

NCMD 1:05CV428

STATE OF NORTH CAROLINA THE GENERAL COURT OF JUSTICE  
IN THIS OFFICE  
Clerk, U. S. District Court  
Greensboro, N. C.  
COUNTY OF FORSYTH SUPERIOR COURT DIVISION  
94-CRS-1451

STATE OF NORTH CAROLINA            )  
  )  
vs.                                    )       TRANSCRIPT OF THE  
THOMAS MICHAEL LARRY,            )       MOTION FOR APPROPRIATE  
  )       RELIEF  
  )  
  )  
Defendant.                            )  
-----)       

This matter coming on to be heard before the Honorable Ronald E. Spivey, Superior Court Judge Presiding, Forsyth County, commencing June 2, 2003.

**APPEARANCES:**

ERIC SAUNDERS, Office of the Forsyth County District Attorney, appearing for the STATE.

WILLIAM G. CAUSEY, JR., and MARK KILLIAN, Attorneys at Law, appearing for the DEFENDANT.

CAROL M. BROOME  
Official Court Reporter  
21st Judicial District

## I N D E X

STATE'S WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
Mark Hazelrigg	137	165		

DEFENDANT'S WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
Darlene Mixon	3			
Carolyn Larry		37	43	46
Dr. Brad Fisher	50		125	131

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2- School Records	49	49
3- DOC Records	49	49
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5- DSM-IV Definition of Mental Retardation	63	
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1 (June 2, 2003.)

2 (DEFENDANT AND COUNSEL IN COURTROOM.)

3 THE COURT: Are you ready to proceed?

4 MR. CAUSEY: We are, Your Honor.

5 THE COURT: Call your first witness.

6 MR. KILLIAN: We would call Darlene Mixon to the  
7 stand.

8 THE COURT: Just for purposes of the record,  
9 this is the defendant's motion for appropriate relief  
10 alleging the prohibitions in 15A-2005. Is that correct?

11 MR. KILLIAN: That's correct, Your Honor.

12 **DARLENA MIXON, being first duly sworn to state the truth,**  
13 **testified as follows during:**

14 **DIRECT EXAMINATION by MR. KILLIAN**

15 Q. Ma'am, if you would, state your name for the Court,  
16 please.

17 A. Darlene Mixon.

18 Q. And you're a resident here in Forsyth County?

19 A. Yes.

20 Q. How long have you lived in Forsyth County?

21 A. Since '64.

22 Q. Are you currently employed?

23 A. No, I'm retired.

24 Q. Where are you retired from?

25 A. The Winston-Salem/Forsyth County School System.

1 Q. When did you begin employment with the Winston-  
2 Salem/Forsyth County School System?

3 A. September of 1966.

4 Q. Was that following graduation?

5 A. Yes.

6 Q. Where did you attend undergraduate?

7 A. Undergraduate Mary Baldwin College in Staunton,  
8 Virginia and graduate at Wake Forest.

9 Q. And when you graduated from Wake Forest University,  
10 what was your degree?

11 A. Psychology and a master's degree.

12 Q. What year was that?

13 A. I actually got the degree in 1967, the spring. I had  
14 to write a thesis so I worked while I did my thesis.

15 Q. So after obtaining your master's degree did you  
16 begin employment immediately with the Winston-  
17 Salem/Forsyth County School System?

18 A. Yes.

19 Q. In 1972 what was your position with the school  
20 system?

21 A. I was paid by the Division of Vocational  
22 Rehabilitation to work in the school system to evaluate  
23 students for special programs.

24 Q. What kind of special programs?

25 A. Special education, classes for the mentally

1     handicapped, learning disabled and emotionally  
2     handicapped.

3     Q.     In that position, Ms. Mixon, were you working under  
4     a licensed psychiatrist or psychologist?

5     A.     No. It wasn't required.

6     Q.     In 1972 in that position were you a licensed  
7     psychologist?

8     A.     Not at that time. Not until 1981.

9     Q.     Is that when you became licensed?

10    A.     Yes.

11                 MR. SAUNDERS: I'm sorry, I didn't hear when.

12                 THE COURT: 1981.

13    Q.     Ma'am, I'm sure you've done many evaluations. Is  
14    that a fair statement, during your tenure as a  
15    psychologist?

16    A.     Yes. Probably over 3000.

17    Q.     Would it be fair to say that you don't remember Mr.  
18    Larry?

19    A.     No, I'm sorry, I don't. It was 31 years ago.

20                 MR. KILLIAN: May I approach the witness, Your  
21    Honor?

22                 THE COURT: Yes. You testified you've done over  
23    3000 evaluations as a psychologist. Again, this 1972  
24    arena was prior to the time you became a licensed  
25    psychologist?

1 THE WITNESS: It wasn't required at that time.

2 (DEFENDANT'S EXHIBIT NO. 1 WAS MARKED FOR  
3 IDENTIFICATION.)

4 Q. Ms. Mixon, I'll hand you what has been marked for  
5 identification as Defendant's Exhibit 1 and ask if you'd  
6 look at that for a minute. Have you had a chance to  
7 review that ma'am?

8 A. Uh-huh.

9 Q. Does that bear your initials or signature on that  
10 copy?

11 A. Yes.

12 Q. Does that appear to be an accurate copy of the  
13 report that you did on Thomas Michael Larry back in 1972?

14 A. Yes, it does.

15 Q. What was the date on that, ma'am? Do you have the  
16 exact date?

17 A. 04-12-1972.

18 Q. And is this part of the referral to you for special  
19 education placement?

20 A. Yes.

21 Q. Do you recall who Ralph Hicks was?

22 A. Yes, I do.

23 Q. Who was that?

24 A. He was an administrator for the school system. He  
25 was like head of special education placement in the

1 school system.

2 Q. Does that document, Defendant's Exhibit 1, indicate  
3 he's the one that referred Mr. Larry to you?

4 A. Yes.

5 Q. And this Defendant's Exhibit 1 was that a psychology  
6 evaluation or more a special education placement?

7 A. Well, it was for special education placement. It was  
8 like the school system required certain levels of scores  
9 for certain programs so it was more of an educational  
10 evaluation more than what we think of a psychological  
11 evaluation of the person's motives and personality.

12 It was a test given by psychologists to  
13 accurately depict ability levels but it was for special  
14 education placement.

15 Q. At that time, you mentioned special education  
16 placement, was that to determine whether a student should  
17 be focused toward vocational as opposed to academic?

18 A. Right, yes.

19 Q. Was the test you gave Mr. Larry on that date was  
20 that called a Wechsler Adult Intelligence Scale Test?

21 A. Yes, it was.

22 Q. Have you been contacted by any other, any  
23 psychologist regarding Mr. Larry?

24 A. No, I haven't.

25 Q. Have you been contacted by a gentleman named Dr.

1 Mark Hazelrigg?

2 A. No.

3 Q. Just for clarification, Ms. Nixon, at the time you  
4 gave this test you were not a licensed psychologist. Is  
5 that correct?

6 A. Correct.

7 MR. KILLIAN: That's all I have.

8 THE COURT: Questions of the witness?

9 **CROSS EXAMINATION by MR. SAUNDERS**

10 MR. SAUNDERS: Did you leave the exhibit up  
11 there?

12 MR. KILLIAN: No, here it is.

13 Q. Ms. Nixon, you gave this test in 1972. Is that  
14 correct?

15 A. Yes.

16 Q. Had you been with the school system any period of  
17 time?

18 A. For six years.

19 Q. But you were actually working for Vocational Rehab  
20 at that time?

21 A. The job started out as a cooperative agreement. Half  
22 of my salary was paid by the school system, half by Voc  
23 Rehab and then Voc Rehab took it over but I still did the  
24 same job in the school system.

25 Q. And you said you had given over 3000 of these Adult



1 Placement Tests?

2 A. Well, I can't say how many of the WAIS Tests I gave.  
3 Overall I evaluated about 100 students a year and I  
4 worked 36 years.

5 Q. And you said you were licensed in '81?

6 A. Uh-huh.

7 Q. Do you know how many of these WAIS Tests you gave  
8 before 1981?

9 A. Well, on the average I tested 100 students a year. I  
10 don't know how many of them -- if they were 16 or over, I  
11 gave them the WAIS. That was required.

12 Q. That was required at that time?

13 A. Right.

14 Q. If they were 16 or over?

15 A. Right.

16 Q. And this defendant was 16 at the time, was he not?

17 A. Yes.

18 Q. Did you do anything differently as far as giving  
19 these WAIS Tests after you were licensed as before you  
20 were licensed?

21 A. No.

22 Q. So the procedures and policies were the same?

23 A. Right.

24 Q. Same procedures that you followed?

25 A. Right. The licensing required a test, you know.

1 Became a requirement at that time to be licensed by the  
2 state.

3 Q. As far as the WAIS testing in the public school  
4 system now, do you know how that goes on now?

5 A. Yes.

6 Q. How does that happen now?

7 A. Well, teachers refer students who they feel need a  
8 special program or are having difficulties with  
9 academics. They are referred to the school psychologist  
10 who works in their school.

11 Q. And this defendant was not referred to you until he  
12 was 16?

13 A. Right.

14 Q. All of his elementary school years, up until the  
15 time he was 16, he was never referred for testing?

16 A. Well, I understand he was tested at a young age but  
17 I wasn't referred him until that time but I believe he  
18 was tested at a much younger age.

19 Q. But that would have been in a group setting?

20 A. No, it would have been individual also but I don't  
21 have -- I don't remember those -- I don't have access to  
22 that information. But it's my understanding that that  
23 wasn't the first time he was evaluated.

24 Q. And Vocational Rehab is also for learning disabled.  
25 Is that correct?

1 A. Yes.

2 Q. And in your report, Ms. Mixon, you said the  
3 defendant tends to give up very easily and would not  
4 guess answers on the verbal scale?

5 A. Yes.

6 Q. You also said he also tended to give up fairly easy  
7 on difficult tasks. He commented during the picture  
8 arrangement sub-test, "I know my scores are low"? Do you  
9 remember that?

10 A. If I wrote it down, I probably ---

11 Q. You said his verbal abilities are in the educable  
12 range?

13 A. Uh---

14 Q. Why don't you take that? (Mr. Saunders hands  
15 witness document he had been reading from.)

16 A. Well, borderline mentally handicapped range. A  
17 verbal IQ of 77.

18 Q. Beg your pardon?

19 MR. CAUSEY: We're going to object to the  
20 scores. If we could be heard very briefly?

21 THE COURT: Yes.

22 MR. CAUSEY: Judge, Mr. Killian and I are trying  
23 to figure out how to properly handle this. From what  
24 we've read in their expert's report and what our expert  
25 has said -- we have Dr. Fisher, they have Dr. Hazelrigg -

1 - the test that this lady gave back in 1972 is in those  
2 reports. There are also some tests before that. As you  
3 know, we're looking at an IQ test with scores of 70 or  
4 below or above 70. We have two tests given early on that  
5 school records do not tell what kind -- really who  
6 administered the test, whether it jumps through the hoops  
7 that are required by the statute such as being  
8 individually administered by a licensed psychologist,  
9 etcetera, etcetera, so from reading their expert's report  
10 anticipating they're going to object to us trying to  
11 introduce those.

12 So that leaves us with the three tests that  
13 were given. They are the WAIS test that Ms. Mixon gave in  
14 1972, the WAIS original version Dr. Fisher gave, and the  
15 WAIS-R in December of 2001 and January of '02 and Dr.  
16 Hazelrigg gave the WAIS-III so we've got three different  
17 versions of this test.

18 We know what our doctor has tested and they  
19 have access to not only these scores but the data  
20 supporting it. We know what their doctor tested and I  
21 don't think there is going to be a contention at that  
22 point in this hearing that both Dr. Hazelrigg and Fisher  
23 are licensed psychologists, it was individually  
24 administered, etcetera, etcetera.

25 That leaves us with this test here from 1972

1 that we weren't sure how to strategically handle this  
2 because we knew we'd be hearing all this for the first  
3 time. In our interviews with Ms. Mixon, this occurred  
4 back when she was not a licensed psychologist in 1972  
5 when she would have administered this test and that  
6 result is something relied on by Dr. Hazelrigg in his  
7 report. We wanted to object to that when he is  
8 testifying but since we have the burden of proof, we're  
9 going first putting on our witnesses and we didn't know  
10 whether to let all this stuff in and object to it when  
11 he's testifying after we've already introduced our  
12 evidence or just put her up at the beginning to establish  
13 to the Court here's why we're objecting to that 1972 test  
14 coming into evidence because it is not -- was not  
15 administered by a licensed psychologist which she has  
16 testified to.

17 So what we're doing is trying to put the cart  
18 before the horse and not waste your time and let you hear  
19 all this and figure out at the end of the road what  
20 weight to give it but from the front decide whether this  
21 is admissible or not. So we would be objecting to her  
22 scores from 1972 for that reason.

23 If the Court could give us a ruling on that it  
24 kind of dictates how the rest of our evidence will flow  
25 and what we can anticipate from the State.

1           THE COURT: I'll hear from the State but it  
2 would appear to go towards its weight and not its  
3 admissibility since licensing was not required at the  
4 time of administration. What says the State?

5           MR. SAUNDERS: Judge, if you are even  
6 contemplating keeping this one out because it wasn't by a  
7 licensed psychologist or psychiatrist, I would have no  
8 objection to that. I would also ask you not to consider  
9 the earlier two that were given as well because there is  
10 no evidence they were done by a licensed psychologist or  
11 psychiatrist as well.

12           MR. CAUSEY: And we would not disagree with  
13 that. I guess what we're trying to do is figure out -- we  
14 know the statute came into effect in August of '01. It  
15 just said here's what tests we are going to consider to  
16 determine is it 70 or below. We understand there would  
17 be tests, that he referred to, that Mr. Larry would have  
18 had prior to the 1972 test. Again, we don't know if  
19 those tests will jump through the hoops that Your Honor  
20 would need to admit those.

21           I guess what we're asking for is a consistent  
22 ruling. We understand if you keep out her 1972 test, that  
23 in all fairness that our tests prior to that should not  
24 come in. But if you're going to let in the '72, 1972  
25 test, then we would ask that our earlier test be

1 admitted. We're trying to figure out what the ruling is  
2 going to be before we put up two doctors and let the cat  
3 out of the barn and everybody testify to all these scores  
4 and we're not even sure of what is going to be  
5 admissible.

6 MR. SAUNDERS: Judge, if they're willing to  
7 stipulate that none of these before 1972 come in, that's  
8 fine with me.

9 THE COURT: Okay.

10 MR. CAUSEY: I think we can do that.

11 THE COURT: All right then. The Court will  
12 accept the stipulation then that the test administered by  
13 this witness and prior tests done from unknown witnesses,  
14 the parties will agree they will all be suppressed.

15 MR. CAUSEY: And that would be, just for Your  
16 Honor's benefit so you know we're going since we didn't  
17 give an opening statement, we would have a test that our  
18 doctor was given and the State would have a test that  
19 their doctor has given and that will pretty much be the  
20 world of psychological tests. I'm just trying to  
21 simplify issues for you.

22 THE COURT: Then given the stipulation will  
23 sustain objection to the question that was then answered  
24 by a particular number. Further questions from the  
25 State?

1 MR. SAUNDERS: Yes, sir.

2 Q. (Mr. Saunders) You also determined he had average  
3 social comprehension and judgment?

4 A. Yes.

5 Q. And you said he functioned intellectually in the  
6 slow learner range?

7 A. Right.

8 MR. SAUNDERS: That's all the questions I have,  
9 Your Honor.

10 THE COURT: So the question before the last one,  
11 he had average what?

12 THE WITNESS: Social comprehension and judgment  
13 measured by one self-test.

14 THE COURT: And he functioned in the slow  
15 learner range?

16 THE WITNESS: No, excuse me. I didn't say that.  
17 No, his comprehension was in the educable range of  
18 functioning.

19 MR. CAUSEY: His comprehension was in the  
20 educable range?

21 THE WITNESS: Yes. His comprehension was in the  
22 educable range so I didn't ---

23 Q. Ms. Nixon --

24 A. -- Okay, I'm seeing the paragraph. Okay. I was  
25 looking at the picture arrangement. His ability to



1 arrange cartoon-like pictures in a sequential order  
2 really to tell a story, that's what social comprehension  
3 and judgment is on this test and he did score average.

4 Q. And you also said --

5 A. -- But his general comprehension was educable.  
6 Asking verbal questions, what would you do in this or  
7 that situation? So his comprehension was very poor.

8 Q. And you said he is functioning intellectually in the  
9 slow learner range?

10 A. Right. The slow learner range, that's an educational  
11 category.

12 Q. And I believe I did ask you, Ms. Mixon, if he was  
13 also referred for learning disabilities as well?

14 A. Well, he wasn't followed as being able to perform  
15 adequately in the academic program of a regular school so  
16 this was to allow him to go to a special school where he  
17 could get vocational training and it wouldn't be  
18 academically oriented so that was the purpose of this  
19 test. And he did qualify to go to that school but, I  
20 believe, he said he did not want to attend and I'm not  
21 sure that he did attend.

22 Q. Did not want to attend would be consistent with your  
23 opinion that he tended to give up very easily and didn't  
24 want to do difficult tasks? Is that correct?

25 A. Well, maybe.

1 MR. SAUNDERS: That's all I have of Ms. Nixon.

2 THE COURT: Redirect?

3 MR. CAUSEY: Briefly.

4 **REDIRECT EXAMINATION by MR. CAUSEY**

5 Q. So you came to the end of your conclusions and made  
6 a recommendation whether he goes into the academic  
7 environment or the vocational environment, you came to  
8 the conclusion that he should go to the vocational  
9 environment?

10 A. Definitely, definitely. He could not probably do  
11 very well in an academic environment.

12 MR. CAUSEY: Thank you.

13 THE COURT: Anything further?

14 MR. SAUNDERS: No, sir.

15 THE COURT: Do you seek to release the witness?

16 MR. CAUSEY: Yes.

17 THE COURT: Any objection?

18 MR. SAUNDERS: No.

19 THE COURT: Thank you. Ms. Nixon, we appreciate  
20 your attendance and you may stay with us if you wish or  
21 you may leave.

22 MR. KILLIAN: I would call Carolyn Larry.

23 **CAROLYN LARRY, being first duly sworn to state the truth,**  
24 **testified as follows during:**

25 **DIRECT EXAMINATION by MR. KILLIAN**

1 Q. Good morning, Ms. Larry.

2 A. Good morning.

3 Q. If you would, just tell the Court your full name and  
4 current address.

5 A. My name is Carolyn Lorraine Larry and I live at 1317  
6 Eagle Ridge Drive, Charlotte, North Carolina.

7 Q. Ms. Larry, how are you related to Thomas Michael  
8 Larry?

9 A. That's my brother.

10 Q. How much age difference is between you and Mr.  
11 Larry?

12 A. Less than a year. We stay the same age for about  
13 six days.

14 Q.

15

16 Q. How did y'all refer to him? Did he go by Thomas or  
17 Michael?

18 A. We called him Mike.

19 Q. Mike?

20 A. Uh-huh.

21 Q. So if I ask you questions, you're going to refer to  
22 him --

23 A. -- I'll refer to him as Mike.

24 Q. Okay. Ms. Larry, what is your current occupation?

25 A. I'm an LPN.

1 Q. Where are you employed?

2 A. North Central Family Medical Center.

3 Q. And where is that?

4 A. In Rock Hill, South Carolina.

5 Q. How long have you been there at the North Central  
6 Family Clinic?

7 A. For a year and a half.

8 Q. And where were you employed before that?

9 A. Carolinas Medical Center.

10 Q. Is that in Charlotte?

11 A. Yes.

12 Q. How long were you employed there?

13 A. For about six or seven years.

14 Q. Did you attend school in the public school system in  
15 Winston-Salem/Forsyth County?

16 A. Yes.

17 Q. Now, was your brother that I'll call Mike, was your  
18 brother Mike ahead of you when school started?

19 A. Yes.

20 Q. One grade ahead?

21 A. He was one grade ahead of me.

22 Q. How old is your brother?

23 A. He's 47.

24 Q. And when you were growing up did your family live  
25 here in the Winston-Salem area all your life?

1 A. Yes, all my life.

2 Q. When did you move to Charlotte?

3 A. In 1989.

4 Q. Before then did you work or finish school here in  
5 Winston-Salem?

6 A. Yes, I went to Forsyth Community College and  
7 Parkland High School. I graduated from Parkland. I  
8 graduated from Forsyth Community College in their LPN  
9 program.

10 Q. Did you and Mike have any other brothers and  
11 sisters?

12 A. Yes, we had two other brothers. Hayman was the  
13 oldest and James Walter, but we called him Walt, was the  
14 next to the oldest and they're both deceased.

15 Q. When did your oldest brother pass away?

16 A. In 1997.

17 Q. And what about Walt?

18 A. Walt passed away in 1995.

19 Q. Is your mother still alive?

20 A. Yes.

21 Q. What is her name?

22 A. Daisy Larry.

23 Q. During your childhood did your father stay at home  
24 with y'all?

25 A. No, I have no recollection of my father.

1 Q. Who raised you?

2 A. My mother.

3 Q. During those years, during your childhood years, did  
4 all four of you live together with your mother?

5 A. Yes.

6 Q. Where did y'all live during your elementary school  
7 years?

8 A. In Happy Hill Gardens.

9 Q. Is that here in Winston?

10 A. Yes. It's a housing -- housing authority project.

11 Q. During that time was your mother employed?

12 A. Yes. She worked for Baptist Hospital.

13 Q. What did she do for Baptist Hospital?

14 A. She worked in the laundry.

15 Q. So in terms of birth order, it was your brother  
16 Hayward, then Walt, then Mike and then you. Is that  
17 correct?

18 A. Yes.

19 Q. Did you attend the same elementary school as your  
20 brothers?

21 A. Yes.

22 Q. What school was that?

23 A. Diggs Elementary School.

24 Q. And at that time were schools still segregated? The  
25 elementary schools?

1 A. Yes. I believe.

2 Q. Now, do you recall any memories about growing up  
3 with Mike and your other brothers?

4 A. Yes.

5 Q. Let me ask you first about school, Ms. Larry.

6 A. Uh-huh.

7 Q. Did your other two brothers, Hayward and Walt, did  
8 they finish school?

9 A. Yes, they did. Hayward actually went into the Job  
10 Corps before he graduated from high school but he got his  
11 GED while he was there but Walt graduated from Parkland  
12 High School.

13 Q. Did Walt go to college?

14 MR. SAUNDERS: Objection.

15 THE COURT: Sustained.

16 MR. KILLIAN: Let me ask you some questions  
17 about Mike and schooling if you recall.

18 A. Uh-huh.

19 Q. Do you remember -- you said you were a year behind  
20 him. Is that correct?

21 A. Yes.

22 Q. Did there come a point in time that you actually  
23 passed him in school?

24 A. Yes.

25 Q. When was that?

1 A. Mike was in first grade a year before me and then  
2 when I started school, I passed him in the first grade  
3 and I stayed ahead of him the whole time.

4 Q. Was that because of his grades or because you were a  
5 more advanced student?

6 A. Because --

7 MR. SAUNDERS: -- Objection, Your Honor.

8 THE COURT: Sustained.

9 Q. So when did you pass him?

10 A. I passed him in the first grade. I just stayed ahead  
11 of him the whole time.

12 Q. Did you fail any grades?

13 A. No.

14 Q. Did Michael fail any grades?

15 A. Yes. I think the first and the fifth grade.

16 Q. And can you tell me how far you went at Diggs before  
17 you went to another school?

18 A. We went to the sixth grade and then we went to  
19 Anderson for the seventh through the ninth and then  
20 schools got segregated and we went to Parkland from the  
21 tenth to the twelfth.

22 Q. Do you recall how far your brother Mike went to  
23 school?

24 A. No, I don't.

25 Q. Did he graduate from high school?



1 A. No.

2 Q. Did he ever go to Anderson or Parkland?

3 A. No.

4 Q. When you were growing up, you were with your mother  
5 in your mother's household. Is that correct?

6 A. Yes.

7 Q. Did you say yes or no? I'm sorry.

8 A. Yes.

9 Q. How did your mother in terms of discipline and  
10 chores, how was she towards you and your brothers?

11 A. She was very stern. We had chores that we had to do.  
12 She kept a very neat home and we all had chores and  
13 things we had to do. Of course, you know, she would put  
14 things (inaudible) and of course Mike didn't never do his  
15 chores. We would always have to do his chores or make  
16 him do his chores. She kept a very clean house. She took  
17 pride in how her children looked. Our clothes were always  
18 clean, pressed and ironed. She laid them out for us. She  
19 would have to lay Mike's stuff out because he couldn't --  
20 he wouldn't put his stuff together. He couldn't put his  
21 stuff together or his clothes together or bathe and put  
22 his clothes on. He had to be told to do those things.

23 Because my mom was, you know, she did run a  
24 stern house and she was a proud mother, she would make  
25 sure that her child was bathed and clean. She would have

1 to do that for him.

2 Q. Did she have to do that for you or your two other  
3 brothers?

4 A. No.

5 Q. How about homework? How was that handled when you  
6 were growing up?

7 A. We did our homework when we came home from school  
8 and we could do our homework but mom would have to help  
9 him. You know, we'd be out playing but he'd have to still  
10 be in the house doing homework and mom would have to be  
11 there with him to help him with his homework. He couldn't  
12 get it.

13 Q. Would it be fair to say she had to spend more time  
14 with him as opposed to you and your brothers?

15 A. Actually she spent all the time with him.

16 Q. And you mentioned a lot of different areas. Let me  
17 go back and ask you some specific questions. Okay?

18 A. Okay.

19 Q. Let me ask you about the clothes. Did your mother  
20 lay out clothes for all of you?

21 A. Yes, she did.

22 Q. Would you and Hayward and Walt put your clothes on?

23 A. Yes, we would and we would have input as to what we  
24 wanted to wear. You know, and she would lay them out for  
25 us and put them out but we would put our clothes on and

1 we would take our bath at night and in the morning we  
2 would put our clothes on, but then she would have to  
3 check Mike and make Mike bathe and put his clothes on.  
4 Clean clothes at that.

