTAK)

| | | | |
|---|---|---|---|
| Reading | Grade | SS 75 | %ile 5 |
| Spelling | Grade | SS 62 | %ile 1 |
| Arithmetic | Grade | SS 82 | %ile 12 |

OTHER ACHIEVEMENT TESTS

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

OTHER DIAGNOSTIC INSTRUMENTS AND RESULTS

CTBS- 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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Jerry Swan, School Psychologist
Examiner/Title 2-23-84 dap

AA7744

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 were 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:

6. Intellectual:
Source(s): SIT
Classification/Range: V.I.Q. 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

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

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

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

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

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** IT IS NOT TO BE DUPLICATED OR RELEASED TO ANY OTHER PERSON OR AGENCY **
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DATE: 08/26/88 P R E V I O U S R E C O R D PAGE: 01

PREVIOUS RECORD FOR: THOMAS MARLO DEMITRIUS ID#: 7842030A
PROBATION OFFICER: ENSWORTH-NYTC CASE #: 029999

| REF # | OFF # | REFERRAL DATE | OFFENSE DESCRIPTION | REPT AGENCY | STATUS DATE | STATUS ACTION | PROBATION OFFICER | PG # |
|---|---|---|---|---|---|---|---|---|
| 013 | 001 | 07/09/87 | BWAD WEAP | NLVPD | 08/19/87 | DISMISSED | F GUZMAN | 015 |
| 012 | 001 | 06/04/87 | G L | LVMPD | 10/29/87 | COMMIT NYTC | F GUZMAN | 014 |
| 011 | 001 | 03/04/86 | BATTERY | NLVPD | 07/07/86 | DN-OFFNS INSIG | J.S.MACDONALD | |
| 010 | 001 | 03/14/86 | BATTERY | CCSD | 04/14/86 | DISMISSED | F GUZMAN | 013 |
| 009 | 001 | 10/04/85 | BATTERY | LVMPD | 11/15/85 | DISMISSED | FRED FISHER | 009 |
| | 002 | 10/04/85 | BATTERY | LVMPD | 01/23/86 | REF PROBATION | F GUZMAN | 010 |
| | 003 | 10/04/85 | BATTERY | LVMPD | 11/15/85 | DISMISSED | FRED FISHER | 011 |
| | 004 | 10/04/85 | BATTERY | LVMPD | 11/15/85 | DISMISSED | FRED FISHER | 012 |
| 008 | 001 | 10/02/85 | BATTERY | LVMPD | 11/15/85 | DISMISSED | FRED FISHER | 008 |
| 007 | 001 | 06/09/85 | TRESPASSING | NLVPD | 01/23/86 | REF PROBATION | F GUZMAN | 007 |
| 006 | 001 | 05/08/85 | DOC | LVMPD | 07/18/85 | REF PROBATION | FRED FISHER | 006 |
| | 002 | 05/15/85 | BATTERY | LEGAL | 05/15/85 | DN-OTHER | SCOTT MITCHEL | |
| 005 | 001 | 11/07/84 | TRESPASSING | LVMPD | 12/12/84 | DISMISSED | F GUZMAN | 004 |
| | 002 | 11/07/84 | BATTERY | NLVPD | 12/12/84 | DISMISSED | F GUZMAN | 005 |
| 004 | 001 | 09/25/84 | EVADING POL OFR | NLVPD | 12/12/84 | DISMISSED | F GUZMAN | 003 |
| | 003 | 09/25/84 | VAG/PROWL | NLVPD | 09/27/84 | DN-FILING D/CHG | ROS CSIIOW | |
| 003 | 001 | 07/19/84 | BATTERY | LVMPD | 01/02/85 | FORM PROB | JOHN MCGROARTY | 001 |
| 002 | 001 | 12/12/84 | BATTERY | NLVPD | 01/02/85 | FORM PROB | JOHN MCGROARTY | 001 |
| | | 07/06/84 | ROBBERY | | | | | |
| 001 | 001 | 03/28/84 | BATTERY | LVMPD | 05/04/84 | JUD REPRIMAND | FRED FISHER | |

TOTAL # REF 013 OFF 013

Exhibit "B"