5 Q. What do you mean clean clothes?

6 A. Well, he wet his bed. He was a bed wetter and in the  
7 mornings she would have to make sure he took off his wet,  
8 dirty underwear and put on clean ones.

9 Q. How long did the bed wetting go on?

10 A. For years. Years.

11 Q. Did it continue through the elementary school years?

12 A. Oh, yes.

13 Q. And in terms of following directions from your  
14 mother, did you and your brothers follow her directions  
15 pretty closely as far as around the house?

16 A. Yes.

17 Q. What about Mike? Was he any different?

18 A. He was very different.

19 Q. How so?

20 A. My mother would have to tell him the same things  
21 every day. There was Salem Creek. He would swim in the  
22 Salem Creek every day. Every day my mom would tell him  
23 not to swim in that creek and every day he would swim in  
24 the creek.

25 She would have to -- every day she would have

1 to tell him to take a bath. Every day. And use soap. It  
2 was constantly she would have to tell him things every  
3 day, the same things.

4 Q. Would she have to say the same things as many times  
5 to you and your other brothers?

6 A. No.

7 Q. Did your mother -- you mentioned some chores. Did  
8 your mother divide those chores up among you and your  
9 brothers?

10 A. Yes, she would. She would put the list on the  
11 refrigerator and we would have the list as to what we  
12 would have to do on the refrigerator and we would do our  
13 chores. Most of the time Mike wouldn't do his. Either we  
14 did them or we made him do them.

15 Q. Were those chores done while your mom was at work or  
16 under her supervision?

17 A. She gave it to us while she was at work.

18 Q. What kind of chores did Mike have?

19 A. He would either have to wash the dishes or empty the  
20 trash around the house or sweep the floor.

21 Q. Those were his main chores?

22 A. Those were his main chores.

23 Q. Did he do those?

24 A. Not without us making him do it, no.

25 Q. Who made him do it?

1 A. Me and my other two brothers.

2 Q. You mentioned Salem Creek. What was significant  
3 about swimming in Salem Creek? Why was it bad?

4 A. It was a stinky creek. I mean, it wasn't the best --  
5 it was nasty and he would swim in that nasty water. I  
6 mean, the creek is still -- I don't know if it is still  
7 there but he had a swimming pool right there at the  
8 recreation center, Happy Hills Recreation pool, but they  
9 would go and swim in that nasty water.

10 Q. Do you remember while you were growing up in the  
11 household with Mike and your other brothers, do you  
12 remember playing games? At time do you remember playing  
13 board games and card games with your brothers?

14 A. Yes. We used to play Checkers and me and Mike would  
15 play Checkers together but he would get mad or he  
16 wouldn't -- we would explain the rules, you know, how you  
17 jumped and when I would do the jump, he would get mad and  
18 just hit the board and knock it over.

19 Q. Did you try to explain the rules of the game to him?

20 A. We explained and he'd say, oh, you're cheating and  
21 just walk away. Just go away, you're cheating.

22 Q. Did y'all try to play any other board games or card  
23 games with him that you recall?

24 A. We didn't like playing with him because he never did  
25 get the rules. He would just say you was cheating or he

1 would destroy the game or throw it on the floor.

2 Q. Now as far as outside activities, playing outside,  
3 did you play any ball games outside with him like  
4 softball or catch or anything?

5 A. We would sometimes but if you were winning the game,  
6 if you would win if you played kick ball or stick ball or  
7 whatever with Mike and you was winning the game, he would  
8 hit you with a rock and run off or whatever. So, you  
9 know, we limited that.

10 Q. Did your other brothers exhibit behavior like that?

11 A. No.

12 MR. SAUNDERS: Objection.

13 THE COURT: Sustained.

14 Q. Did you ever observe your brother Mike trying to do  
15 any type of model car work or anything like that?

16 A. Oh, yes. My oldest brother had gotten us interested  
17 in doing -- putting model cars together, gluing the model  
18 cars together, and Mike was trying to put a piece on but  
19 he had the wrong piece and he was trying to make the  
20 piece fit and I kept telling him he had the wrong piece.  
21 He got mad and then he smashed it because he was trying  
22 to put the wrong piece on.

23 Q. This was a model car you say?

24 A. Yes.

25 Q. Was this again during the elementary years?

1 A. It was during our younger years, yes.

2 Q. Do you recall did Mike have -- let me rephrase that.  
3 During the time he entered the first grade, there came a  
4 time when he went to training school. Is that correct?

5 A. Somewhere in there, yeah.

6 Q. During that time do you ever recall Mike having any  
7 close childhood friends or having any friends over?

8 A. No. I didn't know any of his friends. I didn't know  
9 he had any.

10 Q. Would he in terms of doing school work, did he bring  
11 his school books home for homework?

12 A. No. I never saw Mike with a book except for the one  
13 time my mom was doing some homework with him and he had  
14 some papers and mom was doing that but I have never seen  
15 him like take school books like I had, no.

16 Q. How did Mike do in terms of interacting with you and  
17 your brothers and other kids?

18 A. We didn't. We didn't interact with him a lot  
19 because he just didn't -- he was different and Mike never  
20 was around us a lot. He didn't -- it was like we looked  
21 at movies and stuff together. He was not. He didn't  
22 interact. He didn't do that with us.

23 Q. Do you recall an incident that happened when Michael  
24 was about six years old involving some vandalism at Diggs  
25 Elementary?

1 A. Yes.

2 Q. What can you tell the Court about that?

3 A. Mike and another -- some other boys vandalized Diggs  
4 Elementary School and they threw eggs, paint, and syrup  
5 and stuff all over the walls and floors and the  
6 punishment of that was they were to clean up the school.  
7 So we all had to go and clean that school up.

8 Q. Ms. Larry, did your brother Mike ever get a North  
9 Carolina driver's license?

10 A. No, not that I'm aware of.

11 Q. Did he ever try to get one?

12 MR. SAUNDERS: Objection.

13 MR. KILLIAN: If she knows.

14 THE COURT: If she knows. Go ahead if you know.

15 A. I don't think, no. I don't think he ever tried to  
16 get a license.

17 Q. Did you ever see him drive a car?

18 A. No. I've never seen him drive.

19 Q. Let me ask you, Ms. Larry, how long did you live  
20 with your mother before you moved out?

21 A. Eighteen. I was 18 when I got my first place.

22 Q. You mentioned Mike throwing some rocks at you and  
23 your brothers?

24 A. Uh-huh.

25 Q. Was that a frequent occurrence?



1 A. Yes, he threw rocks a lot.

2 Q. Any particular thing that would set that off -- that  
3 activity off?

4 A. If he would get angry with you about something or if  
5 he felt like you did something or picked on him or  
6 something or hurt his feelings, he would throw a rock. He  
7 would throw and hit you with a rock.

8 Q. You mentioned if you hurt his feelings. Was he --

9 A. -- He was easily bruised. Even if you told him, you  
10 know, Mike, go in and take a bath or, Mike, put on some  
11 clean clothes, Mike, you wet the bed, it's not that we  
12 hurt his feelings but he felt like that. He felt like  
13 you were picking on him.

14 Q. Do you ever recall him having a job for any length  
15 of time?

16 A. I think he had a job for about two weeks that I  
17 actually knew about. He was cooking somewhere and I  
18 think it was about two weeks.

19 Q. Do you recall about what age he would have been?

20 A. Oh, God, we were older. I don't know like what age  
21 but we were older.

22 Q. During those childhood years, do you have any  
23 recollection of Mike staying gone from home for long  
24 periods of time?

25 A. Yes. He would go away and it's like we would go out

1 and play and do different things or whatever, and Mike,  
2 he would go wherever he would go. You know, I don't know  
3 where it would be. He'd be gone all day. This is before  
4 the time -- besides the time he was in reform school.

5 MR. SAUNDERS: I'm sorry, I didn't hear.

6 THE WITNESS: Besides the time that he was in  
7 reform school.

8 Q. Did you ever know your brother Mike to have a  
9 checking account or a savings account?

10 A. No.

11 Q. At bedtime did your mother have to tell Mike when to  
12 go to bed?

13 A. Yes. She would have to tell him to go to bed. She  
14 would have to tell him to take a bath, put on pajamas.  
15 She would have to tell him to go to bed because he would  
16 just sit up.

17 Q. What about -- you may have touched a little bit on  
18 this -- hygiene. Was there anything unusual about Mike's  
19 hygiene when you were growing up?

20 A. Besides the bedwetting, you know, my mama taught us  
21 all personal hygiene, washing your hands and stuff, but  
22 she would always have to send Mike back to the bathroom  
23 to check himself, wash himself, make sure he cleans  
24 himself after he using the bathroom and bathing every day  
25 or changing his clothes or whatever. She would always

1 have to supervise that.

2 Q. Ms. Larry, let me ask you a couple of questions  
3 about his school years, schooling in particular. To your  
4 knowledge do you recall Mike attending school constantly?

5 A. I beg your pardon?

6 Q. Do you recall Mike attending class on a full-time  
7 basis?

8 A. No.

9 Q. Explain that to the Court.

10 A. Well, when we were in elementary school, we would  
11 have, you know, you'd go in and you'd go to your  
12 classroom and be checked in or whatever but at lunch time  
13 we would have recess. At recess, Mike wouldn't be there.  
14 He wouldn't be in school.

15 Q. Wouldn't be where?

16 A. He wouldn't be at school.

17 Q. Was he anywhere on the school grounds?

18 A. Not that I'd know of. At the end of the day, you  
19 know, he would not be there.

20 Q. How did you get home from school?

21 A. We walked.

22 Q. Would he walk home with you?

23 A. I'd walk home with my friends, you know, and Mike  
24 wouldn't be there. At lunch time -- we would go to school  
25 together but at lunch time he wouldn't be there.

1 Q. Would he show up in the morning in school?

2 A. In the morning in school but at lunch time and at  
3 recess or whatever, when you'd go out for your hour or  
4 few minutes to play, I don't know where Mike would be but  
5 he wouldn't be there.

6 Q. Ms. Larry, do you recall signing an affidavit back  
7 in January of 2002?

8 A. Yes, I do.

9 Q. One of the things you mentioned in your affidavit  
10 was that he (quote) "needs a structure. Someone telling  
11 him when to eat, go to the bathroom." Do you remember  
12 that?

13 A. Yes, I do. I remember saying that.

14 Q. Did he have to have a lot of structure as you  
15 remember from growing up with him?

16 A. Uh-huh, and that was the same thing I was saying. My  
17 mama always had to tell him when to do things. When to  
18 put on clean clothes. If he wet the bed, he had to be  
19 told that those were wet, dirty underwear and that he had  
20 to put on clean underwear.

21 Q. You also mentioned, ma'am, in your affidavit he  
22 wouldn't follow rules. What type of rules were you  
23 referring to?

24 A. Well, my mom had rules as far as how she expected  
25 you to behave like coming home in a timely manner.

1 Dinner was served always at six o'clock. Just rules and  
2 regulations that our parents had -- my mama set for us  
3 and Mike would always not follow those rules. He would  
4 either not come home for dinner or he stayed out, you  
5 know, after dark where mama would have to go look for him  
6 or send us out to look for him or whatever. He just would  
7 not follow instructions.

8 MR. KILLIAN: That's all the questions I have on  
9 direct of this witness.

10 THE COURT: For the State?

11 **CROSS EXAMINATION by MR. SAUNDERS**

12 Q. Ms. Larry, did you attend your brother's trial in  
13 1995?

14 A. No, sir, I did not.

15 Q. You did, however, talk with Dr. Gary Hoover who was  
16 his psychologist for purposes of that trial. Is that  
17 correct?

18 A. No, I did not.

19 Q. So if Dr. Hoover testified that he did in fact talk  
20 to you, did he make that up?

21 A. I don't know a Dr. Gary Hoover and I have not talked  
22 to a Dr. Gary Hoover.

23 Q. Did you talk to anyone on your brother's behalf  
24 prior to his trial in 1995?

25 A. No.

1 Q. Did anybody contact you prior to his trial in 1995?

2 A. No.

3 Q. You knew your brother was on trial for his life,  
4 didn't you, Ms. Larry?

5 A. Uh-huh.

6 Q. But you never came?

7 A. No.

8 Q. You didn't feel that the information you had about  
9 your brother was important to anyone?

10 MR. KILLIAN: Objection.

11 THE COURT: Sustained.

12 MR. SAUNDERS: You didn't try to contact anyone  
13 about all this information that you've told the Court  
14 today?

15 A. I beg your pardon?

16 Q. You didn't try to contact anyone about this  
17 information that you've told the Court about today?

18 MR. KILLIAN: Objection to when.

19 MR. SAUNDERS: Well, before the trial in 1995?

20 A. No.

21 Q. You said that he would go away for a whole day at  
22 the time and be gone?

23 A. Uh-huh.

24 Q. Would he come home later that evening?

25 A. Uh-huh.

1 Q. Would he ever be gone over night and come back?

2 A. Not that I'm aware of.

3 Q. But he would be gone all day long and then come home  
4 in the evening?

5 A. Well, late at night. That type stuff.

6 Q. You mentioned an incident about a model car that he  
7 got frustrated and just smashed it. Is that correct?

8 A. That's correct.

9 Q. So when he got frustrated with things he would act  
10 out and be aggressive?

11 A. He would hit you with a rock or smash it or tip the  
12 board and knock the board over. Things of that nature,  
13 yes.

14 Q. That was when things were not going his way?

15 A. I don't know if it was not going his way. He would  
16 just get angry and do it.

17 Q. Just out of the clear blue, get angry?

18 A. Well, if you were winning the game.

19 Q. That's what I mean. If things were not going his  
20 way, he'd get angry and act out and be aggressive, is  
21 that correct?

22 A. That would be correct.

23 Q. Okay. And you said that on a lot of days he would  
24 be gone from school at recess?

25 A. Yes.

1 Q. Was that every day or just --

2 A. -- It would just be like, you know -- not every day  
3 but it would be many days.

4 Q. Many days?

5 A. Many days.

6 Q. And about what time of day was recess, Ms. Larry?

7 A. It would be around lunch time. You know, eleven  
8 o'clock, twelve o'clock. Whatever time we did lunch  
9 time.

10 Q. So a couple of hours into -- two or three hours into  
11 the school day he would leave?

12 A. I expect so.

13 Q. Maybe even before that because he was gone at  
14 recess?

15 A. He could have. I don't know.

16 Q. And, of course, if he wasn't at school he couldn't  
17 make good grades, could he?

18 A. I would expect not.

19 Q. It would be hard to do, wouldn't it, ma'am?

20 A. (No audible response.)

21 Q. And in the affidavit that the attorney asked you  
22 about, you signed it in 2002, is that correct?

23 A. That's correct.

24 Q. And one of the things you said, Ms. Larry, was that  
25 he was really good at track, softball, baseball, and



1 swimming, is that right?

2 A. Uh-huh.

3 Q. He was really good at art, painting and drawing?

4 A. Uh-huh.

5 Q. If he wanted to do something, he excelled?

6 A. If he liked it.

7 Q. But if he wasn't interested, you could forget it?

8 A. That's pretty much.

9 Q. You also said Mike understood the rules, he just  
10 didn't follow them?

11 A. Sometimes you felt like that.

12 Q. Well, that's what you swore to in 2002?

13 A. That's what I told them, yes.

14 Q. And you said he could read and write?

15 A. Yes.

16 Q. You said the main things that was different about  
17 him was he was just mean?

18 A. Sometimes he was.

19 Q. And did you -- did James tell you that Dr. Hoover  
20 had diagnosed him as antisocial personality disorder?

21 A. No.

22 Q. He did not tell you that?

23 A. No.

24 Q. You said he started stealing from you all when you  
25 all were little?

1 A. Yes.

2 Q. And then he'd lie about stealing and say he found  
3 things?

4 A. Oh, yes.

5 Q. So he was lying and stealing at an early age?

6 A. Yes, he was.

7 Q. You also said, Ms. Larry, that he didn't have any  
8 trouble taking care of himself. He just didn't want to.

9 A. Well --

10 Q. -- That was what you said in 2002?

11 A. Uh-huh.

12 Q. And he wanted things done his way?

13 A. He wanted it done his way.

14 Q. And he went off to training school in seventh grade,  
15 is that right?

16 A. I'm not sure what grade he was in but I do know he  
17 went off to training school.

18 Q. About 13 or 14?

19 A. I don't know. I know he went off to training  
20 school.

21 Q. Do you remember how long he was gone for?

22 A. Oh, God, no. I just know he was gone for awhile.

23 Q. You didn't see him much after that, did you?

24 A. When he was in training school.

25 Q. I mean even after training school because in '72 he

1 got convicted of an adult crime and went off to prison?

2 A. Yes, I think that's correct.

3 Q. So you just didn't see him after he was 13 or 14?

4 A. Not much.

5 Q. You don't know too many 13 year olds that have a  
6 checking account, do you, ma'am?

7 A. No.

8 Q. And you said he would never do his chores around the  
9 house. Your mother would have to make him?

10 A. Or we made him.

11 Q. And then after you all made him, he did them?

12 A. With a lot of resistance.

13 Q. Yes, ma'am, I understand. About like most boys.

14 A. (No response.)

15 MR. SAUNDERS: That's all I have of this  
16 witness, Your Honor.

17 THE COURT: Further redirect?

18 **REDIRECT EXAMINATION by MR. KILLIAN**

19 Q. Ms. Larry, right before your brother's trial in  
20 1995, were you ever asked by anyone or told that Mike may  
21 have some mental retardation?

22 A. No, not that I can remember. No.

23 Q. And going back to the affidavit. Did it appear to  
24 you he got -- you said he was mean. Would he also appear  
25 to get frustrated very easily?

1 A. He did. If he didn't understand it or didn't get  
2 it, he'd get real frustrated real easy.

3 Q. Is that what you mean by sometimes getting mean?

4 A. Yes, and that's what I would refer to as mean. He  
5 would get frustrated real easy.

6 Q. You said you would have been 18 when you graduated  
7 from high school and moved out of your mother's house?

8 A. Uh-huh.

9 Q. I hate to ask you to date yourself but what year  
10 would that have been?

11 A. Oh, God, '76. 1976.

12 Q. So you were living with your mother until 1976?

13 A. Yes.

14 Q. After 1976 you still stayed in the Winston-Salem  
15 area?

16 A. Yes, I had an apartment in the Happy Hill projects  
17 two blocks up from my mom.

18 Q. All right. How long did you live close to your mom  
19 up there?

20 A. Oh, until --

21 MR. SAUNDERS: -- Object. I don't see what this  
22 has to do --

23 MR. KILLIAN: -- The State asked her when she  
24 moved off and had no contact with him. I'm trying to  
25 establish that on redirect.

1 THE COURT: Overruled.

2 THE WITNESS: I lived there until 1984.

3 Q. Was that close to your mother's house?

4 A. Yes.

5 MR. SAUNDERS: Judge, I'm going to object. The  
6 defendant was in the Department of Corrections from 1974  
7 to after '84.

8 THE COURT: I understand but the Court will  
9 allow her to testify where she lived until 1984. That  
10 was how far away?

11 THE WITNESS: About two blocks.

12 Q. During that period of time from 1976 to 1984, would  
13 you visit your mother frequently?

14 A. Every day. I mean, she was only a couple of blocks.

15 Q. And during that period of time were there ever any  
16 occasions when your brother Mike would be home from  
17 prison?

18 MR. SAUNDERS: Objection.

19 MR. KILLIAN: The State asked her if she had no  
20 contact with him.

21 THE COURT: Overruled.

22 A. Whenever he would get out of jail or he would write  
23 letters or whatever. When he would get out, you know, he  
24 would get out and come by. We would talk. But you would  
25 see him and then he would be gone.

1 Q. When he was out during this period of time, did he  
2 ever have his own apartment or home?

3 MR. SAUNDERS: Objection, Your Honor. I don't  
4 think it has been established he was ever out for any  
5 period of time and I'm not sure what period of time  
6 you're talking about.

7 MR. KILLIAN: I'm talking about from 1976 to  
8 1984. She testified that when he'd get out he would come  
9 home.

10 MR. SAUNDERS: Objection, Your Honor. That's  
11 impossible.

12 THE COURT: Overruled. Do you know if he had an  
13 apartment during that period of time?

14 THE WITNESS: No.

15 THE COURT: Don't know or he did not?

16 THE WITNESS: No, I don't think he's ever had an  
17 apartment.

18 Q. From the time your brother was 16, Ms. Larry, until  
19 the time he went to prison, did he ever have any  
20 independent living? Did he ever live out on his own?

21 A. No.

22 MR. KILLIAN: That's all I have.

23 THE COURT: The State wish to follow up?

24 **RE CROSS EXAMINATION by MR. SAUNDERS**

25 Q. You never lived out on your own until you were 17

1 either, did you, Ms. Larry?

2 A. I was 18.

3 Q. And from '75 to '86, did you visit your brother  
4 while he was in the Department of Corrections serving  
5 time for armed robbery?

6 A. A couple of times.

7 Q. So he couldn't have come home between 1975 and 1986  
8 because he was in the Department of Corrections serving  
9 time for armed robbery, wasn't he?

10 A. I don't know the dates and times that he was in the  
11 corrections system. I just know that whenever he would  
12 get out of jail, come home, visit, whatever, whatever  
13 time. He stayed in jail so much.

14 Q. Yes, ma'am, he did. That's because he kept  
15 committing robbery.

16 A. (Witness shrugs.)

17 Q. But you know from about the time you left your house  
18 in 1975 until the next ten, 11 years he never came home,  
19 did he?

20 A. I don't -- he was in jail for a long period of time  
21 at one time.

22 Q. And I believe the defense attorney asked you if  
23 anybody contacted you about your brother's possible  
24 mental retardation. But you never contacted anybody  
25 else?

1 A. No.

2 Q. And you're the one that lived with him for 13, 14,  
3 15, 16 years while he was growing up?

4 A. Uh-huh.

5 MR. SAUNDERS: That's all I have, Judge.

6 THE COURT: You may step down. Before your next  
7 witness, let's take an abbreviated morning recess to give  
8 the court personnel just a moment. Probably 15 minutes.

9 (RECESS WAS OBSERVED.)

10 (DEFENDANT AND HIS COUNSEL IN COURTROOM.)

11 THE COURT: You may call your next witness.

12 MR. KILLIAN: Your Honor, prior to doing that,  
13 Mr. Causey brought to my attention that the stipulation  
14 with the State regarding his earlier IQ grades or scores,  
15 in paragraph six of that affidavit of Dr. Fisher, which  
16 was filed with our motion back in January 2002, he  
17 recites all these various IQ scores. We'd move at this  
18 time to strike those from his affidavit in lieu of this  
19 stipulation. It's in paragraph six of his affidavit.  
20 Just consider it, I guess, part of the pleadings in this  
21 case.

22 THE COURT: The Court would agree -- excuse me,  
23 the State would agree with that?

24 MR. SAUNDERS: Yes, sir.

25 THE COURT: The Court will allow motion to



1 strike those references in that previous affidavit.

2 MR. KILLIAN: Also prior to calling our next  
3 witness, pursuant to stipulation with the State, we  
4 would move to introduce Defendant's Exhibit 2, a copy of  
5 his Winston-Salem/Forsyth County school records from  
6 grades one through six and likewise I've redacted from  
7 those other IQ scores. Is that correct, Mr. Saunders?

8 MR. SAUNDERS: Yes, sir.

9 THE COURT: Without objection, the Court will  
10 receive Defendant's No. 2.

11 **(DEFENDANT'S EXHIBIT NO. 2 WAS MARKED AND RECEIVED INTO**  
12 **EVIDENCE.)**

13 MR. KILLIAN: And Defendant's Exhibit No. 3 is a  
14 copy of Mr. Larry's Department of Correction records,  
15 which I believe Mr. Saunders has had copies of these for  
16 a long time and would stipulate to their admissibility  
17 without further authentication. Is that correct?

18 MR. SAUNDERS: That's correct.

19 THE COURT: The Court will receive Defendant's  
20 Exhibit 3 by stipulation.

21 **(DEFENDANT'S EXHIBIT NO. 3 WAS MARKED AND RECEIVED INTO**  
22 **EVIDENCE.)**

23 MR. KILLIAN: If I may approach?

24 THE COURT: Yes. I would just note these are  
25 lengthy documents. Do I need to read these prior to

1 hearing the next witness or can I read these at lunch?

2 MR. KILLIAN: I'd say you can probably read  
3 those at lunch.

4 MR. CAUSEY: His testimony should be a walk  
5 through some of that information.

6 THE COURT: All right. You may call your next  
7 witness.

8 MR. KILLIAN: Thank you, Your Honor. We call  
9 Dr. Brad Fisher.

10 **BRAD FISHER, being duly sworn, testified as follows**  
11 **during:**

12 **DIRECT EXAMINATION by MR. KILLIAN**

13 Q. Would you state your full name for the Court,  
14 please?

15 A. Brad Fisher. F-I-S-H-E-R.

16 Q. Dr. Fisher, what is your profession?

17 A. I am a clinical forensic psychologist.

18 Q. Do you have an office?

19 A. Yes, in Chapel Hill, North Carolina.

20 Q. And how long have you been a psychologist?

21 A. Twenty-eight years.

22 Q. Are you a licensed psychologist in North Carolina?

23 A. Yes. I came to North Carolina in 1977 to Chapel  
24 Hill. I've never left and I've always practiced.

25 Q. When were you licensed by the state of North

1 Carolina?

2 A. I guess that year or the next year right when I  
3 came. So '77 or '78.

4 Q. Dr. Fisher, would you state for the Court your  
5 educational background beginning with undergraduate  
6 school, please.

7 MR. SAUNDERS: Judge, I'll stipulate Dr. Fisher  
8 is an expert in the field of forensic psychology.

9 THE COURT: Are you willing to accept the  
10 stipulation?

11 MR. KILLIAN: We'd still like to hear his  
12 qualifications within the narrow range of mental  
13 retardation. We'd like to go ahead and put on some  
14 evidence as to his background.

15 THE COURT: He's declined your stipulation. Go  
16 ahead.

17 A. I will try and be concise. I'm a graduate of  
18 Harvard University, cum laude, 1972. This required  
19 during my four years there I was working in the prisons  
20 and my thesis was in community-based corrections  
21 practices there. 1973, received my master's degree from  
22 Southern Illinois University in a joint program with  
23 their Center for Crime Delinquency and their clinical  
24 psychology program. In relation to this case, this  
25 master's degree did require a full year of training in

1 individual's IQ testing.

2 I then entered one of two programs set up at  
3 that time in the country for training clinical  
4 correctional or clinical forensic psychologists. These  
5 are psychologists that work in court-related settings.  
6 This was the University of Alabama. I had to redo  
7 another -- so I had another year of training in  
8 individualized IQ assessments and that was just part of  
9 that program. It also required a one year internship so  
10 although my graduate degree is from the University of  
11 Alabama, my internship was half with the Ohio Department  
12 of Corrections and half with Ohio State University  
13 Hospitals. My dissertation was in the prediction of  
14 dangerous behavior.

15 Q. Did you receive a Ph.D. from the University of  
16 Alabama?

17 A. Yes, I did.

18 Q. What was that in?

19 A. Clinical psychology.

20 Q. What year was that?

21 A. 1976.

22 Q. And after, following that, you mentioned an  
23 internship at Ohio State University Hospitals?

24 A. Half at the hospital, half with the Department of  
25 Corrections.

1 Q. Let me ask you about your internship in the  
2 Department of Corrections. Was that the Alabama  
3 Department of Corrections?

4 A. This was the Ohio Department of Corrections.

5 Q. Was there any particular area?

6 A. Classification. We helped develop and used the  
7 instruments for what prisoners go where.

8 Q. Following your getting your Ph.D. from the  
9 University of Alabama, is that when came to North  
10 Carolina?

11 A. Yes.

12 Q. Can you tell the Court what your positions were  
13 after that in North Carolina? Who you worked with?

14 A. Yes. I came to North Carolina in 1977. I came as  
15 the clinical director of the Dillon Youth Center. This  
16 is a training school in North Carolina, like Fountain  
17 that he went to. That was a joint position where I was  
18 also teaching -- one of the days of the week I was  
19 teaching at University of North Carolina.

20 I did then and have continued without any  
21 change or stop to do evaluations in clinical forensic  
22 settings of people who have committed violent crimes,  
23 including evaluations of people's intelligence and  
24 whether or not they're retarded.

25 Part of this work resulted in a full-time grant

1 from the National Institute of Corrections, which was  
2 part of the federal Justice Department starting in 1979,  
3 and this was to develop guidelines for prisoner  
4 classification. This is work that extended from my work  
5 the year before coming here to develop prisoner  
6 classification or prisoner evaluation methods for Alabama  
7 prisoners. This was a result of a court order by Judge  
8 Frank Johnson that required our university to develop  
9 prisoner evaluation systems. We did.

10 I continued to work in this area and this  
11 resulted in my grant while in North Carolina. This  
12 developed systems and methods for evaluating prisoners.  
13 Part of this obviously is issues of mental retardation  
14 and that in turn led to both work and research in areas  
15 related to this. For example, the whole issue of whether  
16 a retarded prisoner is integrated into the prison system  
17 or put outside in separate units. So research into both  
18 of this areas continued over the next several years, with  
19 grants and with evaluations and testimony for the Justice  
20 Department. This included --

21 Q. -- Was that the United States Justice Department?

22 A. The United States Justice Department, Civil Rights  
23 Division. Especially in Texas, where it was a big  
24 concern. I continued to work in this area. Related  
25 research would include for groups such as the American

1 Correctional Association, where we dealt with special  
2 needs prisoners, and ongoing individual evaluations,  
3 which often considered the issue of what the intelligence  
4 of a prisoner is, and it has become more frequent in the  
5 last five or ten years as different jurisdictions have --  
6 the issue of whether or not a prisoner, especially a  
7 death row prisoner, is retarded has taken on more  
8 importance, and I've done evaluations there which include  
9 the Penry case in Texas. I did an evaluation of Penry.

10 In Georgia, a case called Spencer, which  
11 included an evaluation of several individual IQ  
12 instruments that were used, the Kaufman, the WAIS and  
13 some others that were considered. Issues of acquiescence  
14 for mentally retarded prisoners. This is just an issue  
15 where you get a tendency for retarded prisoners, a  
16 tendency to acquiesce in their responses that may skew  
17 data. In particular, we had a prisoner named Holloway  
18 and --

19 MR. SAUNDERS: -- Objection.

20 THE COURT: Sustained.

21 Q. Let me ask you if you can go back. You mentioned  
22 earlier that you had some specialized classes or training  
23 in IQ testing. When was that?

24 A. Well, I had to repeat it. I did first my master's  
25 degree because it was a normal part of the master's

1 degree. How do you administer an individual IQ test. And  
2 I got to my Ph.D. program and figured I'd been through  
3 that hoop and they said no so I repeated it.

4 Q. Is there any particular area of forensic or clinical  
5 forensic psychology where you specialize or tend to  
6 specialize?

7 A. Well, I'm not sure if it's a sub-area. My  
8 specialization is in methods of classification and  
9 evaluation for prisoners, especially those prisoners or  
10 people going to prison who have committed violent crime.  
11 This is what I've done since graduation. I have never  
12 stopped. I've never done anything different.

13 Q. Now, when did you leave Dillon Youth Center?

14 A. Well, I continued to work there on a part-time and a  
15 consulting basis for maybe a decade but my grant from the  
16 National Institute of Correction -- National Institute of  
17 Correction part of the Justice Department came in 1979  
18 and lasted for approximately three years.

19 Q. When did you start your own practice?

20 A. At the end of that.

21 Q. Was that the early '80's, if you recall?

22 A. Yes.

23 Q. Was that your office you mentioned in Chapel Hill?

24 A. Yes.

25 Q. Since then have you been continuously employed in



1 private practice?

2 A. Yes.

3 Q. You mentioned some teaching positions at the  
4 University of North Carolina at Chapel Hill.

5 A. I've taught for several years at both Duke  
6 University and the University of North Carolina.

7 Q. What subjects have you taught there?

8 A. Several. Sometimes specialized classes in what they  
9 call a basic series at Duke. I was called in to talk  
10 about clinical forensic evaluations. I've also taught  
11 personality theory, developmental psychology, abnormal  
12 psychology.

13 Q. In which positions you have had or grants that you  
14 have had where you spent the most time, when you talk  
15 about classifying prisoners with respect to the mental  
16 retardation issue, where did you really focus on that?

17 A. Well, in individual cases -- I don't mean to --

18 Q. -- You mentioned --

19 A. -- everywhere. Mental retardation is not an issue  
20 that, at least in my experience, has been relegated to  
21 North Carolina or Florida or Georgia or Texas. I've  
22 testified in all those areas. I have testified in  
23 approximately 30 states doing individual evaluations.  
24 I've never seen a state where that is not a question.

25 But as far as a system evaluation, what we do

1 with prisoners in our system who score mentally retarded,  
2 I think some of my major work has been in Florida, where  
3 that was a consideration, and in Georgia and in Texas.

4 Q. What about -- you mentioned the Department of  
5 Justice. Was that part of your grant work?,

6 A. The Department of Justice, Civil Rights Division  
7 involved me in -- this is a case called Ruiz in Texas  
8 where --

9 MR. SAUNDERS: -- Objection.

10 Q. Don't go specifics of Ruiz. Just stick to my  
11 question about the Department of Justice.

12 A. The Department of Justice was concerned with the  
13 placement, the evaluation and then consequent placement  
14 of mentally retarded prisoners within the Texas prison  
15 system.

16 Q. The Texas state prison system?

17 A. Yes, at all their facilities.

18 Q. Dr. Fisher, I'm not going to ask you to list  
19 everything you've had published but have you published  
20 articles in your field?

21 A. Yes. Most all of my articles concern this --  
22 prisoner evaluations, evaluations of people who commit  
23 crimes, the prediction of dangerous behavior and risk  
24 screening. There's a lot of overlap in those different  
25 descriptions.

1 Q. Do you belong to any professional associations  
2 besides --

3 A. -- The American Psychological Association and the  
4 North Carolina Psychological Association.

5 Q. Any other associations you belong to besides the  
6 American Psychological Association and the North Carolina  
7 Psychological Association?

8 A. Those are the two main ones.

9 Q. Roughly how many articles have you published in the  
10 field?

11 A. Well, you have got my vitae but it seems to me it  
12 was 20 or 30.

13 MR. KILLIAN: May I approach?

14 THE COURT: Yes.

15 Q. Dr. Fisher, I'm handing you what's been marked for  
16 identification as Defendant's Exhibit 4 and ask you if  
17 you recognize that?

18 A. Yes. This is a copy that I sent to you of what I've  
19 done. It's several years old but -- I haven't updated it  
20 in several years.

21 Q. This your curriculum vitae?

22 A. Yes.

23 Q. Is it as far as you can tell accurate as far as your  
24 education, qualifications, training, and experience?

25 A. Yes.

1 MR. KILLIAN: Your Honor, we'd move to introduce  
2 Defendant's Exhibit 4, Dr. Fisher's curriculum vitae.

3 THE COURT: Any objection?

4 MR. SAUNDERS: No, sir.

5 THE COURT: The Court will receive Defendant's  
6 4, the C.V. of Dr. Fisher.

7 **(DEFENDANT'S EXHIBIT NO. 4 WAS MARKED AND RECEIVED INTO**  
8 **EVIDENCE.)**

9 Q. Dr. Fisher, you mentioned doing some evaluations of  
10 capital defendants in other states for mental retardation  
11 determination, is that correct?

12 A. Yes.

13 Q. Let me turn your attention to North Carolina. Have  
14 you done some evaluations of capital defendants for  
15 mental retardation in cases since August of 2001?

16 A. Yes.

17 MR. SAUNDERS: Objection, Your Honor.

18 THE COURT: Overruled as to that question.

19 Q. Approximately how many had you done before doing Mr.  
20 Thomas Michael Larry?

21 A. In the 20's. Twenty-two, 23, 24. I can't remember  
22 exactly.

23 Q. That's here in North Carolina?

24 A. That's in North Carolina since August of 2001.

25 Q. Were these forensic evaluations?

1 A. Yes.

2 Q. And were these all defendants charged with capital  
3 crimes or who had been convicted of capital crimes?

4 A. Yes.

5 Q. Were some of these for post-conviction cases?

6 MR. SAUNDERS: Objection, Your Honor.

7 THE COURT: Overruled.

8 A. Yes, they were.

9 Q. You said you've done about 23 to 25, is that  
10 correct?

11 A. Yes.

12 Q. Of those 23 to 25, in how many cases did you find  
13 the defendant to be actually mentally retarded?

14 A. I believe the answer is a minority, less than 50  
15 percent, but I don't know the exact number. My findings  
16 were in all directions.

17 MR. KILLIAN: Your Honor, at this time we would  
18 tender Dr. Brad Fisher as an expert in psychology,  
19 specifically in the field of mental retardation.

20 THE COURT: Questions for the State?

21 MR. SAUNDERS: No, sir.

22 THE COURT: Wish to be heard?

23 MR. SAUNDERS: No, sir.

24 THE COURT: The Court will accept him in the  
25 area tendered and also him to so testify. You may

1 proceed.

2 Q. Dr. Fisher, are you familiar with the definition of  
3 mental retardation as set out in North Carolina General  
4 Statute 15A-2005?

5 A. Yes.

6 Q. Let me also ask you some questions, too. Are you  
7 familiar with the definition of mental retardation as set  
8 out in the Diagnostic and Statistical Manual of Mental  
9 Disorders, Fourth Edition?

10 A. Yes.

11 Q. For purposes of clarification, I'm going to refer to  
12 that as the DSM-IV.

13 A. That's fine.

14 Q. Is that fine?

15 A. Yes.

16 Q. Also, are you familiar with the definition of mental  
17 retardation set out by the AAMR, the American Association  
18 for Mental Retardation?

19 A. I am.

20 MR. KILLIAN: If I may approach the witness,  
21 Your Honor?

22 THE COURT: Yes.

23 Q. Dr. Fisher, is the statutory definition of mental  
24 retardation as contained in 15A-2005, is that similar to  
25 the DSM-IV definition of mental retardation?

1 A. Yes.

2 Q. How so?

3 A. They are just similarly written. The components are  
4 the same. Determination of the IQ is the same. They look  
5 at the behavior before the age of 18. So that's why I  
6 say they are similar.

7 MR. KILLIAN: If I may approach again?

8 THE COURT: Yes.

9 **(DEFENDANT'S EXHIBIT NO. 5 WAS MARKED FOR**  
10 **IDENTIFICATION.)**

11 Q. I'm handing you what's been marked as Defendant's  
12 Exhibit 5 for identification purposes and ask if you'll  
13 look at that first.

14 A. (Witness examining document.)

15 Q. Does that contain the definition of mental  
16 retardation as in the DSM-IV?

17 A. Yes. The DSM-IV called it a text revision but yes.

18 **(DEFENDANT'S EXHIBIT NO. 6 WAS MARKED FOR**  
19 **IDENTIFICATION.)**

20 Q. I will also hand you what's been marked as  
21 Defendant's Exhibit 6, AAMR 10th Edition of Mental  
22 Retardation, and does that likewise have a definition of  
23 mental retardation in it?

24 A. It does and again they are similar. This is the  
25 American Association of Mental Retardation.

1 Q. Are both the DSM-IV and the AAMR 10th edition bodies  
2 of literature that are relied upon by psychologists?

3 A. Yes.

4 MR. SAUNDERS: Objection, Your Honor. It's not  
5 relevant to this hearing.

6 THE COURT: Overruled.

7 Q. You may answer.

8 A. Yes.

9 Q. You mentioned -- let me ask you about the components  
10 of the North Carolina statute and how they're similar to  
11 these. In the adaptive skills limitation areas, are they  
12 very similar?

13 A. Yes.

14 Q. How so?

15 A. The words are similar, whether it's self-care,  
16 communication, work skills, these different categories.  
17 The words are either synonymous or the same or similar.

18 Q. Now, the DSM-IV, does that have a listing of what's  
19 called skill areas or domains?

20 A. Yes.

21 Q. How many of them are there?

22 A. Communication, self-care --

23 Q. -- I'm sorry. How many first?

24 A. One, two, three, four, five, six, seven, eight,  
25 nine, ten, 11, 12.



1 Q. And what are they?

2 A. Self-direction, self-care, communication, home  
3 living, social antipersonal skills, use of community  
4 resources, functional academic skills, work, leisure,  
5 health, and safety.

6 Q. And also does this same definition for DSM-IV define  
7 intellectual functioning?

8 A. Yes.

9 Q. Is that similar to the North Carolina statute?

10 A. Yes.

11 Q. And did that have to do with IQ testing?

12 A. Yes.

13 Q. Dr. Fisher, are you familiar with a death row inmate  
14 named Thomas Michael Larry?

15 A. I am.

16 Q. Is that the gentleman seated between Mr. Causey and  
17 me?

18 A. Correct.

19 Q. How did you become familiar with him?

20 A. You requested that I evaluate him.

21 Q. What kind of evaluation?

22 A. A psychological determination of his intelligence.

23 Q. Did you -- were you asked to evaluate Mr. Larry, was  
24 this you said for mental retardation determination?

25 A. Yes.

1 Q. Tell the Court briefly how you went about your  
2 evaluation. The process.

3 A. The same as on the other 20 some odd. I attempted  
4 to administer an individual IQ test. As different  
5 psychologists may have different approaches, mine  
6 involved seeing him on at least two sessions. The reason  
7 for having two sessions is so that I can also make at  
8 least some considered opinion of whether or not they're  
9 lying to me, whether there's malingering going on,  
10 whether the data is credible.

11 Further, I requested that the attorneys in this  
12 case, Mr. Killian and Mr. Causey to send me any data that  
13 might relate to this evaluation. In particular, there  
14 frequently is data that can give you information about  
15 the 12 areas of adaptive functioning that we've discussed  
16 since you're supposed to determine those before the age  
17 of 18 and they're in prison beyond that age so you have  
18 to look at other sources or it's helpful to look at other  
19 sources beyond just what the prisoner tells you. So  
20 that's what I do each time.

21 Q. Now, I'm going to break it down and ask you some  
22 specific questions about your testing. You said you  
23 tested him on two different occasions?

24 A. Yes.

25 Q. Which months?

1 A. December and -- December of '01 and -- December of  
2 2000, January of 2001.

3 Q. Let me ask you -- 2001?

4 A. You're correct.

5 MR. SAUNDERS: Which is it?

6 MR. KILLIAN: December 2001 and January 2002.

7 Q. And on each occasion, how much total time did you  
8 spend with Mr. Larry approximately?

9 A. Well, I don't keep an exact amount of time we're in  
10 the prison cell, death row cell, but usually it varies  
11 between two to three hours total time.

12 Q. On each session?

13 A. No. Total time.

14 Q. And let me ask you this. AS far as your time you  
15 spent with Mr. Larry, what did you ask him? What type of  
16 questions?

17 A. Well, some of the questions I asked him are  
18 questions on the WAIS, the Wechsler Adult Intelligence  
19 Schedule, so, you know, they're "name four presidents."  
20 That's a question that's on the test. I'm asking those  
21 questions.

22 Further, I'm asking him questions on both  
23 occasions that are the same question for purposes of  
24 reliability. In other words, does he tell me one thing  
25 one day, something else the next time. And third I'm

1 asking him questions that relate to the functional hows,  
2 how his adaptive behaviors work. Tell me about your  
3 school, how far did you go in school, how did you go in  
4 school; tell me about your work, how'd you do in work;  
5 tell me about your friends; how long you hold jobs.

6 Those kinds of questions.

7 Q. Now, just to make sure I understand this. What was  
8 the exact test version you gave Mr. Larry?

9 A. Wexler Adult Intelligence Scale, Revised, called the  
10 WAIS-R.

11 Q. And is that a scientific and recognized standardized  
12 intelligence quotient test?

13 A. Yes.

14 Q. And you say you measured this on two occasions?

15 A. Yes, part one and part another.

16 Q. What are the parts of the WAIS-R comprised of?

17 A. Eleven sub-tests that just look at different  
18 components of intelligence. Some are arithmetic. Some  
19 relate to an information pool. You'd have like when I  
20 ask you to name four presidents. Different type,  
21 different aspects of intelligence.

22 Q. And you mentioned reviewing some records as part of  
23 your diagnosis?

24 A. Yes. In his case, you had Department of Corrections  
25 and school records. You had -- there was an investigator

1 or a mitigation specialist information about relatives  
2 and the like. People that knew him.

3 Q. And did you review the affidavit from his sister?

4 A. Yes, that's what I'm talking about.

5 Q. How long, Dr. Fisher, have you been using the WAIS-R  
6 IQ test?

7 A. Since -- I don't know exactly. For a long time.  
8 It's the one that I see the most often in the interviews  
9 of prisoners, which is why I give it.

10 Q. Let me ask you some questions about the adaptive  
11 behavior areas.

12 A. Yes.

13 Q. How did you determine whether or not Mr. Larry had  
14 deficits in those areas?

15 A. Well, really a couple of parts to it. One is I try  
16 to figure out whether he's lying to me or not so I need  
17 some sort of central determination. I thought he was  
18 giving me credible information, again looking to see  
19 whether he's reliable across sections, whether it's  
20 reliable to the data I got from other sources. These  
21 kinds of things.

22 Once I had an opinion that his data had some  
23 merit, I included that data with data I was getting from  
24 other sources, primarily school records, Department of  
25 Corrections records, the -- well, you mentioned the

1 affidavit but I'm talking about just all the sources of  
2 information from other people that knew him. Oh, I'm a  
3 teacher or I'm a sister. That kind of information that  
4 would relate to each of the 12 areas.

5 Q. You mentioned adaptive behavior assessment system.  
6 We'll call it ABAS. Was that given to him?

7 A. I started to. I tried that for a few prisoners and  
8 the reason I didn't think it was very useful is it's as,  
9 you know, how do you keep them in check. The ABAS just  
10 had too many questions that were not applicable because  
11 they were in prison and the test wasn't designed for  
12 people in prison so I found that a much, for me, a better  
13 approach was to just ask straightforward questions about  
14 school, academic functioning, adaptive behaviors in the  
15 other categories -- self care, communication and the like  
16 -- rather than trying to score something that was geared  
17 towards people not in a prison setting.

18 You would have at least half the questions were  
19 not applicable because they were in prison. In his case,  
20 especially not applicable because he had spent so much  
21 time in prison or training school.

22 Q. You mentioned the use of a WAIS-R. Is that  
23 something you have customarily used since becoming a  
24 clinical psychologist?

25 A. Yes. I have never -- it seemed to me to be quite

1 appropriate in the sense that a major question is are  
2 they lying to you, are they malingering. And in many  
3 prisoner's cases, we had a prior WAIS-R and so if they  
4 said "name four presidents" and this time they named them  
5 and last time they didn't, or vice versa, that would give  
6 you a clue as to were they lying to you or did they have  
7 a brain tumor or whatnot but something was askew. And so  
8 I felt that for this population was especially important.

9 Q. Why did you use the WAIS-R as opposed to, say, a  
10 WAIS-III?

11 A. For that reason.

12 Q. What reason again?

13 A. Because it allows for a qualitative analysis. It's  
14 now -- I hadn't given this any thought until I received  
15 the anonymous question as to what test I was using but  
16 when that question arrived, I'm asked this question so my  
17 answer to it is, as I've said before, I'm looking to the  
18 WAIS-R to give me information and then I compare and do a  
19 qualitative comparison with prior WAIS-Rs that frequently  
20 are in the prisoner's jacket.

21 Q. Did -- in all respects of the test that you gave  
22 him, the WAIS-R, in December of 2001 and January of 2002,  
23 did you administer that in accordance with the generally  
24 accepted protocol?

25 A. Yes.

1 Q. For the Court's information, the WAIS-III stands for  
2 what?

3 A. Wechsler Adult Intelligence Scale, Third Revision.

4 Q. Is that test similar to the WAIS-R?

5 A. Yes. I forgot the exact number but the items are  
6 the same. It's just sort of, it's a new revision.

7 Q. Is it any way different?

8 A. Yes, it has different questions. It has, I think,  
9 one primary difference is that it makes up -- it gives  
10 more questions -- some more questions and easier  
11 questions at the lower end of the spectrum, meaning those  
12 who would score retarded and within the retardation  
13 range.

14 Q. They get some easier questions?

15 A. More and easier is my understanding so you get a  
16 greater continuum, more analysis of that sub-group.

17 Q. Dr. Fisher, are you aware of any scientific  
18 recognized authority that states either the WAIS-R or the  
19 WAIS-III is more reliable than the others?

20 A. No, and I really think -- I mean, when the question  
21 was posed to me, I made a thorough attempt to answer  
22 that. I consulted with every expert I could find, every  
23 source of literature and it may well be there but I  
24 haven't found it.

25 Q. Now, you mention in your report, I believe, which



1 you testified about trying to detect malingering, is that  
2 correct?

3 A. Yes.

4 Q. Did you do that in Mr. Larry's case?

5 A. Yes.

6 Q. What was your conclusion based on your observations?

7 A. That he was not malingering.

8 Q. Is there any formal test for malingering, any  
9 scientific test for malingering?

10 A. Well, you have several authors that have tried to  
11 put forth different attempts for malingering. I've found  
12 that my approach of a combination -- there's a book  
13 called Rogers that combines the different instruments.  
14 That is what has been most useful to me. It's, among  
15 other things, it's very expendable to a court. I can  
16 tell them exactly what questions I asked and what the  
17 person answered and how I determined that that meant to  
18 me that they were malingering or not.

19 Q. Is there a so-called formal test, though?

20 A. Not that I gave. In other words, I choose to do it  
21 that way. There's the WEY (phonetic) Test. There's  
22 other tests that perhaps another clinician would prefer.

23 Q. You became aware as part of your evaluation, did you  
24 not, sir, that another psychologist had administered a  
25 WAIS-III to Mr. Larry sometime after your test?

1 A. Yes. Eight or nine months.

2 Q. And on the WAIS-III, can you tell the Court what the  
3 intelligence quotient result was that you administered to  
4 him?

5 MR. SAUNDERS: Objection. He didn't give him  
6 that test.

7 MR. KILLIAN: WAIS-R. Excuse me.

8 THE COURT: Sustained.

9 A. Yes, he received a full scale score of 69 on the  
10 WAIS-R.

11 THE COURT: Is that a plus or minus result or  
12 absolutely 69?

13 A. That's the -- the American Association of Mental  
14 Retardation and the American Psychological Association  
15 recommend a five point give or take -- used to be three  
16 points, now it's five points -- on either side so the  
17 range there would be 74 to 60. Yeah. Five points either  
18 way.

19 Q. Is that the same or similar to a standard error of  
20 measurement?

21 A. Yes.

22 Q. So it would be fair to say there's no exact  
23 intelligence quotient. There's always some error?

24 A. Right. They're saying you should give it that  
25 latitude, five points in either direction.

1 Q. Dr. Fisher, did you prepare a psychological  
2 evaluation on Mr. Larry?

3 A. Yes, I did.

4 MR. KILLIAN: Approach the witness, Your Honor?

5 THE COURT: Yes, sir.

6 **(DEFENDANT'S EXHIBIT NO. 7 WAS MARKED FOR**  
7 **IDENTIFICATION.)**

8 Q. Dr. Fisher, I would ask you if you recognize that  
9 document marked as Defendant's Exhibit 7?

10 A. This looks to be the report, yes, that I sent to  
11 you.

12 Q. What is it?

13 A. This is my psychological evaluation of Mr. Larry.

14 Q. Is that your signature on the last page of that  
15 marked copy?

16 A. Yes.

17 Q. Does it appear to be a true and accurate copy of  
18 your evaluation report?

19 A. I think so.

20 MR. SAUNDERS: May I see that one more time?

21 THE COURT: Sure.

22 Q. Dr. Fisher, I'm going to redact some old IQ scores  
23 in this report, then I'm going to ask you some questions  
24 so please bear with me.

25 (Defense counsel redacts portions of report.)

1 Q. Dr. Fisher, I will tell you I have redacted some IQ  
2 scores out of there.

3 A. Okay.

4 Q. In your evaluation, on the last page under "current  
5 test results," if you would turn to that page.

6 A. Yes.

7 Q. As you mentioned, you stated in your current testing  
8 that he received a full scale IQ of 69 on the Wechsler  
9 Adult Intelligence Scale, Revised, placing him in the  
10 mentally retarded range of intelligence. That's your  
11 conclusion?

12 A. Yes.

13 MR. KILLIAN: Your Honor, we would move to  
14 introduce Defendant's Exhibit 7.

15 MR. SAUNDERS: Judge, there is also a sentence  
16 in that result that would relate back to things that have  
17 been redacted. I have no objection to it being  
18 introduced but at some point I would like that to be  
19 redacted also.

20 MR. KILLIAN: I'll do that.

21 THE COURT: All right, the Court will receive  
22 Defendant's Exhibit 7 upon redaction of the sentence.  
23 Do you wish to go ahead and do that now?

24 MR. KILLIAN: I will.

25 MR. SAUNDERS: It doesn't have to be now. We

1 can do it at lunch.

2 THE COURT: I didn't know if there was one you  
3 wanted me to look at.

4 MR. KILLIAN: Let me go ahead and do that now  
5 before I get off track. May I approach, Your Honor?

6 THE COURT: Yes.

7 **(DEFENDANT'S EXHIBIT NO. 7 WAS RECEIVED INTO EVIDENCE.)**

8 Q. Dr. Fisher, you mentioned in your testimony  
9 something about what's called the SEM, the standard error  
10 of measurement. Is there also, in regards to  
11 intelligence quotient testing, something known as the  
12 practice effect?

13 A. Yes.

14 Q. Explain to the Court what is the practice effect.

15 A. Hopefully, I can talk in common sense. It's just if  
16 you repeat a test with similar questions, some of the  
17 questions the same soon after it, is the chance that on  
18 the second rendition you will receive an elevated score.

19 Q. Why is that?

20 A. Because you have repeated the question. The person  
21 -- if I said "name four presidents," the example I keep  
22 giving to him and then he's trying to get that answer and  
23 then six months later, especially if he's in the prison  
24 environment, he's trying to get information, that  
25 information is something he might query about. He's

1 given the same question or one similar to it, there's a  
2 better chance that he would know it the second go round  
3 than the first go round.

4 MR. SAUNDERS: Objection, Your Honor. That  
5 answer is based on pure speculation that a person may  
6 attempt to query about it.

7 THE COURT: Well, that's based on him asking  
8 somebody else. You don't say you gave the wrong answer  
9 and tell him the right answer?

10 A. Right. I did mess up my answer. I should not have  
11 said that. I'm saying that the practice effect says that  
12 the chances are in the direction of increasing a score  
13 through repetition of either the question or similar  
14 questions. Period.

15 THE COURT: But the questioner doesn't tell him  
16 the first time he's got this right or wrong.

17 THE WITNESS: The questioner does not tell them  
18 the first time that he got it right or wrong. Correct.

19 THE COURT: Sustained. The Court will allow him  
20 to strike the practice effect.

21 Q. Dr. Fisher, on the WAIS-III, I would like to ask you  
22 questions about the WAIS-III and the WAIS-R. Are the  
23 time limitations given for each test the same?

24 A. I think they're similar, yes.

25 Q. The intelligence quotient testing, Dr. Fisher, is

1 there a recognized -- is the practice effect a recognized  
2 phenomena?

3 A. Yes.

4 Q. Without talking about Mr. Larry's case or any  
5 individual case, tell the Court in general terms what it  
6 is.

7 MR. SAUNDERS: Objection.

8 THE COURT: Overruled. I'll let him describe  
9 what the practice effect is.

10 A. Repetition of a test, a test with similar questions,  
11 are likely to result in elevated scores on the subsequent  
12 administrations.

13 Q. Just to clarify this, which test, as far as your  
14 test or Dr. Hazelrigg's test, which was given first?

15 A. The WAIS-R was given in December and January and his  
16 was given in the fall, in October.

17 Q. By "his," you're referring to Dr. Hazelrigg's?

18 A. Yes.

19 Q. Your test was given in December and January?

20 A. Yes.

21 Q. Dr. Fisher, you testified that based on your WAIS-R  
22 test administered to Mr. Larry, that he had a full scale  
23 IQ of 69, is that correct?

24 A. Correct.

25 Q. Now, in terms of intelligence quotient testing, is

1 it possible to confirm an exact score for an individual?

2 A. Again, I hope I've mentioned it here, the American  
3 Association of Mental Retardation and the American  
4 Psychological Association recommend that you give it a  
5 five point latitude in either direction.

6 Q. Would that be called range of confidence?

7 A. Yes.

8 Q. And you said those parameters were three to four  
9 points or five points?

10 A. I think five points.

11 Q. So with regards to your 69, the range of confidence  
12 would be 64 to 74?

13 MR. SAUNDERS: I object, Your Honor.

14 THE COURT: Overruled.

15 A. Yes.

16 Q. Now, Dr. Fisher, I'm going to switch gears here a  
17 bit.

18 MR. KILLIAN: Your Honor, I'm getting ready to  
19 go into questions about a different area or a different  
20 procedure. Do you want to go ahead and proceed or stop  
21 for lunch?

22 THE COURT: This might be an appropriate time,  
23 then, if you want to change channels. We can go ahead  
24 and take the lunch recess. Dr. Fisher, you may step down  
25 at this time and we'll resume your testimony in a few



1 minutes. Anything further from the State or the defense  
2 prior to the lunch recess?

3 COUNSEL: No.

4 THE COURT: Mr. Sheriff, we'll be in recess  
5 until two o'clock.

6 (LUNCHEON RECESS WAS OBSERVED.)

7 (DEFENDANT AND HIS ATTORNEYS IN THE COURTROOM.)

8 THE COURT: You may proceed when you're ready.

9 Q. Let me ask you a few more questions before I change  
10 channels. Did the WAIS-R that you administered to Mr.  
11 Larry, can you tell the Court how that is administered in  
12 terms of directions, questions, how they're asked?

13 A. They're just different -- there are 11 different  
14 sub-tests and you ask questions that are different for  
15 each sub-test and a couple -- there's one sub-test where  
16 you're having them draw a figure underneath figures but  
17 most of them are, you are saying things, again, I use  
18 that example of name four presidents. How are these two  
19 things alike or add these two numbers. That type of  
20 thing.

21 Q. And so you read the directions, too?

22 A. Yes.

23 Q. And as far as the answers, does he write his answers  
24 down on each sub-test or do you write them down?

25 A. I do.

1 Q. Now, during the course of this, when you became  
2 involved in this case, you became aware of and received  
3 some records from Dr. Mark Hazelrigg regarding a forensic  
4 evaluation he had done on Mr. Larry?

5 A. Eventually I received some records from him, yes.

6 Q. Also, did you receive some results from an  
7 intelligence quotient test that was administered by Dr.  
8 Hazelrigg?

9 A. Yes.

10 Q. And do you recall what the full scale IQ or score  
11 that he gave Mr. Larry?

12 A. Seventy-four.

13 Q. Okay. Now, is that score, 74 that is, is that  
14 consistent or inconsistent with your full scale score of  
15 69?

16 A. It seems to me that it is consistent.

17 Q. Why is that?

18 A. Well, again, we have a suggested variation of five  
19 points, you know, plus or minus for any given person  
20 that's given it at any given time, and he's within that.  
21 You could take it from that perspective.

22 He's taken a very similar test again a few  
23 months later so I would expect a few points' gain because  
24 of the practice effect as I discussed. So regardless  
25 from the point of view, it wasn't surprising that it

1 would be a few points difference if he had gotten a 67 or  
2 something. They're within the range of what I might have  
3 expected.

4 Q. Now, after you received those scores and received  
5 some of Dr. Hazelrigg's records, what did you do next as  
6 far as your evaluation of Mr. Larry?

7 A. Well, the information -- I didn't know it had come  
8 from Dr. Hazelrigg but when I found out, he had some  
9 questions about the IQ test that I had administered,  
10 which was the WAIS-R. I proceeded to query every --

11 MR. SAUNDERS: -- Objection. Asked and  
12 answered, Your Honor.

13 THE COURT: Overruled. Go ahead.

14 THE WITNESS: -- query every source where I  
15 could find out information about that. This included the  
16 American Psychological Association, the Psych Corporation  
17 that produces the WAIS-R test -- all experts I could  
18 find, which were many since I've been doing this for a  
19 long time, and the State's witness is an issue of  
20 concern. Larger -- this included both psychologists and  
21 attorneys who work in this area. And further the  
22 agencies where this is a major consideration and they  
23 were a source of literature, such as the Capital  
24 Collateral Center in Florida, same one here in North  
25 Carolina.

1           So I looked everywhere that I could think of to  
2 see whether I was using the wrong test or using a test  
3 for the wrong reasons or any of those things that were  
4 possible as concerns.

5 Q.   And you found no definitive authority either way. Is  
6 that correct?

7 A.   I found no either individual or court opinion or  
8 article which said this test is the be all and end all.  
9 I would find some opinions that said well, you know, the  
10 WAIS-R is better because you can do a qualitative  
11 analysis, the WAIS-III is better because it's more  
12 recent. You would have different opinions about some  
13 other people like Kaufman or other IQ tests. You would  
14 find different opinions regarding the different tests  
15 that were given but I found no conclusion as to which  
16 test was the best.

17           I also found several sources that had looked at  
18 this same broad range. In other words, if there's a  
19 person whose opinion is you should this test or this test  
20 or this combination and had looked at all of them, as I  
21 hopefully have looked at all them, and said the same  
22 thing. There is not a consensus seen, and this came out  
23 through court opinions.

24 Q.   When was the WAIS-III developed? What was the first  
25 year, do you know?

1 A. I'm not positive of the first year. It comes out  
2 and then it has a time for adaptation. It was at the end  
3 of the 1990's but I don't know exactly.

4 Q. But it came out late 1990's?

5 A. Yes.

6 Q. Now, part of making a diagnosis of mental  
7 retardation, this involves some clinical judgement or is  
8 it --

9 A. -- Yes.

10 Q. -- IQ score?

11 A. Well, we have discussed the adaptive functioning  
12 and, clearly, that would include clinical judgement about  
13 those 12 areas.

14 Q. And did you do that in Mr. Larry's case?

15 A. I did.

16 Q. Would you summarize for this Court what your  
17 findings were?

18 A. Yes. I found that he had -- I think the criteria  
19 are difficulties in two or more of the areas. He had  
20 difficulties in many of them. I think if we just go with  
21 some of the basics.

22 Here's a person who repeats first grade,  
23 repeats fourth grade, only goes as far as the sixth grade  
24 and during all that time is getting just Cs, Ds and Fs.  
25 This is a problem of functional academics.

1           You have a person who never has held a job for  
2 more than a couple of weeks. This is work area. You  
3 also have a person who within the job -- again, sort of  
4 in the work area and sort of self care as a lot of the  
5 issues overlap -- is never able to develop beyond any  
6 menial work. His work is all -- the longest he's held a  
7 job is two weeks so it's not really even worth getting  
8 into details but he didn't ever hold a job that requires  
9 abstract or complex thinking.

10           In terms of self care, we heard these  
11 descriptions of the, you know, not able to work, only  
12 changes clothes, only washes, only takes care of those  
13 kind of things if pushed to do it, if instructed to it.

14           Being aware of consequences of his actions --  
15 clearly, he is a person who is not aware of the  
16 consequences of his actions because he continues to get  
17 into trouble for his behaviors, making poor choices,  
18 making wrong choices in terms of things like use of  
19 community resources. Here's a person who was offered at  
20 several points vocational training and the like and never  
21 took that or benefitted from that.

22           So, well, certainly more than two but from a  
23 large number of the overlapping areas of adaptive  
24 functioning, he presented as being much less than  
25 adequate. I mean, we see, if I can summarize it, this is

1 a person who just doesn't make it in school at all and  
2 you really are -- the number that repeat first grade is  
3 small and only go to sixth grade is small. And then he  
4 proceeds to not be able to do any kind of work that  
5 includes any real thinking and the work that he has, to  
6 hold it only for a short amount of time.

7 He proceeds to be a person that can't take care  
8 of himself -- washing, bathing, putting on clothes --  
9 unless they're presented with the structure that makes  
10 them do this. He is described by family members as being  
11 a real loner without friends, who has these interpersonal  
12 skill deficits and who every time he tries to function in  
13 the more complex community -- I say every time in the  
14 sense that he spent a lot of time either in prison or  
15 down at the training school -- he makes it only for a  
16 matter of months or a short amount of time and then he's  
17 back in the more intense structure of prison or jail.

18 And I took all of these together -- I took it  
19 together in the context of my years doing this and said,  
20 yes, indeed, this is a person with significant and  
21 serious limits in their adaptive functions from certainly  
22 more than two of the areas as delineated by AAMR or DSM  
23 IV.

24 Q. What about areas of 15A-2005?

25 A. I think one says 12, one says ten but they're

1 similar.

2 Q. But in substantially the same areas?

3 A. Yes.

4 THE COURT: Defendant's Exhibit No. 3 had a  
5 social history that says that he was employed at Salem  
6 Systems for three months earning \$338 a week. Were you  
7 familiar with that record?

8 THE WITNESS: I don't remember that particular  
9 site but I do remember contradictions and paradoxes. I  
10 don't remember any description of a lengthy employment  
11 but my recollection if I'm asked that, and we heard  
12 earlier today, that the employment never lasted beyond a  
13 few weeks, so I don't recall and I don't think I put in  
14 my report anything lasting, you know, in this case three  
15 months or half a year or a year. I was not aware of one  
16 that lasted that long.

17 Again, although I would put three months still  
18 as marginal as far as sustained employment.

19 THE COURT: You also described -- and, again, I  
20 just happened to see this record right before we came  
21 back in -- that his experience consisted of concrete  
22 finisher, welder and carpenter?

23 THE WITNESS: Well, now, that one comes up  
24 frequently in the prisoners that I evaluate and that is  
25 not consistent with my interview with him. At least it's



1     been my experience I find that when -- it might say  
2     concrete finisher but when you ask them about it, it's  
3     much more "yes, I moved a wheelbarrow." So I don't have  
4     the details here but he never described, either in the  
5     self description or the description from family members  
6     and others, I never was given the description of any  
7     specific work duties that were as complicated as would be  
8     connoted by welding specialist, for example.

9             THE COURT: Can you -- I just want to make sure  
10    I've got this right. You have named as the categories  
11    functional academics --

12            THE WITNESS: -- Self care, definitely.  
13    Interpersonal skills -- he's a person that, at least  
14    through the family descriptions and his own self  
15    description, that is always being a loner. The use of  
16    the community, I think, is the one -- in DSM IV -- I  
17    think he was presented with some opportunities through  
18    vocational training, at least he said he didn't want to  
19    do that at the time it was offered that and one of them  
20    also includes benefitting from experience and he clearly  
21    doesn't. Every time he goes out into the community he  
22    fails within a short amount of time and returns to  
23    prison.

24            THE COURT: Work skills is your other one?

25            THE WITNESS: Work skills I would definitely

1 include. I would include that even with your addition of  
2 three months at a job.

3 THE COURT: Again, I just was curious if you  
4 were familiar with that.

5 THE WITNESS: I don't recall. I may have read  
6 it but I don't recall that.

7 Q. And social skills, Dr. Fisher. The judge may have  
8 asked you this but was that an area you were able to  
9 identify?

10 A. Yes, but I'm shy in that area for this reason. That  
11 that one, neither the AAMR or the DSM IV, never really  
12 delineate exactly what they mean. They do -- it's been  
13 said of him consistently and he's self described as a  
14 loner, a person that doesn't connect with others but I  
15 don't know because I don't know exactly what they mean by  
16 social skills so I can't answer that one definitively.

17 Q. For my clarification, you say functional academics?

18 A. Yes.

19 Q. Self care?

20 A. Yes.

21 Q. Work?

22 A. Yes.

23 Q. Use of community resources?

24 A. Yes.

25 Q. And what about self direction or communication?

1 A. Well, self direction I put in the category of --  
2 communication is another one that I wish they would have  
3 given some more specifics for it. But self direction, to  
4 me, is a person who every time they return to the more  
5 complex community from a prison environment can't  
6 function. That's a person lacking in self direction.  
7 That's my -- the basis for my clinical interpretation of  
8 his failure in that category.

9 THE COURT: So you do or don't --

10 THE WITNESS: -- I do believe that he failed in  
11 that category because he was never able to stay out of  
12 prison. I'm trying to give my rationale for my clinical  
13 opinion.

14 Q. Which category is that? I'm sorry.

15 A. That he's not capable of independent living.

16 Q. What about in the area of home living?

17 A. Well, we talked about that a little bit in that I  
18 think the prosecutor probably pointed out that he did not  
19 ever, you know, complete a checkbook before the age of  
20 13. I asked him about that in my interview with him  
21 generally and he had never, in my understanding from my  
22 clinical interviews and supplemented by the data that  
23 came from his family members, he has never had  
24 independent living skills. In other words, lived in his  
25 own household where he's had to do the checkbook.

1           So in other words your question before was at  
2 the age of 13 but I'm saying no, I talked to him about  
3 his whole time up to the time that I saw him and he said  
4 that no, he had never been in an independent living  
5 arrangement. I think he was in one with a girl for some  
6 time but never one where he was required to keep the  
7 books, do the checks, make the payments and where he  
8 completed this task.

9       Q.   So, again, I apologize. I'm not trying to confuse  
10 you but in the home living area, did you identify a  
11 deficit or not?

12       A.   Yes, and that's the reason why. But, again, these  
13 areas overlap.

14       Q.   What about health and safety?

15       A.   Well, you know, I regard that as overlapping with  
16 self care and it depends on what rubric or what category  
17 you put in. A person who has to be told to change their  
18 clothes or to clean and doesn't wash. Is that health or  
19 is that self care?

20       Q.   Is that a yes or no? Is that a deficit in this  
21 domain?

22       A.   Well, it's a deficit but I put it in the category of  
23 self care but if another clinician put it in the category  
24 of health, I would have no quarrel with that. If someone  
25 said it's not a deficit, I would have a quarrel with it.

1 Q. Finally, how about the area of leisure skills?

2 A. I don't know. I've never done that. It was  
3 described that he and he described to me as a person who  
4 doesn't really have hobbies but I don't know what to do  
5 with that category. I don't think I've ever checked that  
6 one.

7 Q. What about communication. That's the last one.

8 A. Well, that's a very tough one for me because, you  
9 know, I have yet to run into a prisoner, including those  
10 who are retarded, who haven't been able to talk. You say  
11 well they're able to talk to me and communicate with me  
12 so they pass that but I think probably they mean more in  
13 terms of effective communication.

14 I really didn't analyze it in as great detail  
15 because there were so many others where his failure was  
16 so specific and significant.

17 Q. Now, were you here this morning the entire time when  
18 Ms. Carolyn Larry was testifying?

19 A. Yes.

20 Q. And did you hear her testimony?

21 A. Yes.

22 Q. Is part of your opinion based on what she testified  
23 to?

24 A. Yes, it is.

25 Q. Is that the kind of testimony that is important to

1 you in discerning whether a person had a deficit in these  
2 adaptive areas, adaptive skill areas?

3 A. It's important. It's more important when you have a  
4 person that's falling, as he is certainly, sort of in  
5 this fence territory.

6 Q. Is a part of a diagnosis for mental retardation --  
7 is there such or is there a problem with what's called  
8 impulse control?

9 A. I believe that's in the AAMR opinion. That these  
10 are people that have problems.

11 MR. SAUNDERS: Objection.

12 THE COURT: Well, overruled that it exists.

13 Q. Is that something that's present in people who have  
14 mental retardation as part of your experience and  
15 training and education?

16 MR. SAUNDERS: Objection.

17 THE COURT: Overruled.

18 A. Yes.

19 Q. And Mr. Larry, based on your evaluations, his  
20 history and interviews and view of miscellaneous records,  
21 did he seem to have that problem?

22 A. Yes. Impulse control. Yes.

23 Q. What's that? What is impulse control?

24 A. Well, in other words, looking at his difficulty from  
25 learning from experience. This is an overlap category.

1 You would see it with mental retardation. You wd also  
2 see it with antisocial disorder. It's a person who does  
3 not benefit from experience, who is impulsive, who acts  
4 out, who doesn't learn from experience. We've had that  
5 described in much better detail than I could do it this  
6 morning.

7 **(DEFENDANT'S EXHIBIT NO. 8 WAS MARKED FOR**  
8 **IDENTIFICATION.)**

9 Q. Dr. Fisher, I'm handing you what's marked as  
10 Defendant's Exhibit 8 and ask that you look at that a  
11 moment and I'll ask you some questions about that.

12 A. (Witness reviews exhibit.) I'm ready.

13 Q. Does Defendant's Exhibit 8, left hand column, does  
14 that illustrate what you just testified to about what  
15 adaptive deficits you found to be present in Mr. Larry?

16 A. Yes.

17 Q. Except for communications, is that correct?

18 A. Correct.

19 Q. And there are some that are typed and there are some  
20 handwritten in by me. Would you agree that those are  
21 areas that you identified?

22 A. Yes, I would.

23 Q. If you look in the middle column, does that set out  
24 the human what we call adaptive behavior skill areas  
25 taken from the statute?

1 A. To the best of my recollection, yes.

2 Q. And those pretty much track the DSM IV, is that  
3 correct?

4 A. Yes.

5 Q. Can you use that chart, Defendant's Exhibit 8, to  
6 illustrate what you just testified to today to show what  
7 the deficits that you found in Mr. Larry as compared to  
8 what the statutory domains are?

9 A. Yes, that's -- I found the ones in the left hand  
10 column to be the primary deficits that he had.

11 MR. KILLIAN: Your Honor, we would move to  
12 introduce Defendant's Exhibit 8.

13 THE COURT: Any objection?

14 MR. SAUNDERS: No, sir.

15 THE COURT: The Court will receive Defendant's  
16 Exhibit 8 to illustrate his testimony.

17 **(DEFENDANT'S EXHIBIT NO. 8 WAS RECEIVED INTO EVIDENCE.)**

18 Q. Dr. Fisher, based upon your examination of Mr.  
19 Larry, your review of Mr. Larry's prior testing and  
20 school records and his institutional records, that is DOC  
21 records, do you have an opinion based on a reasonable  
22 degree of certainty in the field of psychology and  
23 specifically the area of mental retardation about whether  
24 Mr. Larry has significantly sub-average general  
25 intellectual functioning existing concurrently with major



1 limitations in adaptive functioning, both of which were  
2 manifested before the age of 18 years?

3 A. Yes. I would add I also reviewed his school  
4 records.

5 Q. I think I asked that. What's your opinion?

6 A. That he does.

7 MR. KILLIAN: That's all on direct.

8 THE COURT: Cross?

9 **CROSS EXAMINATION by MR. SAUNDERS**

10 Q. Dr. Fisher, this is Defendant's Exhibit No. 7, which  
11 was your psychological evaluation, is that correct?

12 A. Yes.

13 Q. Is that accurate and complete?

14 A. I think so.

15 Q. Do you want to take a minute or two to look at it to  
16 make sure it's accurate and complete?

17 A. (Witness reviews exhibit.) It seems to be in my  
18 look.

19 Q. There's not a date on there. Do you know when you  
20 came to those conclusions that you have compiled in that  
21 evaluation?

22 A. I do not know. I sent that to Mr. Killian.

23 Q. Would it have been before or after you received Dr.  
24 Hazelrigg's report?

25 A. Before.

1 Q. But it is accurate, is that correct?

2 A. I think so.

3 Q. Well, I just gave you an opportunity to look at it.  
4 Do you need to look at it again? Is it accurate or not?  
5 It's your report.

6 A. Yes, I think it is accurate. If you've got  
7 something that suggests that it's not accurate, then I  
8 would listen to what you have to say.

9 Q. Well, I'm just trying to get your opinion as to  
10 whether or not your --

11 A. -- Yes, I believe it is accurate.

12 Q. -- Your opinion is it is accurate

13 A. I think that it is accurate, yes.

14 Q. Now, did you review any of the testimony of Dr.  
15 Cooper in the defendant's trial in 1995?

16 A. I heard you mention that earlier today. I don't  
17 recall reviewing anything that he said or wrote. That's  
18 my initial -- I did a quick look through my box that has  
19 the file and I don't remember seeing that. I may have  
20 but I don't remember seeing that or seeing either.

21 Q. And Dr. Cooper is a licensed psychologist?

22 A. I don't know.

23 Q. You didn't attempt to contact him or find out  
24 anything about him?

25 A. Correct. I did not.

1 Q. It may have been important to see what his  
2 evaluation was to assist you in your evaluation as well,  
3 would it not?

4 A. Yes, it may have been important.

5 Q. But you chose not to talk to him?

6 A. I don't know I know who it is. I'm sorry. I don't  
7 mean to be -- I don't think I know who it is. I looked  
8 back through my records and I just, I don't -- I didn't  
9 find anything about that.

10 Q. Bottom line is you didn't review his testimony from  
11 the 1995 trial?

12 A. Correct.

13 Q. Did you review the defendant's testimony from the  
14 1995 trial?

15 A. No, I do not think that I did. I don't recall doing  
16 that.

17 Q. Don't you think that may have assisted you in  
18 determining the defendant's communication skills?

19 A. Well, I doubt it because I just -- that  
20 communication one has really been hard for me for all the  
21 defendants. I don't know what is great communication and  
22 what is bad communication. I've just seen too much -- I  
23 don't know. I don't know what the standards are for good  
24 and bad communication.

25 Q. Well, if you don't know what the standard is how can

1     you say he has a marked deficit?

2                 MR. KILLIAN: Objection. I don't think he said  
3     that. I think he said he didn't find that one.

4                 THE COURT: I think you said you didn't use  
5     communication frequently?

6     A. I just -- I don't know. I think my description was,  
7     I hope my description was that I don't know how to say  
8     here's the whole person's scores in communication. This  
9     counts this way or not. I don't know how to do it.

10    Q. Then how do you determine whether or not somebody  
11    has a marked deficit?

12    A. I'm not good at doing that based on the  
13    communication factor.

14    Q. Okay. So we should strike out communication on this  
15    Defendant's No. 8.

16    A. Yes.

17    Q. Okay. These ones that were written in as opposed  
18    to typed in, when did you come to those conclusions?

19    A. I don't think my conclusions have really changed. I  
20    think the way I have described him has been consistent.

21    Q. Didn't you talk with Mr. Killian before you  
22    testified and tell him what the areas were?

23    A. Yes.

24    Q. There's four items on here that are written in and  
25    not typed in, which means they were written in after this

1 exhibit was prepared?

2 A. Okay.

3 Q. And this exhibit certainly would have been prepared  
4 after he talked to you, right?

5 A. I expect so, yes.

6 Q. So what the explanation is for these four written in  
7 you are telling the Court that you don't have an idea why  
8 that is?

9 A. I guess that's my answer. My answer is that what I  
10 explained here in court is exactly the same as the way I  
11 have explained to him each time he's asked me about my  
12 evaluation of Mr. Larry.

13 Q. Dr. Fisher, let me ask you if these four were not  
14 written in after Dr. Hazelrigg's report was received?

15 A. No. My description of him didn't change based on  
16 Hazelrigg's report. I don't think anything changed.

17 Q. Now, I believe you indicated one of your primary  
18 areas that you had a lot of training in was to classify  
19 and evaluate prisoners who scored in the mentally  
20 retarded range?

21 A. Yes.

22 Q. This defendant never did that, did he, while he was  
23 in prison?

24 A. I'm not aware of -- yes, I scored him as mentally  
25 retarded in the prison range.

1 Q. But I mean prior to you scoring him any other test  
2 he had ever taken had never scored him as mentally  
3 retarded, had it?

4 MR. KILLIAN: Objection. What test?

5 A. I'm being nervous about answering this question.

6 Q. Well, you've looked at his DOC records, did you not?

7 A. Yes.

8 Q. And you know that when he went in in 1976 he had a  
9 BETA IQ of 84.

10 A. I don't recall that. BETA is not the reason. It  
11 may have been something I saw but slipped my mind is that  
12 BETA is a screening test.

13 Q. It's a screening test?

14 A. Yes.

15 MR. CAUSEY: Your Honor, I'm going to object.  
16 We're going into tests that haven't been identified as  
17 what they're used for and what they are.

18 THE COURT: Is it part of the record?

19 MR. SAUNDERS: Yes, sir, and he claimed to have  
20 this area of expertise as well.

21 THE COURT: Overruled.

22 Q. In another one of the -- on page six, he had an IQ  
23 of 88?

24 A. Do you know what type test this was, by any chance?

25 Q. I do not. How thoroughly did you look at his prison

1 in prison, and this defendant doesn't fall in that  
2 category, does he? Whether or not they were self  
3 administered, what kind they were, he never scored in the  
4 mentally retarded range while he was in prison, did he?

5 A. No.

6 Q. Now, you gave the WAIS-R, is that right?

7 A. That's correct.

8 Q. You did not give the WAIS-III?

9 A. Correct.

10 Q. Would you tell the Judge once again why you chose  
11 the WAIS-R as opposed to the WAIS-III.

12 A. Yes. In my experience, the WAIS-R is much more  
13 likely, cause many of these prisoners have been in  
14 prison, as this prisoner has, for a number of years, to  
15 have a previous WAIS-R so that you would be able to do a  
16 qualitative and quantitative analysis so you'd be able to  
17 say here's how he answered the questions last time. Did  
18 he have gross differences? You would have more  
19 information and that would allow you to say there's been  
20 neurological damage, the person is lying, or any of the  
21 number of hypotheses that you wouldn't be able to  
22 consider if you gave a test that they had never been  
23 given before.

24 Q. So tell Judge Spivey the previous WAIS-Rs that you  
25 compared your test to.

1 A. He -- well, again, I just know -- I mean I have an  
2 answer to this and I'm nervous about giving it.

3 Q. Well, the WAIS-R -- you said you were able to  
4 compare --

5 A. -- Oh, okay. He did not have a previous WAIS-R.

6 Q. Okay. So there would be no reason for you to give  
7 the WAIS-R if that was your only reason for giving it was  
8 to compare it?

9 A. No, I did not know what all of his record was. I  
10 didn't know if I was going to come upon a WAIS-R. It's  
11 more likely.

12 Q. But you didn't look at his records before you went  
13 and tested him?

14 A. I don't know to what extent I had reviewed his  
15 records before all that.

16 Q. Anyway, you had nothing to compare it to, right?

17 A. Right. He does not have a previous WAIS-R in his  
18 prison record.

19 Q. So you don't know whether or not he was actually  
20 malingering or not?

21 A. I gave my opinion about that.

22 Q. I understand that but that was based on some  
23 questions that you asked him?

24 A. Yes.

25 Q. You didn't give him any test for malingering, did



1     you?

2     A.    No.

3     Q.    And there are tests for malingering, aren't there?

4     A.    There are tests for malingering.

5     Q.    And do you know what some of them are, Dr. Fisher?

6     A.    Well, I know the one Dr. Hazelrigg gave was the Rey  
7     test. There are several others. I can't think of them  
8     off the top of my head.

9     Q.    Now, you gave the Rey test because that was in his  
10    report. You saw that. Tell Judge Spivey some other  
11    malingering tests.

12    A.    I don't know as I've just said.

13    Q.    Would you tell Judge Spivey what specific questions  
14    you asked this defendant to determine whether or not he  
15    was malingering?

16    A.    Well, I think -- no, I can't say what questions were  
17    repeated but I can say the nature of it included these  
18    components. Was the data reliable? Did he give -- one  
19    of the reasons I have two testing sessions is so I could  
20    see was the data from him reliable. Secondary, was that  
21    data consistent with information that I would review from  
22    the reports.

23               For example, if he said I went to the first  
24    grade and records say he went to the sixth grade, that  
25    would be inconsistent. Further, I'm looking for any --

1 Q. -- Well, how did he answer that question?

2 A. He answered truthfully about his schooling.

3 Q. Which was what?

4 A. He had been to the sixth grade. He had repeated the  
5 first and the fourth grade.

6 Q. And in the Department of Corrections, you notice  
7 that he told them on one occasion he went to the eighth  
8 grade?

9 A. I do remember that, yes.

10 Q. And on another occasion he told them he went to the  
11 eleventh grade?

12 A. I forgot that one but I do remember the eighth  
13 grade, yes.

14 Q. So you asked him what school he went to or what  
15 grade he completed?

16 A. As I've said before, once, I don't remember exactly  
17 what questions I repeated. I do this for each inmate.  
18 You repeat questions and you also compare the repeat  
19 questions with data from outside sources. So you have  
20 what school did you attend or whatever the question might  
21 be repeated both to them and then from outside data  
22 sources. So that's an issue of reliability and I was  
23 going to continue, if I may, that you also have things  
24 such as presenting paradoxical symptoms. This is a  
25 person who says they wait all day long, they're jumping

1 off the walls and then prison personnel, who I always  
2 talk to when I go there, say, oh, they sleep all day. So  
3 there is information there that is inconsistent.

4 Clinical judgement. I've been doing this almost 30  
5 years. You have a sense -- is this person someone who's  
6 trying to con me, is this a person who's trying to  
7 malingering. You have a sense of that. Are we presenting  
8 with rare symptoms? Is this a person who's coming in, in  
9 this case, would be exaggerating retardation or  
10 schizophrenia or something and presenting symptoms  
11 because I am aware of the symptoms that follow in a  
12 particular diagnosis. A person who is malingering or  
13 pretending to present that most often is not so you do an  
14 assessment of that.

15 Put all this together, and it's something you  
16 do all the time, you give a fair assessment, one you can  
17 speak to a court of how you assess malingering potential.

18 Q. So even though there are tests to give, you didn't  
19 give any?

20 A. I specifically didn't give them because I don't  
21 think they are as -- I have found as a clinician that  
22 this is the best way for me to both assess malingering  
23 and present it to the Court. That's what I think is most  
24 effective.

25 Q. Even though you're sitting here telling the trier of

1 fact, Judge Spivey in this case, that you asked specific  
2 questions to determine whether or not he was malingering,  
3 you can't tell the Judge any specific questions that you  
4 asked?

5 A. I think I did one but, I mean, I'm not even quite  
6 sure how the Court needs that question is. I used the  
7 one of the sixth grade but what if it had been what job  
8 did you work. I'm not quite sure if it's, well ---

9 Q. Okay. And you reviewed his school records?

10 A. I did.

11 Q. Well, you remember Ms. Nixon testifying, Dr. Fisher?

12 A. I do. Yes, I was here.

13 Q. And she said he just tended to give up very easily?

14 A. Yes, she did.

15 Q. And that he gave up fairly easily on difficult  
16 tasks?

17 A. Yes.

18 Q. And you heard his sister testify?

19 A. Yes, I did.

20 Q. And she said if he didn't really want to do  
21 anything, you could forget it?

22 A. She did.

23 Q. Now, can you tell Judge Spivey how the WAIS-R is  
24 different from the WAIS-III?

25 A. I can't tell all of the particulars. The WAIS-III

1 is the newer version. It's revised to include a newer  
2 set of questions. Some are the same, some are different  
3 and though some of the differences include that it has a  
4 greater number of questions for the category that is  
5 retarded so that the category that falls 70 and below has  
6 a greater number of questions assessing it so the intent  
7 there was to gather a greater continuum for more  
8 information about those who score retarded rather than a  
9 small amount of information.

10 Further, it has, I believe it has an intent to  
11 compensate for increases that one would expect in  
12 intelligence over time. Those are two of the things that  
13 come to mind.

14 Q. So the bottom line is it would be a better test for  
15 mental retardation than a WAIS-R?

16 A. No, I don't think so. In this case with this  
17 prisoner, you know, I told you why I gave my test and I  
18 think it was the right thing to do. I mean, you know, I  
19 wish a colleague would have asked me if they had concern  
20 but that never happened.

21 Q. You say for this prisoner? You only gave this  
22 prisoner the WAIS-R or you give all prisoners?

23 A. No. All prisoners. I give most everyone -- most  
24 all of them have had WAIS-Rs in their history.

25 Q. I noticed that Mr. Killian had you bring DSM-IV.

1 A. I don't have it.

2 Q. He asked you to compare the DSM-IV to the 15A-2005?

3 A. Yes.

4 Q. He didn't ask you about DSM-III, did he?

5 A. He did not.

6 Q. He asked you about DSM-IV because that's the newer,  
7 updated version, isn't that right?

8 A. Well, yes, the DSM-IV TR.

9 Q. A newer, updated version?

10 A. Correct.

11 Q. Again, the WAIS-III, Dr. Fisher, you have to go back  
12 for kind of more testing yourself, don't you?

13 A. You can. You can get their videotape, which I've  
14 watched, or you can go to a workshop, yes.

15 Q. And you've done neither of that?

16 A. The videotape I have watched, yes.

17 Q. But yet you don't choose to give that test?

18 A. No, I -- for prisoners, I really think that -- I am  
19 getting my best data I can find, something to compare it  
20 to. It's just that the malingering issue comes up so  
21 often.

22 Q. And you had nothing to compare it to in this case?

23 A. I did not.

24 Q. They asked you about his adaptive behavior and the  
25 deficits therein.

1 A. Yes, they did.

2 Q. Did you give him any test for that?

3 A. I did not.

4 Q. And there are some tests --

5 A. -- Well, I gave -- actually, I tried. I think under  
6 examination earlier I gave part of the adaptive behaviors  
7 scale but the questions aren't geared towards prisoners,  
8 and he's, if anything, he is a prisoner.

9 Q. Which brings me back to your psychological  
10 evaluation and report, Dr. Fisher. You said in your test  
11 administers and materials reviewed, you said the WAIS-R  
12 was administered to this client on both of these sessions  
13 in December and January?

14 A. Yes.

15 Q. In addition, prison staff were interviewed regarding  
16 his behavior there?

17 A. Correct.

18 Q. In addition, ABAS, Adaptive Behavior Assessment  
19 System, was given --

20 A. -- Right.

21 Q. -- to evaluate his adaptive behaviors before the age  
22 of 18 and when not incarcerated?

23 A. Right.

24 Q. Well, which is it? Did you give it or didn't give  
25 it?

1 A. Well, I gave it but I had to put too many N/As. It  
2 would say -- the question's geared mainly towards how  
3 they fill out a checkbook and things that I kept coming  
4 up with N/As, not applicables. He's in prison.

5 Q. But you didn't file this report until after you had  
6 interviewed this defendant, correct?

7 A. Correct.

8 Q. And this is pretty clear that you're stating you  
9 gave the test?

10 A. Correct.

11 Q. And that's not accurate, is it?

12 A. I think it is accurate.

13 Q. Okay, then can we see your results?

14 A. No, I didn't finish giving the test because I didn't  
15 think it provided enough data to score.

16 Q. Okay. So your report that you said a minute ago was  
17 accurate is not accurate, is it?

18 A. I don't know -- I do know the answer to that I think  
19 is a fair response to your question.

20 Q. Did you interview Carolyn Larry?

21 A. I did not.

22 Q. Did you interview his mother?

23 A. I did not.

24 Q. Who were some of the teachers that you --

25 A. -- I did not. I only reviewed the records they gave



1 me.

2 Q. I thought you indicated that you had interviewed  
3 teachers?

4 A. I don't remember.

5 MR. KILLIAN: I don't think he said that, Your  
6 Honor.

7 THE COURT: Overruled.

8 Q. If you didn't, I apologize. I had it written down  
9 under whether or not --

10 A. -- Well, maybe I did say that but --

11 Q. -- you could make a determination of whether he was  
12 telling the truth about some things.

13 A. I'm sorry. I don't recall interviewing a teacher or  
14 a sister or a mother.

15 Q. So you didn't give the behavioral skills test to any  
16 of his friends or relatives or teachers who would know --

17 A. -- No. That would have been a better approach but I  
18 didn't do it.

19 Q. You chose not to do that?

20 A. I didn't do that.

21 Q. Now, you didn't give the Milan test either?

22 A. No, I just gave the test -- I gave the WAIS-R that I  
23 have described to you.

24 Q. Do you know what the Milan test is, Dr. Fisher?

25 A. No, I don't.

1 Q. You don't know if that's an adaptive skills test?

2 A. Milan? No, I don't. I don't know the Milan test.

3 Q. Now, you talked about for his functional academics,  
4 you talked him about him repeating the first and fourth  
5 grade?

6 A. Yes. I believe that's from the records review.

7 Q. And, of course, you heard his sister say he came  
8 home a lot at recess?

9 A. Yes, I did.

10 Q. And, you know, not attending school would be one of  
11 the reasons why he didn't do good in school?

12 A. Yes.

13 Q. And do you remember his first grade school teacher,  
14 what she had to say about him?

15 A. No.

16 Q. Her name is Eleanor Morris. And this is the one he  
17 repeated, right?

18 A. Correct.

19 Q. It's got a section for personal and social  
20 adjustment. See that?

21 a. Yes.

22 Q. And under "listens well," what does she have marked  
23 there for all four quarters?

24 A. What is that, an X? I'm sorry.

25 Q. Well, it certainly looks like an X compared -- that

1 looks like a check mark and you can certainly tell the  
2 difference between the two?

3 A. Yes.

4 Q. And that looks like an X, doesn't it?

5 A. Yes.

6 Q. And X means pupil needs improvement?

7 A. Yes.

8 Q. So for "listens well," she's got "needs improvement  
9 every quarter."

10 A. Yes.

11 Q. Also, "follow directions" she's got an X?

12 A. Yes.

13 Q. Which means needs improvement?

14 A. Correct.

15 Q. And that could have been one reason why he didn't do  
16 very well in first grade?

17 A. Yes.

18 Q. And there's another check mark down here. What does  
19 that apply to?

20 A. "Works and plays well with others."

21 Q. She doesn't think he had a problem getting along  
22 with other individuals, did she?

23 A. No.

24 Q. And she was somebody spending eight hours a day with  
25 him for 180 days out of the year?

1 A. Yes.

2 Q. And every teacher that he had while he was in school  
3 indicated that his conduct was satisfactory?

4 A. I just can't give a fair answer to that one. I  
5 don't recall.

6 Q. You want to go back through them?

7 A. Well, I just, you know, otherwise I'd be giving you  
8 an answer that I just don't recall each one.

9 Q. Well, this is in grade two. Here's his conduct.  
10 S's all the way across. That stands for satisfactory?

11 A. Yes.

12 Q. Which means that apparently he didn't act up in  
13 class, didn't have problems getting along with other  
14 folks?

15 A. They marked that as satisfactory.

16 Q. In fourth grade, first quarter he had an N, which  
17 means needs improvement?

18 A. Yes.

19 Q. The rest of the time he had S's?

20 A. Yes.

21 Q. Which means he got along -- apparently after she  
22 straightened him out he got along with folks?

23 A. I believe that means he's satisfactory in those  
24 areas, yes.

25 Q. So he didn't have any problems while he was in

1 school that year getting along with folks and adapting  
2 and, you know, some of his socialization process. That  
3 wasn't a problem?

4 A. I don't know. To me, that seems like a jump. He got  
5 satisfactory in those areas that were marked.

6 Q. Well, you said that you relied on these for  
7 functional academics?

8 A. I did. Yes.

9 Q. Well, if not going to school would explain why he  
10 didn't do well in school because apparently he got along  
11 well with the teachers and he got along with the  
12 students. It wouldn't have been some other reason.

13 A. Yes, not going to school explains why he was not  
14 doing well in school.

15 Q. And when he repeated the fourth grade he'd already  
16 started his drug use, had he not?

17 A. Yes.

18 Q. And that may explain why he wouldn't do well in  
19 school?

20 A. It's possible.

21 Q. And he only went to the sixth grade. At the time he  
22 was in the sixth grade, he was 14 years of age?

23 A. He may have even been older than that.

24 Q. And then he started getting in trouble?

25 A. He went to Fountain the next year, yes.

1 Q. And that was in 1970, right?

2 A. I believe that's -- '70 or '71, yes.

3 Q. Spent a year down there, then had an opportunity to  
4 send him to vocational school but he didn't want to go,  
5 did he?

6 A. Right.

7 Q. Because that would be hard. He didn't want to do  
8 anything that was hard?

9 MR. CAUSEY: Objection.

10 THE COURT: Sustained.

11 MR. SAUNDERS: Then in '72 is when he started  
12 getting in trouble and going to prison?

13 A. Yes.

14 Q. And one of the reasons that he never held a job is  
15 because he was in prison most of the time?

16 A. Correct.

17 Q. And he had troubles with self care and didn't want  
18 to change clothes and didn't want to wash?

19 A. Yes.

20 Q. But, I mean, he would do it if they stayed on him?

21 A. Yes.

22 Q. But he could do it. It wasn't that he didn't know  
23 how. He could do it. He just chose not to?

24 A. Correct. He could do it.

25 MR. KILLIAN: Objection to whether he chose or

1 not.

2 THE COURT: Overruled.

3 Q. You don't have any notation that he didn't want to  
4 do it, that he didn't choose to do it. You just said you  
5 found an indication he didn't want to do it?

6 A. I think my answer -- I said he could do it, yes.

7 Q. So the fact that he chose to is different than not  
8 being able to?

9 A. Yeah, chose not to.

10 Q. And that was like almost all his choices in life,  
11 Dr. Fisher. He chose the path that he went rather than  
12 not being able to work?

13 MR. CAUSEY: Objection. That's not a question.

14 THE COURT: Sustained as to the form.

15 MR. SAUNDERS: Now, you said he was incapable of  
16 self direction. You said he was incapable of independent  
17 living?

18 A. Yes. My interpretation of the record led me to  
19 believe that he did not have any extended time of  
20 independent living, where he's, you know, filling out the  
21 checkbook. Independent living.

22 Q. Did you talk to you about his wives?

23 A. I did not. I believe they were -- well, I think  
24 they were common law. I'm not sure.

25 Q. He got married twice in the Department of

1 Corrections?

2 A. Yes.

3 Q. Did you talk --

4 A. -- I did not talk to --

5 Q. You didn't talk to either one of his wives --

6 A. -- No.

7 Q. -- to see how he was doing as an adult?

8 A. No, I did not.

9 Q. I mean, you know how he did as a child. He was --  
10 if he didn't want to do something, he just didn't do it?

11 A. I did not talk to either of them.

12 Q. I think you also indicated that this self direction  
13 was because he didn't understand consequences and only  
14 chose to repeat a crime as opposed to continue to work?

15 A. That's fair.

16 Q. So is it your opinion that everybody who commits  
17 another crime and goes to jail is mentally retarded?

18 A. No.

19 Q. And this leisure skills category, he did real well  
20 as a child in the things that he liked to do in school,  
21 is that correct?

22 A. Again, it could be. I'm not recalling but I didn't  
23 check the leisure category anyway.

24 Q. Wasn't that one of the areas you were asked to opine  
25 about, Dr. Fisher?



1 A. Yes.

2 Q. You chose not to check it?

3 A. Right. I didn't consider him as having a functional  
4 deficit in that area. That's what I meant to say.

5 Q. In social skills, now that you have -- would you  
6 want to take an opportunity to review the school records  
7 again to determine whether or not he got along in school?

8 A. No.

9 Q. You wouldn't want to review?

10 A. No.

11 Q. Did you talk to him about how he got along with  
12 inmates in prison?

13 A. Yes.

14 Q. He got along with them okay, didn't he?

15 A. Yes, he generally did, yes. He wasn't a  
16 disciplinary problem.

17 Q. And he had some self direction while he was in the  
18 Department of Corrections, didn't he?

19 A. I tend to think that of what's offered in prisons is  
20 more direction.

21 Q. Well, but when you don't have to work your way up to  
22 get to honor grade. I mean, you have to have some  
23 direction to do that?

24 A. Yes, but I do not recall in his description of  
25 either of his time at Fountain or his time in his first

1 incarceration of any dramatic passage through the  
2 classifications and custodies. I don't think he maxed  
3 out but he didn't ---

4 Q. In 1982 in Davie County U.C.C. met with Michael  
5 Thomas Larry on this date for honor grade consideration?

6 A. Yes. Well, most prisoners make their way to honor  
7 grade at one point or another.

8 Q. Somebody that was mentally retarded, it would be  
9 much more difficult for them to do that, especially if  
10 they didn't have any self direction, right?

11 A. No.

12 Q. It wouldn't?

13 A. I don't think so.

14 Q. All right. At one point he was considered to be a  
15 leader in one unit he was at. You remember that?

16 A. That doesn't surprise me. I don't remember that  
17 particular segment but it doesn't surprise me.

18 Q. And any time they would talk to him about his crimes  
19 he would always make excuses for them?

20 A. I don't know the answer to that.

21 Q. They indicated in '87 that he may have some  
22 educational deficit but he could -- he would have the  
23 potential to obtain his GED?

24 A. Okay.

25 Q. That means he had the ability?

1 A. That means someone had that opinion and there are  
2 people who are mentally retarded I do believe that have  
3 obtained a GED. But yes, somebody did say that.

4 Q. And you knew that from reading these documents?

5 A. Yes, I reviewed those documents.

6 Q. In 1995 he was diagnosed as an antisocial  
7 personality disorder?

8 A. Correct.

9 Q. And everything that you have said he had a marked  
10 deficit in could be just as easily been the result of  
11 being antisocial personality?

12 A. That's a good question. I think the answer to that  
13 is yes.

14 Q. And you said the total time you spent with the  
15 defendant was two to three hours?

16 A. Yes.

17 Q. That's December and January?

18 A. Yes.

19 Q. And when you were trying to justify through other  
20 folks about giving the WAIS-R, how many different people  
21 would you say you talked with?

22 A. How many people I talked to about that? I would say  
23 30.

24 Q. You spent probably more time on that than you did on  
25 this defendant then, didn't you?

1 A. A lot more time, yes.

2 MR. SAUNDERS: That's all.

3 THE COURT: I'm just curious about one point you  
4 brought up on cross examination. Apparently Dr. Hoover  
5 did some examination of the defendant -- don't know what  
6 it was -- but you didn't -- you didn't know about it?

7 THE WITNESS: I don't recall having seen  
8 anything. The name's not even ringing a bell. I don't  
9 recall an affidavit. If they say oh, yes, you absolutely  
10 saw, I will have my foot in my mouth but I don't recall  
11 having seen anything, either testimony or report, of a  
12 Dr. Hoover in this case.

13 THE COURT: Further redirect?

14 **REDIRECT EXAMINATION by MR. KILLIAN**

15 Q. Dr. Fisher, is an IQ -- is a full scale IQ of 69 or  
16 70, is that classified as "mildly mentally retarded?"

17 A. Yes, I believe so. Mentally retarded.

18 Q. What is the BETA screening test?

19 A. It's a screening IQ test developed, I believe, in  
20 World War II for, you know, as sort of a gross screening  
21 out of ones that may be too slow to be enlisted or  
22 perhaps to work in certain parts of the Army.

23 It was used years back when I started in the  
24 '70s in prisons for a screening IQ, where you would then  
25 do individual tests.

1 Q. So is the BETA very similar to the WAIS-R or WAIS-  
2 III or WAIS?

3 A. I think most clinicians would agree that there's no  
4 connection. I think it's just figures, as I recall.

5 Q. In fact, it doesn't even have the same components,  
6 does it?

7 A. No. They are very separate.

8 Q. More a performance component?

9 A. Right. Well, I think it's a performance-geared.

10 Q. It has no verbal component?

11 A. No.

12 Q. In fact, it's not even a scientifically recognized  
13 test in the psychological community, is it?

14 A. Well, certainly not for IQ determination but it  
15 could be for screening purposes.

16 Q. Is there a scientifically recognized formal test for  
17 malingering, Dr. Fisher?

18 A. I'm not aware of any agreement between professionals  
19 that one particular malingering test is the cat's meow.  
20 I know the Rogers book that I cited gives several  
21 different approaches and tests and combinations of  
22 interview styles and the like and that's what I use but I  
23 know there are other clinicians that might pick one or  
24 another specific test for malingering.

25 Q. Something that was brought out on cross about the

1 use of the WAIS-R versus the WAIS-III, it may go back to  
2 my direct question. Did I hear you say during your  
3 direct examination the WAIS-III tipped the scores higher  
4 than the WAIS-R?

5 A. This is my understanding. That the WAIS-III has a  
6 larger number of questions developed to give a greater  
7 scrutiny, to understand better those scoring in the  
8 retarded range. So there's more questions geared towards  
9 that group and that therefore one might expect an  
10 elevation of a score in that category, meaning that low  
11 category.

12 There is a second issue, which is the date.  
13 You expect IQ to increase over time and if you were  
14 further from the date of standardization, you would  
15 expect the IQ increase to be greater therefore you would  
16 subtract a number of points so that in that case since  
17 the WAIS-R is further from its point of origins you would  
18 have to expect that score to be somewhat lower and less  
19 so for the WAIS-III.

20 Q. Now, is the WAIS-III, are some of these questions  
21 easier questions?

22 A. Well, again, I'm just aware the research that looked  
23 at that lower group, that it has more questions and, I  
24 believe, easier questions. Dr. Hazelrigg may well know  
25 more about that.

1 Q. Mr. Saunders asked you about the defendant's school  
2 grades. I'm going to ask you a couple of follow up  
3 questions. Looking at the defendant's grades for first  
4 grade, of course, he's failed, is that correct?

5 A. Yes.

6 Q. Now, the teacher, Ms. Moore, made notation of days  
7 attending and days absent, didn't she?

8 A. Yes.

9 Q. According to her records, he only missed seven days  
10 the whole school year, is that right?

11 A. On that record, yes.

12 Q. And he seems to have flunked first grade?

13 A. Yes.

14 MR. SAUNDERS: I'm sorry. Where are you  
15 reading?

16 MR. KILLIAN: First grade attendance records.

17 Q. All right. Then the second year he repeated first  
18 grade. What kind of grades does he get, according to the  
19 records?

20 A. He was consistent with Ds.

21 Q. In the second grade -- I'm sorry, when he repeated  
22 the first grade, he had perfect attendance according to  
23 Ms. Moore's records, didn't he?

24 A. Yes.

25 Q. But he got all Ds, according to her records?

1 A. Yes.

2 Q. Second grade, Mrs. Mildred M. Macon, if I can make  
3 that out right, his grades were either Cs or Ds, correct?

4 A. Yes.

5 MR. SAUNDERS: Judge, I am going to object.  
6 They're in evidence. I think the Court can certainly  
7 look at them.

8 THE COURT: Overruled. Go ahead.

9 Q. And in that grade he only missed one day of school?

10 A. Correct.

11 Q. Third grade he had perfect attendance according to  
12 the teacher's records, Ms. Lawrence, didn't he?

13 A. Yes.

14 Q. And he made Ds and Cs, is that right?

15 A. Right.

16 Q. In fourth grade he, of course, according to these  
17 records he flunked. Flunked fourth grade, is that  
18 accurate?

19 A. Yes.

20 Q. He missed three days that year, did he not?

21 A. Yes.

22 Q. Fourth he repeated. He had perfect attendance  
23 according to Mrs. Richardson's notes, records?

24 A. Yes.

25 Q. And made almost all Ds, didn't he?



1 A. Yes.

2 Q. And finally fifth grade. It looks like according to  
3 the records from Ms. Howell, he missed three days?

4 A. Right.

5 Q. According to her final grades, he made five Ds and  
6 two Cs?

7 A. Correct.

8 Q. You mentioned awhile ago about the date, the older  
9 the test is you have to give the IQ gain. Is that what's  
10 called the Flynn effect?

11 A. Well, I just reviewed these articles and I believe  
12 so but I may be off on that. I just went back over Flynn  
13 and I do believe this refers to the increase of IQ  
14 expected over time and how test scores further from the  
15 date that they were standardized would be expected to be  
16 inflated. You would subtract from that number.

17 Q. Were you ever contacted by Dr. Mark Hazelrigg who  
18 questioned your test scores? Did he ever call you  
19 directly?

20 A. Disappointingly, no. I was never -- I've never met  
21 the man.

22 Q. And you sent all your records to him, didn't you?

23 A. I sent the records to him. I sent a letter to you  
24 saying it was my understanding of psychology that we  
25 should talk to each other when we had differences but I

1 didn't want to violate any legal principles through doing  
2 stuff wrong. I didn't -- the whole thing to this day  
3 makes no sense to me.

4 Q. Dr. Fisher, one more question. Is there anything  
5 that you've been asked to testify on direct or cross or  
6 redirect today that would change your opinion that you  
7 gave earlier?

8 A. No.

9 MR. KILLIAN: That's all.

10 THE COURT: Recross?

11 **RECROSS EXAMINATION by MR. SAUNDERS**

12 Q. Did you contact Dr. Hazelrigg?

13 THE COURT: Wait a minute. Let me ask. You  
14 said there was a malingering test called the cat's meow?  
15 Is that what you said?

16 THE WITNESS: No. There may be but I'm not  
17 aware of it but there's one called the Rey, R-e-y, and  
18 that's the only one that I'm aware of at the moment.  
19 There was a summary of it done by a writer named Rogers  
20 on tests for malingering. I've forgotten the exact title  
21 of the book but not one called cat's meow. If I said it,  
22 I was ---

23 MR. KILLIAN: I think he said there was no test  
24 that is known as the cat's meow.

25 THE WITNESS: Oh, that's what I said.

1 THE COURT: You just indicated you were  
2 disappointed you were not contacted by I assume the  
3 State's witness. Wouldn't you have found it important to  
4 find out about whatever it is Dr. Hazelrigg may or may  
5 not have done during his interviews?

6 THE WITNESS: Yes. I don't know anything about  
7 the doctor.

8 THE COURT: Go ahead.

9 Q. (Mr. Saunders) Did you ever try to contact Dr.  
10 Hazelrigg?

11 A. Yes, I did.

12 Q. You did? And what was that conversation about?

13 A. I was afraid to call him directly so I sent a letter  
14 to the attorneys saying I contacted ABA, went through the  
15 ethical principles and everything else and it was my  
16 understanding that as colleagues we should just talk to  
17 each other so I sent a letter to that effect to the  
18 attorneys, saying this is my understanding of it but I  
19 don't want to violate anything about how it goes up  
20 through attorneys and across. That was where it ended.

21 Q. Maybe Dr. Hazelrigg sent me the same letter.

22 A. That's possible, yes.

23 Q. Then why would that disappoint you?

24 A. Because I never -- I just received this accusation  
25 out of nowhere. I didn't know it was from him. I wasn't

1 allowed to --

2 Q. -- What accusation is that, Dr. Fisher?

3 A. I received a legal document saying that the testing  
4 that I had given was outdated.

5 Q. And it is. The WAIS-III -- the norms were  
6 established in '94 and then it was published in '96 so  
7 the test you gave was outdated?

8 MR. KILLIAN: Objection.

9 THE COURT: Was that a question or a statement?

10 MR. SAUNDERS: It's a question. The test you  
11 gave was outdated, wasn't it?

12 A. No. I believe that my extensive research since then  
13 has led me to query everyone I could find about this and  
14 they say yes, the WAIS-R is valid and the reasons I am  
15 giving it are also valid.

16 Q. But that doesn't make it not outdated?

17 A. Well, it makes it not the newest version but when I  
18 called the Psych Corporation, they said we don't sell a  
19 test if it's not valid.

20 Q. And that's because there are a lot of psychologists  
21 who don't want to get the extra training required to give  
22 the WAIS-III?

23 A. No, I don't think that's true. It's not a big deal.

24 Q. You don't know if the school system had a policy  
25 where if a student took attendance in the morning and

1 they took attendance and then if they left at recess  
2 whether or not they went back and scratched it out, do  
3 you?

4 A. No.

5 Q. He always scored satisfactory in art, music, P.E.,  
6 and conduct. Stuff he wanted to do, he scored well on  
7 it, didn't he?

8 A. He scored well in those areas.

9 MR. SAUNDERS: That's all I have, Your Honor.

10 THE COURT: Do you seek to release the witness?

11 MR. KILLIAN: I'm going to keep him for  
12 rebuttal.

13 THE COURT: You may step down. Next witness for  
14 the defense.

15 MR. CAUSEY: Judge, this would be the witnesses  
16 we have for purposes of the motion and we would just out  
17 of caution move to introduce all of our exhibits but the  
18 first one. The fifth and sixth, I believe, Your Honor.  
19 I've lost track. Just to make sure.

20 THE COURT: So you don't want to do the 1972  
21 test?

22 MR. CAUSEY: Right. We had a stipulation that  
23 that was not coming in so we are not introducing that.  
24 The test or the documents.

25 THE COURT: Five and six you want to introduce?

1 The DSM and AAMR definitions. Do you have any objection?

2 MR. SAUNDERS: No.

3 THE COURT: The Court will receive five and six  
4 and what about eight, areas to be identified as adaptive  
5 behaviors, I believe was received. Anything further from  
6 the defense?

7 **(DEFENDANT EXHIBIT NOS. 5 AND 6 WERE RECEIVED INTO**  
8 **EVIDENCE.)**

9 MR. CAUSEY: I don't have anything further.

10 MR. KILLIAN: Nothing else, Your Honor.

11 THE COURT: Evidence from the State?

12 MR. SAUNDERS: Judge, at this time I would just  
13 move to dismiss. I'm not even sure the defendant has  
14 made a prima facie case of mental retardation. We have  
15 two scores. One was 69 and one was 74. Dr. Fisher did  
16 testify that Dr. Hazelrigg's score was 74 so that's  
17 clearly above the range. You don't have two scores that  
18 are below 70. You only have one that's sits fairly below  
19 70 and one that's four points higher than 70.

20 The adaptive functioning, Dr. Fisher testified,  
21 those could just as easily be explained by antisocial  
22 personality disorder, which this defendant has already  
23 been diagnosed as.

24 So I would contend, you know, that even in the  
25 light most favorable to the defendant they have not even

1 made out a claim for mental retardation for the State to  
2 offer any evidence at all.

3 THE COURT: Response?

4 MR. KILLIAN: The statute, as the Court is  
5 aware, says 70 or below intelligence quotients. We've  
6 got that, that first prong. Dr. Fisher testified, an  
7 expert in mental retardation for 30 years, that in his  
8 opinion that both that and his adaptive limitations in  
9 the adaptive skill areas were present in the defendant  
10 before the age of 18.

11 Additionally, we had lay testimony, the school  
12 records, which speak for themselves as to his functional  
13 academics, and also in some part to following directions  
14 and the testimony of his sister. I think we have made  
15 out a prima facie case in the light most favorable to the  
16 defendant and ask the Court to deny that motion.

17 THE COURT: The Court, looking at all the  
18 presentation in the light most favorable to the  
19 defendant, will deny the motion at this time. Evidence  
20 for the State?

21 MR. SAUNDERS: Judge, would you want to take the  
22 afternoon recess?

23 THE COURT: Yes, sir. All right. We'll recess  
24 for about 15 minutes.

25 (RECESS WAS OBSERVED.)

1 (DEFENDANT AND HIS ATTORNEYS IN THE COURTROOM.)

2 THE COURT: The State ready to proceed?

3 MR. SAUNDERS: We are, Your Honor.

4 THE COURT: You may call your first witness.

5 MR. SAUNDERS: Call Dr. Mark Hazelrigg.

6 **MARK HAZELRIGG, being duly sworn, testified as follows**  
7 **during:**

8 **DIRECT EXAMINATION by MR. SAUNDERS**

9 Q. State your name and occupation for Judge Spivey,  
10 please.

11 A. Mark Hazelrigg and I'm a clinical psychologist and a  
12 forensic psychologist.

13 Q. Where are you presently employed?

14 A. I have a private practice. This today is part of my  
15 private practice and I also work at Dorothea Dix  
16 Hospital, where I am the director of the forensics  
17 treatment program.

18 Q. And how long have you been employed at Dorothea Dix?

19 A. Since 1998.

20 Q. What is your educational level, Dr. Hazelrigg?

21 A. I have a Ph.D. in clinical psychology from the  
22 University of Missouri in Columbia. That was in 1988.  
23 And I have board certification in forensic psychology  
24 from 1995.

25 Q. Speak up a little bit. What are some of your duties



1 at Dorothea Dix?

2 A. At Dorothea Dix, I am the director of the forensic  
3 treatment program, which is the program for people who  
4 were found to be not guilty by reason of insanity and for  
5 a number of people who have been found to be incapable to  
6 proceed. We have 89 beds at this time and I am primarily  
7 in an administrative role, coordinating the treatment  
8 programs, directing the treatment teams.

9 I am clinically involved with assessment of  
10 risk in relation to people requesting release from the  
11 program to the community and I am involved in assessing  
12 competency to stand trial and occasionally an NGRI  
13 defense.

14 Q. After you got your degree in clinically psychology  
15 where did you go, Dr. Hazelrigg?

16 A. I first was working at Fulton State Hospital, which  
17 is another state hospital in Missouri. I actually  
18 started there prior to completing my degree and I was  
19 working in both the geriatric center and in the forensic  
20 center, doing forensic evaluations.

21 Q. And how long were you there?

22 A. I was there from 1987 through 1990.

23 Q. In 1990, where did you go?

24 A. In 1990, I moved to North Carolina and was working  
25 at the federal correctional institution in Butner doing,

1 again, forensic evaluations now in the federal system for  
2 people charged with federal crimes and these were  
3 assessments of competency to proceed and mental state at  
4 the time of the offense primarily.

5 Q. How long were you there?

6 A. I was there from 1990 to 1998, when I went to my  
7 current position at Dorothea Dix.

8 Q. And when did you set up your private practice?

9 A. I've had a small private practice all along, ever  
10 since I was licensed independently in 1988.

11 Q. And have you been certified by the courts of this  
12 state as an expert in the field of clinical psychology?

13 A. Yes.

14 MR. SAUNDERS: Your Honor, the State would  
15 tender him to the Court as an expert in the field.

16 THE COURT: Questions of the witness?

17 MR. CAUSEY: Yes, if I could briefly. You're  
18 tendering him -- I couldn't hear the field -- general?

19 MR. SAUNDERS: In forensic psychology.

20 MR. CAUSEY: General forensic psychology.

21 **VOIR DIRE EXAMINATION by MR. CAUSEY**

22 Q. Good afternoon, Doctor. If I could ask you some  
23 brief questions. Your duties at Dorothea Dix you said  
24 are capacity to proceed and not guilty by reason of  
25 insanity, correct?

1 A. That's a large part of it. Those are the patients  
2 who are admitted to the program for the most part.

3  
4 Q. Okay. So I take it that your primary  
5 responsibilities at Dix do not involve working with  
6 persons who are mentally retarded, is that correct?

7 A. No. Actually there are a number of people in the  
8 program ranging ten to 15 out of 85 to 90 patients who  
9 are in fact mentally retarded.

10 Q. Do you have daily contact with those patients?

11 A. Some of them, yes.

12 Q. And in your daily contact are you doing evaluations  
13 of the mentally retarded people for purposes of court?

14 A. Sometimes, yes.

15 Q. And are you determining whether people in fact are  
16 mentally retarded? Is that part of what your duties are  
17 at Dix?

18 A. Sometimes.

19 Q. Correct me if I'm wrong but it's my understanding  
20 doesn't Dix have a policy of not doing mental retardation  
21 evaluations and farming those to outside physicians?

22 A. Only in this specific arena of the post-conviction  
23 motions. Dorothea Dix has a mandate in the statute to do  
24 assessments of somebody's capacity to proceed and whether  
25 or not they have a reasonable not guilty by reason of

1 insanity plea. If those evaluations involve an  
2 assessment of mental retardation, then it's done.

3 What we do not have at Dix is the mandate to do  
4 evaluations for other issues. This falls outside of what  
5 our program is so we're not able to do that.

6 Q. So your work on this case is not as an employee at  
7 Dorothea Dix but this is part of what you do in your  
8 outside practice?

9 A. Yes, correct.

10 Q. So are you a full-time employee at Dix or part-time?

11 A. Full-time.

12 Q. And so in addition to your full-time duties in the  
13 forensic treatment program you have a part-time side  
14 business or side practice with which you became involved  
15 in this case, if I am understanding you?

16 A. Yes, correct.

17 Q. And have you ever been called upon as an expert in  
18 the field of mental retardation?

19 A. Specifically mental retardation, no.

20 Q. And have you ever testified as an expert in the  
21 field of developmental disabilities?

22 A. I've testified in cases in which developmental  
23 disabilities were the central issue many times but  
24 specified in that narrow way, as an expert on that narrow  
25 issue, no.

1 Q. And have you ever been qualified as an expert and  
2 testified on giving intelligence testing?

3 A. Again, typically it's not broken down to that fine a  
4 level of detail but intelligence testing is clearly an  
5 inherent aspect of clinical psychology and would be  
6 assumed in the field to be subsumed under the title of  
7 clinical psychologist.

8 Q. And you said prior to this job you worked at Fulton  
9 State Hospital in Missouri with geriatric patients?

10 A. I had a multi-faceted job where I supervised the  
11 psychology services in the geriatric center part-time and  
12 I did forensic evaluations part-time in the forensics  
13 center.

14 Q. And when you worked as a geriatric specialist,  
15 typically they were not mentally retarded?

16 A. No. Again, some of them were mentally retarded.

17 Q. I guess I am wanting to know how much experience  
18 you've had dealing with mentally retarded patients.

19 A. I've never had a time in my practice when I wasn't  
20 dealing with a percentage of people who were mentally  
21 retarded. That percentage is higher than you would find  
22 in the general population. I would estimate 15 to 20  
23 percent of the people I come in contact with have either  
24 mental retardation, developmental disabilities, and there  
25 would be a number of people who were questioned -- that

1 was a central question they may have had that ruled out  
2 but the central question was did they have mental  
3 retardation or not.

4 Q. And is that what you would have been doing,  
5 determining whether or not they were in fact mentally  
6 retarded or would you just have contact with them at the  
7 facility?

8 A. No, I would actually be assessing whether or not  
9 they had mental retardation as part of the evaluation.

10 Q. You would not?

11 A. I would be doing that, yes.

12 Q. And did that work involve your placing these people  
13 in jobs or workshops or anything of that nature or just  
14 assessing?

15 A. Typically not. Occasionally perhaps in terms of  
16 placing someone from the facility but for most of my  
17 career the evaluations of competency to stand trial is a  
18 determination that's reported to the Court and it doesn't  
19 involve a placement.

20 Q. And would you agree there's a big difference between  
21 determining someone's competent to stand trial, or insane  
22 or not guilty versus being mentally retarded, as we're  
23 dealing with today?

24 A. Well, again, determining if someone is mentally  
25 retarded has a bearing on those other issues at times and

1 so they are different issues but they also overlap.

2 Q. Have you ever taught in the area of mental  
3 retardation?

4 A. I have covered that in courses that I have taught  
5 but a specific course in only that area, no.

6 Q. Have you ever been published in the area of mental  
7 retardation?

8 A. No.

9 MR. CAUSEY: Those would be the questions I  
10 would have and I would object to him being accepted as an  
11 expert in this case.

12 THE COURT: In clinical and forensic psychology?

13 MR. CAUSEY: Pardon?

14 THE COURT: In clinical and forensic psychology?

15 MR. CAUSEY: In general, no, but if he ventures  
16 into the area of giving opinions on mental retardation, I  
17 would object and ask for a line objection in that area  
18 based on his qualifications.

19 THE COURT: The Court will -- he has been  
20 tendered as an expert in the area of clinical and  
21 forensic psychology so the Court will accept and allow  
22 him to testify in that area and then at some point if you  
23 contend that he is out of those areas of expertise, you  
24 can note objections.

25 MR. SAUNDERS: The Court did accept him in that

1 field?

2 THE COURT: Clinical and forensic.

3 **CONTINUED DIRECT EXAMINATION by MR. SAUNDERS**

4 Q. Dr. Hazelrigg, did you have occasion to be contacted  
5 by me for the purposes of doing a psychological  
6 evaluation on this defendant?

7 A. Yes.

8 Q. And pursuant to that contact did you then contact  
9 this defendant and give him certain tests?

10 A. Yes.

11 Q. Did you prepare a report of what you did in respect  
12 to your testimony here today?

13 A. Yes.

14 MR. SAUNDERS: I believe counsel has a copy of a  
15 copy of it, Your Honor.

16 **(STATE'S EXHIBIT NO. 1 WAS MARKED FOR IDENTIFICATION.)**

17 Q. Dr. Hazelrigg, I'm going to hand you an item of  
18 evidence, State's Exhibit No. 1, and ask you to tell the  
19 Court whether you can identify it, please.

20 A. This is a copy of my report.

21 Q. And is that State's Exhibit No. 1 a fair and  
22 accurate representation of your conclusions in this case?

23 A. Yes.

24 MR. SAUNDERS: Move to introduce into evidence.

25 THE COURT: Any objection?



1 MR. CAUSEY: No objection at this point.

2 THE COURT: The Court will receive State's  
3 Exhibit No. 1.

4 **(STATE'S EXHIBIT NO. 1 WAS RECEIVED INTO EVIDENCE.)**

5 Q. In addition to the testing that you did, did you  
6 also have a clinical interview with this defendant?

7 A. Yes.

8 Q. And the testing that you did, would you tell Judge  
9 Spivey what testing did you do?

10 A. In addition to the interview, I administered the  
11 Wechsler Adult Intelligence Scale III, the Rey 15 Item  
12 Test, which was a procedure for testing malingering, and  
13 the street survival skill questionnaire, which is about  
14 adaptive skills.

15 Q. So prior to testing this defendant on the WAIS-III -  
16 - now, this is opposed to the WAIS-R that Dr. Fisher  
17 gave, is that correct?

18 A. Yes.

19 Q. Prior to giving him the WAIS-III you said you  
20 conducted a Rey 15?

21 A. Yes.

22 Q. And what is that?

23 A. It's a test of motivation or response set or  
24 malingering. Clinicians would use a lot of different  
25 terms but it's essentially a test of how much effort is

1 being put forth.

2 Q. And when you gave Mr. Larry that test, would you  
3 tell Judge Spivey what the results of that were?

4 MR. CAUSEY: Objection.

5 THE COURT: Overruled.

6 MR. CAUSEY: May I ask him questions on voir  
7 dire?

8 THE COURT: About the Rey test?

9 MR. CAUSEY: Yes.

10 MR. SAUNDERS: Judge, I would submit that's  
11 cross examination.

12 THE COURT: I would agree. The other witness  
13 has already testified about what it is and what it's  
14 designed to do, his familiarity with it. Go ahead, sir.

15 A. The Rey 15 Item Test has, as the name says, 15 items  
16 and he got nine of them correct, which is actually a  
17 fairly low number that showed an adequate amount of  
18 effort being put forward to continue testing.

19 Q. Adequate amount?

20 A. Adequate, yes, but probably not his best effort.  
21 Most people, even people who are mentally retarded, can  
22 score --

23 MR. CAUSEY: -- Objection.

24 MR. SAUNDERS: Based on his experience, Your  
25 Honor.

1 THE COURT: Overruled.

2 THE WITNESS: I'd say within the norms of the  
3 test or studies about the test show most people score a  
4 perfect score but even mentally retarded people score ten  
5 to 12.

6 THE COURT: What kind of questions are there?

7 THE WITNESS: Well, it's --

8 THE COURT: -- Just 15 questions?

9 THE WITNESS: No, it's actually presented as if  
10 it's 15 questions but in fact it's showing somebody an  
11 array of items that are easily grouped into threes so  
12 it's capital A, B, C, lower case a, b, c, the numerals 1,  
13 2, 3, Roman numerals I, II, III, etcetera. So it's  
14 actually quite easy to remember the entire thing. So  
15 even someone who is impaired -- people who are impaired  
16 can remember the whole thing so someone who doesn't  
17 remember very many of the items is clearly not putting  
18 forth their effort.

19 Q. And your purpose in giving this test to this  
20 defendant, Dr. Hazelrigg, was for what purpose?

21 A. To determine if he was or to help attempt to  
22 determine if he would give me accurate and valid  
23 responses to the other tests that I was going to  
24 administer.

25 Q. And the other test that you were going to administer

1 I believe you indicated was a WAIS-III?

2 A. Yes.

3 Q. How is it different from the WAIS-R?

4 A. Well, it was revised rather extensively. Many of  
5 the items are different. Some of the materials, the  
6 stimulus items that you would show the subject, are  
7 completely different, completely redone.

8 There are new sub-tests that are added. Each  
9 of the sub-tests has additional items that are  
10 essentially easier than the easiest items on the earlier  
11 version so you can have a more accurate determination at  
12 the lower levels of ability.

13 Q. Is the WAIS-R actually outdated?

14 A. Well, I think it is. The WAIS-III was published in  
15 1996 and part of the reason for redoing the WAIS was that  
16 the norms were old. The normative data that you would  
17 calculate the IQS from were old. Those change over time.  
18 The Flynn effect has been referred to already so that's  
19 one of the influences on the scores.

20 The test items were with experience found to be  
21 unclear, ambiguous and some of those were changed.  
22 Newer, clearer materials were used. New sub-tests were  
23 added to have information on different areas that had not  
24 been included in the WAIS-R so it was expanded and  
25 improved and this was in 1996. So just like I wouldn't

1 use the original WAIS, I wouldn't use the WAIS-R  
2 currently. It is still published and obviously it's  
3 still being used but I personally don't use it. I think  
4 the new version was created for a purpose and so that's  
5 what I use it for.

6 Q. Kind of like each revised edition of the DSM?

7 A. Yes.

8 Q. Each diagnostic manual is updated and that's why  
9 you're using IV now, TR, as opposed to III?

10 A. Correct.

11 Q. And actually the WAIS-III -- would you necessarily  
12 get a higher score given the WAIS-III as opposed to the  
13 WAIS-R?

14 A. Actually no. The developers of the WAIS-III did a  
15 direct comparison and in that on average people scored  
16 higher on the WAIS-R.

17 Q. And how did you score the defendant's WAIS-III?

18 A. Ultimately he had a full scale score of 74.

19 Q. That was with your opinion of not putting forth  
20 maximum effort?

21 A. It was. Right. I can't say -- you know, I don't  
22 have a dollar for how much effort he's putting in. I  
23 don't think it was his maximum effort but it was adequate  
24 and clearly he gave every indication of concentrating at  
25 the times when he needed to concentrate.

1 Q. Did you have some other material furnished to you as  
2 well as the testing and clinical interview you did with  
3 the defendant?

4 A. Yes.

5 Q. What was some of the other information that you had,  
6 Dr. Hazelrigg?

7 A. At the time I did my testing on him, I received the  
8 data and information from Dr. Fisher and also had the  
9 information from the school system, the Department of  
10 Corrections records. I had seen the report and the  
11 testimony of Dr. Hoover. I had also reviewed the  
12 testimony of Mr. Larry. I believe that's the primary  
13 items of information.

14 Q. So you did in fact review Dr. Hoover's report and  
15 his testimony as well?

16 A. Yes.

17 Q. What was his diagnosis of this defendant?

18 A. His diagnosis was antisocial personality disorder.  
19 He made other references and he also diagnosed borderline  
20 personality disorder, and those were his primary  
21 diagnoses.

22 Q. Now, you also had to determine the defendant's  
23 functioning level for some adaptive skills, is that  
24 correct?

25 A. Yes.

1 Q. The areas that you had to review are kind of set out  
2 in the DSM-IV-TR?

3 A. Well, and in the statute as well.

4 Q. Did you give him any screening tests on adaptive  
5 skills functioning prior to making a determination about  
6 his skills?

7 A. Yes.

8 Q. And what test did you give him?

9 A. That was the SSSQ, which again stands for Street  
10 Survival Skills Questionnaire.

11 Q. What kind of test is that?

12 A. It's a test that has, again, a series of sub-tests  
13 that measure different categories of life skills so it  
14 has a test of money management, and health and safety,  
15 and how to read signs, and a variety of different kinds  
16 of skills in the every day world.

17 Q. There's certainly a difference between someone's  
18 adaptive skills and whether or not they have maladaptive  
19 behavior?

20 A. Yes.

21 Q. Explain to Judge Spivey what the difference is.

22 A. The difference is rather easily explained. It's a  
23 difference between capacity to do something versus the  
24 choice to do something that you know is wrong. That  
25 would be considered maladaptive and a lack of capacity

1 would be considered a deficit.

2 Q. Did you find evidence in your review of this  
3 defendant's records whether or not he had maladaptive  
4 behavior?

5 A. Yes. His record is replete with instances of  
6 maladaptive behavior, choices to do things that he knew  
7 were wrong.

8 Q. Lying, stealing, throwing rocks at his family --

9 MR. CAUSEY: -- Objection to the leading.

10 THE COURT: Sustained as to the leading.

11 MR. SAUNDERS: With respect to his criminal  
12 conduct, you documented his criminal conduct and what was  
13 that?

14 A. Prior to -- even prior to this, the most severe  
15 incident, he had convictions for breaking and entering,  
16 robbery, larceny, possession of stolen weapons, robbery  
17 with a firearm and included in this also or during his  
18 stay in the Department of Corrections he's had a number  
19 of infractions, violating rules that he knows are  
20 violations.

21 Q. Some of those rules in the Department of Corrections  
22 were drug related?

23 A. Yes. He was, I guess, charged with obtaining  
24 marijuana many times and attempting to obtain marijuana,  
25 making a sexual assault, making a weapon, things of that



1 nature.

2 Q. With respect to the adaptive skill communication,  
3 Dr. Hazelrigg, did you find any impairment in that  
4 category?

5 A. I did not. I basically agree with Dr. Fisher that  
6 that is a difficult area to pin down but it has been my  
7 experience with people with mental retardation there is -  
8 - when you find someone with a substantial impairment in  
9 communication, that's clear and when you find someone who  
10 is not impaired, that's clear. There's clearly a large  
11 gray area in between but I didn't really find that Mr.  
12 Larry even fit in that gray area.

13 I had no problem communicating with him  
14 verbally, taking the test, and the reports are that he's  
15 able to communicate with others. So, I did not find any  
16 impairment.

17 Q. You also reviewed his testimony at his sentencing  
18 hearing in 1995?

19 A. Correct.

20 Q. And what was your assessment of that?

21 A. I thought he did remarkably well. He was subjected  
22 to a rather vigorous line of questioning and he held up  
23 his end. He did not reveal anything he did not want to  
24 come out.

25 Q. You also made a determination about self care. What

1 was your assessment of self care?

2 A. The self care area is difficult, again, but for  
3 different reasons. Mr. Larry has not really lived in  
4 society for very long. Most of his life has been in  
5 structured environments so that makes it difficult to  
6 assess. So I did rely on the SSSQ for some information  
7 in this area.

8 He was able to understand basic concepts. He  
9 was able to understand what basic signs mean in the world  
10 so he could identify places to go and where to find  
11 certain basic things. Again, it overlaps with some other  
12 areas. But even when incarcerated, he's caring for  
13 himself within a structured environment. He is caring  
14 for himself in terms of setting a personal schedule for  
15 when he exercises, what he does, who he engages with, who  
16 he avoids so he's established that he can care for  
17 himself in at least some areas and did not show problems  
18 on the test.

19 Q. I believe his sister indicated that he didn't have  
20 any trouble taking care of himself. He just didn't want  
21 to?

22 A. Yes, that's what she testified.

23 Q. And how about home living, in the area of home  
24 living, did you find any impairment in self care?

25 A. I did not find impairment in self care. It's

1 possible that it exists and no one's ever had a chance to  
2 see it but from what I could see and what I could assess  
3 I did not find any evidence.

4 Q. Certainly not any significant impairment?

5 A. Correct.

6 Q. And communication, did you find any impairment?

7 A. I found no impairment in communication.

8 Q. And home living?

9 A. In home living, again, the SSSQ is very helpful  
10 here. It has scales that directly assess things that you  
11 need to know living at home -- how to wash clothes, how  
12 to tell time, how to get to appointments on time, how to  
13 put things on a calendar and get there, how to spend  
14 money, how to save money, how to write a check, things  
15 like that. So he did all of those in the average range.

16 So even though he hasn't had a lot of  
17 experience with some of those things, he was in the  
18 average range on most of the scales. The only one he had  
19 any problem with was use of tools. He didn't really miss  
20 that many items but he didn't have a lot of experience  
21 using the tools that you would need to fix a leak in a  
22 faucet, for example, so he was unfamiliar with some of  
23 those items.

24 Q. Could he use a washing machine?

25 A. He didn't have any problem with any of those kinds

1 of tasks. He clearly identified when something needed to  
2 be dry cleaned only, when to use Clorox. He knew how to  
3 call the electric company if the power is out. He knew  
4 how to look up numbers in the phone book. He knew how to  
5 spend money, make change, count money.

6 He knew how to measure things. You know, tape  
7 measures, temperature on a thermometer. He didn't have  
8 any trouble with those things.

9 Q. Not being familiar with tools, did you have any  
10 impairment for him in that category?

11 A. I said he was not impaired in that category. I felt  
12 that anyone who had never seen the difference between a  
13 hacksaw and a coping saw and a rip saw might have  
14 difficulty answering those questions. He clearly had the  
15 ability to learn that information with exposure based on  
16 all the other areas that he had no problems in.

17 Q. How about social skills?

18 A. Social skills, Mr. Larry has a quiet demeanor.  
19 That's been true since childhood. He doesn't have a lot  
20 of friends. He keeps to himself a lot and apparently  
21 always has. This appears to be a choice on his part. In  
22 terms of interacting with someone, when he does interact,  
23 he and I had a very to me normal feeling conversation  
24 with appropriate give and take.

25 You know, you have a conversation with someone

1 and it's hard to analyze exactly why it's normal or why  
2 it's not normal but the best that I can explain it is you  
3 ask a question and the person waits for the question to  
4 end, thinks about it, and then responds in a way that's  
5 responsive and actually answers the question, then moves  
6 on to information that's related in another area that  
7 helps you understand their answer. They laugh when you  
8 make a joke. They are serious when you're talking about  
9 serious things. So that's all part of social skills.

10 Q. What about his affect during the time you were with  
11 him? How would you describe it to Judge Spivey?

12 A. Well, it was not very, not very demonstrative but he  
13 did actually chuckle and laugh. We had some humorous  
14 moments. He had some very serious moments. One of those  
15 came in a related area about social skills where he  
16 talked about another inmate who he didn't get along with  
17 and how he coped with having to live in the same confined  
18 space with someone he had a conflict with. So he  
19 demonstrated to me he had some good social skills in how  
20 to deal with that situation and also in communicating to  
21 me and explaining how he did that.

22 Q. Did you find any impairment in that category?

23 A. No.

24 Q. Community use?

25 A. Community use I relied on the scale on the SSSQ

1 public services where it asks questions about public  
2 utilities, transportation, where do you go to buy certain  
3 things or how do you get places, how do you look up phone  
4 numbers, things like that. And he only missed one item  
5 in which he misread a phone number in the phone book.  
6 Everything else he got correct.

7 Q. What about his ability to get married twice while he  
8 was in the Department of Corrections? Would that impact  
9 on that area at all?

10 A. Well, he certainly knew how to use or work within  
11 the system that he's in to get what he wanted so he knew  
12 how to ask a question and what to do in order to complete  
13 the process.

14 Q. Did you find any impairment in that category?

15 A. No.

16 Q. Self direction?

17 A. Self direction, again, it's somewhat subjective.

18 What I relied on was his ability to establish a routine  
19 for himself. He described when he exercised, when he  
20 interacted with others, how he organized his day. Who he  
21 chose to interact with and who he chose to avoid.

22 Clearly, when he's not incarcerated he has had  
23 problems in terms of making decisions that were illegal  
24 but they were in fact decisions that, as far as the  
25 records indicate, decisions that he made about what he

1 wanted to do. So he decided to do something and he  
2 carried it out, that's self direction. It may be an  
3 illegal activity but it didn't come from a lack of  
4 appreciation that it was illegal.

5 Q. Did you find any impairment in that category?

6 A. No.

7 Q. Health and safety?

8 A. He did not do as well on the SSSQ. There's actually  
9 a scale that assesses health and safety. He missed a few  
10 items there, more than on most of the other scales, and  
11 so had some mild impairment. He knew most of the very  
12 basic things but the score was mildly impaired.

13 Q. When you refer to the SSSQ that you gave, Dr.  
14 Hazelrigg, there's a behavioral scale that you can give  
15 to his family and teachers?

16 A. Yes.

17 Q. You didn't have access to any members of his family,  
18 did you?

19 A. I did not.

20 Q. Most of his teachers would be retired now?

21 A. I don't know. I didn't make any effort to contact  
22 teachers.

23 Q. Did you do in this case some screening test on his  
24 adaptive skills?

25 A. Yes. I used the SSSQ because it is a test that

1 will, that you can use in this circumstance where you  
2 have an inmate who you have direct access to but other  
3 people are more difficult to get to so I have a direct  
4 assessment of his ability now and the drawback is lacking  
5 an assessment of what he was like prior to age 18.

6 Q. The assessment of his health and safety skills, what  
7 did you determine that was?

8 MR. KILLIAN: I think it was asked and answered.

9 THE COURT: Just to clarify, did you say mild  
10 impairment?

11 A. Yes.

12 Q. Functional academics?

13 A. Functional academics, there's mixed reviews in this  
14 area. He did poorly in a few grades in school but as an  
15 end point, I guess I looked at his sixth grade, which was  
16 the last year in school, where he got all Cs and a few  
17 Bs. He did not fail any courses. He did not have Ds in  
18 any courses. So although he had done poorly and did  
19 remediate to some extent, to at least an adequate level  
20 of functioning in the sixth grade, admittedly he's two  
21 years older than the other kids at that time.

22 In conjunction with that, the Department of  
23 Corrections, as part of their screening they do the  
24 screening of IQ but they also do a screening of academic  
25 achievement, and his scores on that measure were of about



1 a fifth grade level for reading and spelling and a  
2 seventh grade for arithmetic and so he quit school after  
3 the sixth grade and his achievement is around the fifth  
4 grade level, seventh grade for arithmetic.

5 That all seems fairly consistent that that's  
6 probably about where he is, which is not great, clearly  
7 somewhat impaired, but he's literate. He can write. He  
8 can read. It takes him longer. His writing is more  
9 simple than others but he has some ability to communicate  
10 so I concluded that he is impaired mildly in that area  
11 but not substantially or significant impairment.

12 Q. And also about the time he was in fourth grade he  
13 started abusing drugs?

14 A. Yes, he started using drugs at a young age.

15 Q. You determined there was mild impairment there?

16 A. Correct.

17 Q. Leisure skills?

18 A. Leisure skills goes back to what we talked about  
19 earlier. He's made a lot of decisions to do things that  
20 are illegal or violate other people's rights. He has not  
21 been impaired in the sense of not having the ability to  
22 engage in normal forms of leisure activities. He's  
23 chosen to engage in drug use and other illegal activities  
24 so there is clearly disruptive functioning in this area  
25 but I concluded it was not due to his cognitive ability

1 but rather to his personality disorder.

2 Q. His sister said he was really good at track,  
3 softball, baseball, and swimming?

4 A. He at one time in his life apparently had reasonable  
5 leisure skills and appropriate leisure activities.

6 Q. She said he was really good at art, painting and  
7 drawing and in those school records where he got  
8 satisfactory in art and music, supported that position?

9 A. Yes.

10 Q. Did you give him any impairment in leisure skills?

11 A. No.

12 Q. Work skills?

13 A. Work skills -- I guess I kind of concluded that I  
14 couldn't assess it. He's never been out in the community  
15 outside of a correctional facility for more than a few  
16 months at a time so he's never had stable employment. In  
17 fact, he's never given himself the chance to maintain  
18 stable employment.

19 There are records from the Department of  
20 Corrections about work and work placements while he was  
21 incarcerated but that's within a structured environment  
22 so I'm not sure that that necessarily counts as  
23 independent work skills.

24 I essentially think he's not allowed this  
25 assessment to be made by not ever creating an opportunity

1 to hold a job.

2 Q. Dr. Hoover's assessment of antisocial personality  
3 disorder, how would you, could you just sort of explain  
4 to Judge Spivey how that figures in with what you found  
5 here about this defendant?

6 A. I agree with that. I think that he meets the  
7 diagnostic criteria for that diagnosis easily and without  
8 really any question and the maladaptive behavior that's  
9 associated with antisocial personality is the same types  
10 of things that are the behaviors that have gotten him in  
11 the most trouble.

12 So failure to function independently in the  
13 outside of correctional facilities is clearly a matter of  
14 his choice to engage in illegal activities and it's not  
15 clear that he was unable to participate in other kinds of  
16 activities, and there are many indications that he did  
17 have the ability to engage in a kind of normal lifestyle  
18 and chose one that was against society's rules.

19 Q. Do you have any opinion that there's any reliable  
20 evidence that this defendant's mentally retarded?

21 A. I believe that he is close to that range but I don't  
22 believe that he's mentally retarded.

23 Q. Do you hold that opinion in light of your background  
24 in clinical and forensic psychology?

25 A. Yes, I do.

1 MR. SAUNDERS: Your Honor, we would tender this  
2 witness.

3 THE COURT: Questions for the witness?

4 MR. CAUSEY: Yes.

5 **CROSS EXAMINATION by MR. CAUSEY**

6 Q. If I could start out with the Rey test that you  
7 first testified about on direct.

8 A. Yes.

9 Q. Again, that test is not an IQ test, correct?

10 A. Correct.

11 Q. It is only designed to attempt to assess someone for  
12 malingering, correct?

13 A. Yes.

14 Q. And isn't it true that there is no generally  
15 accepted test in the psychological community for  
16 malingering?

17 A. No, I don't think that that is true. There are a  
18 number of tests that -- kind of the most noted now would  
19 be the TOMM, the test of memory malingering, the VIP.  
20 There's a variety of malingering tests aimed at people  
21 who might be malingering psychosis. That's maybe not as  
22 relevant here but that would include the structured  
23 interview with recorded symptoms, the atypical  
24 presentation scale. There are a variety of tests for  
25 malingering.

1 Q. So are you saying the Rey test or any test -- are  
2 you saying there is a generally accepted test for  
3 malingering?

4 A. I'm saying there are a number of generally accepted  
5 tests.

6 MR. CAUSEY: May I approach the witness, Your  
7 Honor?

8 THE COURT: Yes.

9 **(DEFENDANT'S EXHIBIT NO. 9 WAS MARKED FOR**  
10 **IDENTIFICATION.)**

11 Q. I will show you what I've marked as Defendant's  
12 Exhibit No. 9 and ask you to review that briefly.

13 A. (Witness reviews Defendant's Exhibit No. 9.) Uh-  
14 huh.

15 Q. And that is a synopsis where you spoke at the DA's  
16 conference last year on mental retardation claims, is  
17 that right?

18 A. Yes.

19 Q. You shared a three hour time period with another  
20 doctor where you spoke on combating claims of mental  
21 retardation, correct?

22 A. No. That was the topic of the conference. What I  
23 spoke on was an informative discussion of IQ testing and  
24 other kinds of testing but it wasn't -- their agenda was  
25 combating these claims. My agenda was informing them

1 about the tests.

2 Q. And at some point in this synopsis there's a topic  
3 called "malingering," is that correct?

4 A. Yes.

5 Q. And this would be under a portion of the seminar  
6 where you and the doctor both spoke and this would have  
7 been from your materials, correct?

8 A. Yes. Somewhere in there. I don't remember exactly  
9 which sections each of us covered though.

10 Q. Do you see the sheet that talks about malingering?

11 A. Yes.

12 Q. Okay. And under malingering, doesn't your synopsis  
13 of that topic, the very first thing it says "is there are  
14 no generally accepted tests for malingering for IQ?"

15 A. Those were the words that were written.

16 Q. Is that incorrect?

17 A. No.

18 Q. Okay. So would you concede on the stand now that  
19 there are no generally accepted tests for malingering for  
20 an IQ test?

21 A. If you let me explain.

22 Q. Sure.

23 A. This was in the context of having discussed IQ tests  
24 and in the area of IQ tests it is generally accepted that  
25 the WAIS tests are the -- usually the term is gold

1 standard for assessing IQ. There is no single test that  
2 stands out for testing malingering.

3 Q. And that would include the Rey test?

4 A. That would include the Rey test. There is no single  
5 test that stands out.

6 Q. And so you chose to give the Rey test based on your  
7 professional judgement?

8 A. Yes.

9 Q. And it is not an accepted or generally accepted test  
10 for malingering. It's just a matter of choice?

11 A. No, it is accepted. It is generally accepted. It  
12 is not the single, the single test -- a gold standard  
13 test. There are a variety of tests that are accepted,  
14 that are generally accepted in the field that are usable  
15 for this purpose. It's one of the many or from several.

16 Q. Is it fair to say that physicians or doctors that  
17 are in your position differ on that? Different doctors  
18 will give different tests for malingering?

19 A. Different doctors will give different tests, yes.

20 Q. Again, just in fairness, the Rey test is your  
21 personal preference?

22 A. It's one of the tests that I use, yes.

23 Q. Did you use other tests in this case?

24 A. In this case, I did not.

25 Q. Okay. So it would be your preference just for this

1 case and this client?

2 A. Correct.

3 Q. Do you recall when you said Mr. Larry got nine out  
4 of 15 correct on the Rey test?

5 A. Yes.

6 Q. Do you recall what were the six questions he would  
7 have missed?

8 A. It's actually not a series of questions. It's an  
9 array of 15 things that the person is shown and then they  
10 have to remember as many of those 15 as they can. So he  
11 remembered nine of the 15.

12 Q. All right. So this test, a large component of it is  
13 the person's memory that's being tested?

14 A. Actually it's presented as if it's a memory test and  
15 it's easy to confuse it as a memory test but it's not a  
16 memory test. Even people with impaired memory can  
17 remember these 15 items. That's the whole idea is that  
18 it is not a test of memory. It's a test of motivation  
19 and how much you are willing to show that you remember.

20 Q. Now, tell us what are the six items he missed?

21 A. He got capital A, B, C. He got a normal number 1,  
22 2, 3 and he got the circle, square and the triangle. He  
23 did not get the lower case letters and he did not do the  
24 Roman numerals.

25 Q. So are you saying he did not get the lower case



1 letters and the Roman numerals. Would you somehow have  
2 that divided into six different questions or six  
3 different items?

4 A. No.

5 Q. My question to you is what are the six things he  
6 couldn't do?

7 A. Okay. The test is designed and presented as if it's  
8 15 items. In fact, it's only really five things that you  
9 have to remember. Capital letters, numbers, shapes,  
10 lower case letters, Roman numerals. You only have to  
11 remember five things. He failed to remember two  
12 categories so he didn't get lower case a, lower case b,  
13 lower case c. He did not get Roman numeral I, Roman  
14 numeral II, Roman numeral III. Those were the six items  
15 he did not remember.

16 Q. You say he did not get those. What do you mean by  
17 that? If you could just be as precise and specific as  
18 you can.

19 A. The way the test is administered is he is shown the  
20 array of all the items and then it's taken away. He's  
21 given a sheet of paper. He's asked to recreate the ones  
22 he remembers. He wrote down the ones I said. He failed  
23 to write down any other ones.

24 Q. So just not knowing Roman numerals you would say was  
25 missed three items because he doesn't in general remember

1 Roman numerals?

2 A. Yes, correct.

3 Q. So he may have just missed one big thing but you  
4 counted that as three wrong?

5 A. Yes.

6 Q. The same is true of the lower case alphabet. He may  
7 not be familiar with the lower case versus upper case and  
8 you would say he's missed three items even though it's  
9 just one thing he doesn't know?

10 A. Right. Yes.

11 Q. Do you factor that into the score at all?

12 A. That's the whole point. The whole point is there's  
13 really only five things to remember, not 15.

14 Q. When you looked at his scores in school, first grade  
15 both times he was in it, second grade, third grade,  
16 fourth grade both times, fifth grade, when you saw his  
17 grades and how he performed in school, did that have any  
18 effect on your opinion of the Rey test?

19 A. To the Rey test?

20 Q. Yes. You told us he had problems with Roman  
21 numerals and lower case alphabet.

22 A. No, I told you he didn't write those down. I don't  
23 know if he has problems with those things or not. What I  
24 know is he got through the sixth grade successfully and  
25 that he can read and write at about the fifth or sixth

1 grade level.

2 Q. So is it your opinion he could do those things and  
3 just chose not to or you don't know?

4 A. It's my opinion he could do those if he had attended  
5 fully and given his maximum effort to a task.

6 Q. And would that, being your opinion, can you say  
7 you're 100 percent correct on that?

8 A. I can't say I'm 100 percent correct about most  
9 things.

10 Q. With respect -- in your report, it looks like you  
11 made reference to BETA scores or BETA tests that had  
12 previously been given to Mr. Larry in the Department of  
13 Corrections, is that correct?

14 A. Yes.

15 Q. And you were here -- you've been here all day and  
16 heard everybody in court?

17 A. Yes.

18 Q. Okay. When we can talk about BETA tests, what they  
19 are and what they are not, the full scale IQ, only WAIS  
20 has two components, correct?

21 A. Yes.

22 Q. That's a verbal score and a performance score,  
23 correct?

24 A. Correct.

25 Q. Based on those two you come up with a full scale

1 score?

2 A. Actually the full scale is independent of those two  
3 but, yes.

4 Q. So that would be the third score?

5 A. Yes.

6 Q. And the full scale was what you actually reported as  
7 being the 74, in your case what you allege Mr. Larry's IQ  
8 is, correct?

9 A. Yes, correct.

10 Q. And based on the data you got from Dr. Fisher, he  
11 had a verbal score, a performance score and a full scale  
12 of 69?

13 A. Correct. No, he had a full scale 69. His  
14 performance score and verbal scores were different than  
15 that.

16 Q. Exactly. But the 69 was the full scale IQ that Dr.  
17 Fisher gave on the WAIS-R, the 74 was the full scale that  
18 you gave on the WAIS-III?

19 A. Yes.

20 Q. A BETA test does not have those two sub-components  
21 of verbal and performance, is that correct?

22 A. Correct.

23 Q. It only has a performance score?

24 A. It has an overall score, yes.

25 Q. It does not have a verbal component, is that

1 correct?

2 A. Not isolated out, no.

3 Q. And typically a verbal score in the average person  
4 is going to be lower than the performance score, is that  
5 true?

6 A. No.

7 Q. Well, in the test that you gave Thomas Larry on the  
8 WAIS-III, in his case the verbal score was lower than you  
9 scaled him on the performance score, is that correct?

10 A. In his case, yes.

11 Q. And on the test that Dr. Fisher gave, the WAIS-R,  
12 with Mr. Larry the verbal score is lower than the  
13 performance score, correct?

14 A. I would actually have to look to confirm that.  
15 (Witness reviews Dr. Fisher's report.) No. He had  
16 exactly the same score on verbal and performance for Dr.  
17 Fisher.

18 Q. Now, where do you get that from?

19 A. His records that you sent me.

20 Q. Is that your report or Dr. Fisher's records?

21 A. Dr. Fisher's records.

22 MR. CAUSEY: May I approach?

23 THE COURT: Yes.

24 Q. If you would hold that place and if I can see where  
25 you're at. That's his report.

1 A. I had Dr. Fisher's data so I'm looking at his verbal  
2 score of 70, performance score 70, full scale 69.

3 Q. So the sheet that you have gotten from Dr. Fisher, a  
4 testing sheet showed a 70 verbal, 70 performance, 69 full  
5 scale?

6 A. That is what I got, yes.

7 Q. And we've heard that the BETA has been described as  
8 a screening test, correct?

9 A. Correct.

10 Q. And that is because it does not have both  
11 components separate, verbal and performance, correct?

12 A. No.

13 Q. For that reason -- pardon?

14 A. That's not why it's considered a screening test.

15 Q. Why is it considered a screening test?

16 A. It's considered a screening test because it's  
17 briefer and is not as comprehensive as a large multi-  
18 faceted IQ test such as the WAIS.

19 Q. Such as the WAIS tests that you're talking about?

20 A. Yes.

21 Q. So whatever BETA scores that you have recited in  
22 your report that DOC would have given, you would not give  
23 great weight in determining Thomas Larry's IQ, is that  
24 correct?

25 A. That's correct. I don't give great weight to them.

1 Some weight but not a lot.

2 Q. Okay. And the reason you say that is because it's  
3 not a full scale IQ?

4 A. Yes.

5 Q. The other reason being you don't know the  
6 circumstances the tests were given, correct, whether  
7 individual or group?

8 A. Actually I do know that.

9 Q. You do know that?

10 A. Yeah.

11 Q. And what would your notes indicate?

12 A. I mean I don't know exactly what the circumstances  
13 were for Mr. Larry but I know how they operate there,  
14 which is they have groups of inmates when they're  
15 admitted and it's administered in a group and individual  
16 (inaudible) under supervision.

17 Q. For purposes of what we're doing here, the WAIS that  
18 you've given and Dr. Fisher are properly given  
19 individually and not in a group setting, correct?

20 A. Correct, yes.

21 Q. If I can ask you about the WAIS testing that we've  
22 heard today. You are familiar with the WAIS-R, correct?

23 A. Yes.

24 Q. You choose not to use that version but the WAIS-III?

25 A. Yes.

1 Q. You don't dispute that the WAIS-R is a valid test  
2 right now, correct?

3 A. I think that it's validity is questionable. I don't  
4 know if it's valid or not.

5 Q. Have you contacted the same person -- the same  
6 company that comes up with and distributes the WAIS-III  
7 also distributes the WAIS-R, correct?

8 A. Yes.

9 Q. Have you contacted that company and inquired as to  
10 whether one test should not be used versus III versus R?

11 A. The publishing company, no. But I also don't  
12 consider a profitable publishing company to be the end  
13 point on determining professional behavior. They're out  
14 to sell the product.

15 Q. Pardon?

16 A. They're out to sell the product.

17 Q. Well, you're not saying they would sell an outdated,  
18 obsolete product that should not be used, for instance?

19 A. No, but they would continue to sell something that  
20 was still up in the air in terms of its utility. Or if  
21 it had utility in some other arena.

22 Q. From the data you got about Dr. Fisher administering  
23 the WAIS-R, do you dispute he individually administered  
24 the test in this case?

25 A. No. It appears to be a correctly administered WAIS.



1 I mean, I have no idea that he did it but it's what he  
2 submitted to me as he represented that he administered  
3 it.

4 Q. Do you have the raw data that supports that full  
5 scale IQ of 69?

6 A. Yes.

7 Q. Do you have any reason to believe that there were  
8 any scoring errors in that test Dr. Fisher gave?

9 A. I looked and did not find any significant ones.

10 Q. Based on the data that you have, do you have any  
11 reason to believe there were any errors in the way the  
12 test was administered to Mr. Larry?

13 A. There's no way for me to answer that.

14 Q. Do you have any reason to believe, based on the data  
15 that you've got, there were any interpretive errors in  
16 the test that Dr. Fisher gave?

17 A. I believe the only error in terms of interpretation  
18 would be to account for the effect on the score of  
19 administering a test that's eight years old and that the  
20 norms were -- I actually don't know when the WAIS-R norms  
21 were done. In the early '80s, I believe, so they were 20  
22 years old by the time this was administered. So I think  
23 some statement to that effect saying that these scores  
24 possibly are not accurate because the norms are so old  
25 would have been appropriate. As far as an error goes, I

1 don't think that there is one.

2 Q. Somebody made a noise. Could you repeat that last  
3 part?

4 A. As far as an error in interpretation, I don't find  
5 one.

6 Q. So you see no reason to claim that. You understand  
7 there is a five point margin of error on the WAIS-R and  
8 the WAIS-III?

9 A. That's true for the WAIS-R but it's not true for the  
10 WAIS-III.

11 Q. What is true for the WAIS-III?

12 A. The WAIS-III, one of the improvements is that you  
13 actually are given confidence intervals for every IQ  
14 score so it varies depending upon what the subject is.  
15 We'll just use Mr. Larry's case, for obvious reasons, and  
16 it's a confidence interval between 70 and 79.

17 So to be overly technical what that means is  
18 that statistically speaking there's a 95 percent chance  
19 that this score falls within that range.

20 Q. So the WAIS, if I'm doing my math right, would have  
21 a four point margin of error either way?

22 A. For a score of 74, it's, you know -- apparently it's  
23 four plus points.

24 Q. And that's how you arrived at the range. Let me  
25 back up one step. You're not claiming the 74 is his

1 exact IQ, are you?

2 A. No.

3 Q. And you're not claiming the 69 is his exact IQ  
4 either, are you, because IQ is in a range. Is that  
5 correct?

6 A. Yes.

7 Q. So is it fair to say it's nearly humanly impossible  
8 to say that a person's exact IQ is in the circumstance?

9 A. Given the state of our psychology, our tests are not  
10 that precise, no.

11 Q. So you just deal with ranges?

12 A. Yes.

13 Q. And the figure you came up with, the 74, is  
14 basically a point on the chart that then you extrapolate  
15 the four points based on Thomas Larry's score on this  
16 test?

17 A. Right.

18 Q. If Dr. Fisher's range was 69, do you agree that five  
19 points on the WAIS-R is a proper number to use?

20 A. Yes.

21 Q. So his range would be 64 to 70. Is that correct?

22 A. Right.

23 Q. Your range is 70 to 79?

24 A. Right.

25 Q. Those ranges overlap a 70. Is that correct?

1 A. Yes.

2 Q. That's what you would expect if both tests were  
3 valid. Correct?

4 A. No. That's just a coincidence.

5 Q. You think it's a coincidence?

6 A. Yes. That they overlap at 70 is the coincidence.  
7 You know, hypothetically if the scores were different but  
8 not five points apart, they would overlap at a different  
9 point, not 70, but the overlap would include 70 and it  
10 would include the top and the bottom of the range.

11 Q. But isn't it fair to say you would expect a person  
12 who has taken these two tests this close together that  
13 their scores would be close?

14 A. Yes, you would expect that.

15 Q. You would not expect a huge gap where the  
16 overlapping doesn't even touch. Correct?

17 A. Not unless there is some other factor involved.

18 Q. And the fact that his scores did overlap at some  
19 point is what you would expect on two tests administered  
20 this close together. Is that not true?

21 A. Assuming that there was an equal amount of effort  
22 given, yes.

23 Q. And there were two different tests with two  
24 different units of measurement. Do you feel that it's a  
25 coincidence that they overlapped at 70. Correct?

1 A. I'm saying that it's a coincidence that the point of  
2 overlap is 70.

3 THE COURT: What is the confidence that there  
4 was five up but only four down?

5 THE WITNESS: Random error. For a 74, it's plus  
6 or minus four point something. I don't know exactly. I  
7 just know this is the interval that they reported given  
8 by this four point something.

9 THE COURT: The company reported that?

10 THE WITNESS: Yes.

11 Q. When you gave Mr. Larry the test in October of '02,  
12 did you follow the similar procedures that Dr. Fisher did  
13 as he read Mr. Larry the instructions and read him the  
14 questions?

15 A. Yes. Depending on the sub-tests, I followed the  
16 administration rules which is you read the explanation,  
17 read the items or you show the materials or whatever it  
18 tells you to do.

19 Q. Then whatever answer or response he gives you, you  
20 write that down?

21 A. Right.

22 Q. So it's not a situation where you go, here, here is  
23 your test. He reads it, he fills out the answers, and  
24 gives it back? It's not that at all, is it?

25 A. Correct.

1 Q. And you gave the test about eight or nine months  
2 after Dr. Fisher's test. Correct?

3 A. Yes.

4 Q. And you're familiar with what's known as the  
5 practice effect. Is that correct?

6 A. Yes.

7 Q. It's where a person taking the same or similar test  
8 repeatedly is going to become more familiar with the  
9 instructions, the layout, the format, etcetera. Is that  
10 correct?

11 A. Yes.

12 Q. And it's not surprising that a person would do  
13 marginally better the second time they take it?

14 A. It's not quite that simple. There are some items or  
15 some types of items where you would expect more of a  
16 practice effect and there are other types of items where  
17 you would not expect the practice effect.

18 So, it's not just a simple matter of well,  
19 he'll do better the next time and the WAIS-III is  
20 substantially different from the WAIS-R. The items are -  
21 - the same sub-tests are completely and totally different  
22 and they are brand new sub-tests that didn't even exist  
23 on the WAIS-R.

24 Q. Let's talk about those. Isn't it true that one of  
25 the reasons the WAIS was revised to the WAIS-III there's

1 this group of people at the bottom end of the retardation  
2 range that the test is designed to separate those out  
3 instead of clumping them all together at the bottom?

4 Is that a fair statement?

5 A. No, not really. I mean, the test was designed to  
6 assess intelligence across the range which includes  
7 extremely high mental and extremely low and of the  
8 abilities that go into intelligence. It's true that some  
9 parts of society find it important to separate out  
10 certain segments of the range, both high and low, for  
11 different purposes but that's not a function of the test.  
12 That's societies application of the test.

13 Q. Isn't one of the purposes, though, for the revision  
14 of the test is to help you, as a doctor, better say where  
15 a person falls on the scale versus just saying they're in  
16 the bottom? Isn't that one of the purposes of the  
17 revision?

18 A. Yes. The revision was designed to help discriminate  
19 at the lower ends of IQ, yes.

20 Q. Is it fair to say that 85 percent of the mentally  
21 retarded people are mildly mentally retarded?

22 A. Yes.

23 Q. And that could be the range of 55 to 70?

24 A. Yeah, approximately.

25 Q. That's what we call mildly mentally retarded?

1 A. Based only on the IQ scores, yes.

2 Q. That's based on the DSM-IV as well, correct?

3 A. Yes.

4 Q. Eighty-five percent of the mentally retarded  
5 population falls in that range. Correct?

6 A. Yes. By definition, yes.

7 Q. And part of the changes from the WAIS-R to the WAIS-  
8 III were directed at those people, those 85 percent, in  
9 that range. Is that correct?

10 A. Yes.

11 Q. And one of the ways that was accomplished is that  
12 there were more easier questions added that would be  
13 directed at that eighty-five percent. Correct?

14 A. Yes.

15 Q. And another way, part of the test is timed and part  
16 of it is not. Correct?

17 A. Yes.

18 Q. The parts that are timed, when you went from the  
19 WAIS-R to the WAIS-III, some of the times were increased.  
20 Is that correct?

21 A. Yes. Some of them were.

22 Q. So the effect of that would be a slow person taking  
23 the test would have more time to complete it?

24 A. Yes.

25 Q. And the effect of adding easier questions is that a



1 person in that bottom mildly mentally retarded range  
2 could get more questions correct?

3 A. In terms of an absolute number, that question is  
4 yes. In terms of elevating their score, no.

5 Q. So if Mr. Larry takes the WAIS-R in December and  
6 January of '01 and '02, takes the WAIS-R and the test you  
7 give him eight to nine months later has more easy  
8 questions and more time and you factor in the practice  
9 effect, it's not surprising that he did do a little bit  
10 better, is it?

11 A. That's not what happened, though.

12 Q. Well he did five points better, didn't he?

13 A. Yes, but not because of the practice effect.

14 Q. And you're saying not because of easier questions?

15 A. Absolutely. I've done a comparison item by item of  
16 the items that are the same on the test.

17 Q. You did that?

18 A. Yes.

19 Q. You're saying that the easier questions had no  
20 effect on Thomas Larry's score?

21 A. Correct.

22 Q. And the extended time periods had no effect on his  
23 score?

24 A. They affect his score in the sense they make it more  
25 accurate. They don't elevate it. The test was created and

1 it was expanded with more easy items and extended time  
2 frames and then it was -- we call the process norming. It  
3 was administered to a huge number of people and the range  
4 of scores and the way people perform on all those items  
5 was calculated into how IQ scores are calculated. So  
6 everybody gets these new items and everybody has more  
7 time.

8 It was done that way because they believed that  
9 was a more accurate way of assessing people. Not to  
10 elevate scores or elevate scores for a particular  
11 population but to give a more accurate range of what a  
12 particular group was doing.

13 Q. So just to be clear so you're putting no credibility  
14 into the extended time periods, easier questions, or the  
15 practice effect in Thomas Larry's five point increase on  
16 the test?

17 A. Those are two different things. The construction of  
18 the test included more items that were easier, if you'll  
19 let me use an analogy. If you have a mathematics test and  
20 it starts with calculating the slope of a line and then  
21 it goes into trigonometry and differential equations,  
22 you'll have a pretty good idea of where people stand if  
23 they already know algebra and algebra II. You won't know  
24 much about people that don't know that stuff.

25 If you add a bunch of items about complicated

1 multiplication and division problems and then briefer,  
2 simpler addition and subtraction problems, then you'll  
3 have a better idea of where people stand below that part  
4 where you stopped before. So the people who understand  
5 calculus will still get all those easy questions right  
6 and the people who don't understand anything more  
7 complicated than multiplication will still get everything  
8 above there wrong, but you'll have a better idea of where  
9 they fall. They understand multiplication but not  
10 division.

11 So you'll have more discrimination in the lower  
12 range. You didn't help anybody's score, you didn't hurt  
13 anybody's score. You just expanded the test so it was a  
14 better test at all the ranges and that's what they did on  
15 the WAIS.

16 Q. Then how do you account for a five point increase  
17 over a nine month period?

18 A. He tried harder visibly and notably on several sub-  
19 tests. He tried harder and got more correct.

20 Q. That's your opinion?

21 A. It's evident from looking at the items.

22 Q. How do you know how hard Thomas Larry tried when he  
23 took the test for Dr. Fisher for comparison?

24 A. I'll stick with the most obvious example and  
25 actually these examples account for probably most of the

1 difference. On the picture arrangement sub-test, and the  
2 picture arrangement sub-test was substantially modified  
3 in the WAIS-III so there is some practice effect but not  
4 very much because the items are not the same anymore.

5 So, for Dr. Fisher on picture arrangement, he  
6 got the first four correct which involved a series of  
7 three cartoon panels that he had to rearrange. Anything  
8 above that, he could not do. He did not get any more  
9 correct.

10 When I administered it, so he had seen that  
11 first item which he got correct again and the next item  
12 was brand new. He got it correct. The next item was an  
13 identical item to the WAIS-R item and he got it  
14 incorrect.

15 Q. What do you mean he got it incorrect?

16 A. He could not solve it. He did not have ---

17 Q. Again, you're still showing him pictures?

18 A. Yes.

19 Q. So what do you mean he couldn't solve it?

20 A. He couldn't reorder the pictures in the correct  
21 order.

22 Q. Just for clarity, did he miss that item on Dr.  
23 Fisher's test?

24 A. It was not administered to him.

25 Q. So this was something new?

1 A. Well, I can't tell if it was administered. It should  
2 have been but it's not really notated. I'm assuming that  
3 he did it and he got it incorrect.

4 Q. So you can't say that he's trying harder on that  
5 item or not?

6 A. Right. And recall that these tests build in  
7 difficulty so they start with extremely easy and end with  
8 extremely difficult items and there are eleven items  
9 total so we're up to item number four which he got  
10 correct. Item number five he got correct. These are  
11 items that were new to this test. He had not seen them  
12 before. There would be no practice effect involved.

13 Q. Can I ask you if these are new items, how can you  
14 say he's trying harder on yours when you have nothing to  
15 compare it with on a previous test?

16 A. Because I'm actually not finished. Let me be more  
17 clear.

18 Q. Okay.

19 A. On item number six, he got partial credit and item  
20 seven he got full seven and on item number eight he got  
21 partial credit. So, this is the same type of item. Some  
22 of them are identical. Some are different. They build in  
23 difficulty. He got eight out -- he got points on up to  
24 eight out of the eleven items.

25 On Dr. Fisher's, he got credit on the first

1 item and the first item only. He did not get the second  
2 most difficult or the third most difficult. He got the  
3 easiest one, period, end of story.

4 When I administered it, he got credit and full  
5 credit up through the seventh item and partial credit on  
6 the eighth. So he demonstrated to me an ability to do  
7 this task. That's independent of the practice effect.

8 Q. So the items he would have missed on Dr. Fisher's  
9 test would have been different items than you had?

10 A. Some were different, some were -- yeah, I think most  
11 of them were different. Well, again, I can't tell from  
12 this if he administered these items or not so some of the  
13 same items exist and I'm not sure if they were  
14 administered but he did get credit for them for Dr.  
15 Fisher.

16 Q. So if you don't know if they were administered or  
17 not, on Dr. Fisher's test, they're different and you've  
18 already testified that the test you administered had more  
19 time and more easier items, how can you say he's just not  
20 trying?

21 A. It's quite easy. If I give you a series of math  
22 problems -- I'll go back to my analogy -- with addition  
23 and subtraction and multiplication and division and  
24 simple algebra and you get the addition problems only and  
25 don't get any of the rest, then later on I give you

1 different items but they're still addition, subtraction,  
2 multiplication and division, simple algebra, and you get  
3 everything up through division, then I know what your  
4 ability level is. I know you're able to do that task. It  
5 doesn't have to be exactly the same item. I'm testing the  
6 same abilities, the same concepts.

7 Q. And, again, in fairness to you the opinion you hold  
8 that he tried harder on your test from what we're hearing  
9 is just your opinion?

10 A. It's an inference based on the data.

11 Q. Can you tell us how the WAIS-R is modified to the  
12 WAIS-III? Is half of the test different, a fourth of the  
13 test different, ten percent of the test different? Can  
14 you tell us how much of a difference there is?

15 A. If you want to go sub-test by sub-test, I can tell  
16 you.

17 Q. Total?

18 A. Well, I can tell you that on every sub-test  
19 something was different. On some sub-tests many of the  
20 items are different. On some sub-tests all materials are  
21 different and there are brand new sub-tests that didn't  
22 exist. So, I mean, I don't know how you'd calculate that  
23 as a percentage.

24 Q. Let's move on. Eighty-five percent of the mentally  
25 retarded population falls in the category of mild mental

1 retardation of which we have claimed Thomas is a part of.

2 MR. SAUNDERS: Objection to the form of that  
3 question. We're just talking about IQ tests alone. I  
4 think he's grouping the whole thing in.

5 THE COURT: Go ahead and finish your question.

6 MR. CAUSEY: Speaking to you in that range of  
7 people that eighty-five percent of the retarded  
8 population falls into which is roughly 50 to 70 IQ's.  
9 People in that group, 50 to 70 IQ, mildly mentally  
10 retarded frequently can attain schooling up to the sixth  
11 grade. Is that correct?

12 A. That's possible, yes.

13 Q. And attaining scores in subjects in the sixth grade  
14 of B's and C's is not inconsistent with someone being  
15 mildly mentally retarded. Is that correct?

16 A. No, that would be possible.

17 Q. And that is entirely consistent with Thomas Larry's  
18 sixth grade grades. Correct?

19 A. Yes.

20 Q. And you've had an opportunity to see how he did in  
21 the first, second, third, fourth which were lower grades.  
22 Correct?

23 A. Yes.

24 Q. So nothing in his grades that we have submitted to  
25 the Court would indicate, by itself, he's not mildly



1     mentally retarded?

2     A.    It doesn't establish it either direction.

3     Q.    My question is those grades that Judge Spivey has up  
4     there, those grades don't tell us this person can't be  
5     mildly mentally retarded, the grades are too high. Is  
6     that correct?

7     A.    They don't rule it out, no.

8     Q.    His grades are consistent with someone who could be  
9     mildly mentally retarded?

10    A.    It's possible, yes.

11    Q.    If I can move on to the SSSQ, street survival?

12    A.    Yes. Street survival skills.

13    Q.    That test -- we've heard testimony about 15A-2005  
14    which has ten items of adaptive behavior that you were to  
15    assess to see if there is some type of deficit. Correct?

16    A.    Right.

17    Q.    The SSSQ test does not address all ten of those,  
18    does it?

19    A.    Correct.

20    Q.    Some of the things that the SSSQ will call an area  
21    that's not the same label that you'd use on 15A-2005 but  
22    are similar. Correct?

23    A.    Yes.

24    Q.    So when you kind of do a review of what it test and  
25    what it doesn't, out of those ten areas the SSSQ does not

1 give you a test or any kind of result for communication.

2 Correct?

3 A. I think there is probably some overlap with some of  
4 the sub-tests but I won't quibble. It doesn't have a  
5 category that directly correlates.

6 Q. There is no category on the SSSQ regarding  
7 communication?

8 A. Correct.

9 Q. With respect to work or work skills, there's no  
10 category for that, is there?

11 A. Again, there's quite a bit of overlap on work skills  
12 for some of these things but there's no category  
13 identified as work skills.

14 Q. And there's no category identified as social skills,  
15 is there?

16 A. That's correct.

17 Q. And there's no category identified as leisure  
18 skills, is there?

19 A. That's correct.

20 Q. And there's no category identified as self-  
21 direction, is there?

22 A. Correct.

23 Q. Is there a category identified as functional  
24 academics?

25 A. No.

1 Q. So far that's six of the ten that the SSSQ does not  
2 have categories for. Correct?

3 A. Right.

4 Q. There is a domestic management category on the SSSQ  
5 that you used and that roughly corresponded to home  
6 living?

7 A. Roughly.

8 Q. Health, first aid and safety on the SSSQ?

9 A. Yes.

10 Q. Would you equate that to health and safety on 15A-  
11 2005?

12 A. Yes.

13 Q. And is there a category for public services on the  
14 SSSQ?

15 A. Yes.

16 Q. Is there a category for self-care?

17 A. There are issues of self-care in that domestics,  
18 health and safety, public services, monetary, in those  
19 areas directly assessing that but they're not all within  
20 one skill.

21 Q. So the skills that you would be assessing under  
22 domestic management, you would let that overlap into  
23 self-care?

24 A. I think it does overlap whether I let it or not.

25 Q. Okay. Is there an independent category for self-care

1 on the test?

2 A. No.

3 Q. So there are one, two, three, four, five, six, seven  
4 out of the ten that are not specifically addressed by the  
5 SSSQ?

6 A. No, I have to disagree. Self-care is specifically  
7 addressed but not within a single scale but there are  
8 items specifically addressing those issues of self-care.

9 Q. Did you give any other test in addition to the SSSQ  
10 to determine what limitations Thomas Larry may have in  
11 these ten statutory areas or is that the only test you  
12 gave?

13 A. That's the only test I gave.

14 Q. And looking at your report, I'll ask you some of the  
15 same questions Dr. Fisher got. You did review the  
16 Department of Corrections records?

17 A. Yes.

18 Q. You did review Thomas Larry's school records from  
19 Forsyth County?

20 A. Yes.

21 Q. You did not contact Thomas Larry's mother?

22 A. Correct.

23 Q. Did you read the affidavit in the file?

24 A. Yes.

25 Q. Did you contact Thomas Larry's sister who testified

1 today?

2 A. No.

3 Q. Did you review her affidavit that is in the file?

4 A. Correct.

5 Q. And it says on here you also reviewed the  
6 psychological report and testimony from Gary Hoover?

7 A. Yes.

8 Q. Now in all fairness do you remember when that report  
9 would have been generated? Are we talking about 1996-  
10 1997?

11 A. Yes, that was around the time of the trial.

12 Q. And that would have predated the mental retardation  
13 statute 15A-2005 by a number of years. Correct?

14 A. Yes.

15 Q. Did you see anything in that report or in reviewing  
16 his testimony that would have any impact on mental  
17 retardation, adaptive living skills, or those ten items  
18 that are listed in the statute?

19 A. Yes.

20 Q. What did you find?

21 A. I found an absence of those.

22 Q. How did you find an absence?

23 A. I read the report and it didn't say anything about  
24 this guy's potentially mentally retarded.

25 Q. Was he asked?

1 A. A good clinical evaluation would give you the  
2 findings of the psychological assessment and those  
3 findings would include positives and negatives. So, if  
4 Dr. Hoover had seen something that made him think that  
5 this person might be mentally retarded, a good  
6 professional would have included that in the report. That  
7 would standard clinical practice.

8 Q. But isn't it fair to say that you didn't have the  
9 statutory list back then?

10 MR. SAUNDERS: Your Honor, I am going to object.  
11 Whether we had it or not, he's answered the question.

12 THE COURT: Sustained. I'm assuming you have a  
13 number of other questions?

14 MR. CAUSEY: Yes, I do.

15 MR. SAUNDERS: Your Honor, he has to be in  
16 Wilkes County in the morning at 9:30.

17 THE COURT: For a simmlar hearing?

18 MR. SAUNDERS: No, it's testimony in a voluntary  
19 commitment.

20 MR. CAUSEY: I can finish in about 15 minutes.

21 THE COURT: Are you going to have redirect?

22 MR. SAUNDERS: It will probably take five  
23 minutes.

24 THE COURT: Okay, all right.

25 MR. CAUSEY: You did not interview any school

1 teachers of Thomas Larry?

2 A. Correct. I did not.

3 Q. You did not interview any guards at the Department  
4 of Corrections concerning Thomas Larry?

5 A. I had causal conversations with them but not a  
6 formal interview.

7 Q. You relied mainly on the records?

8 A. Yes.

9 Q. And you did not contact any other family or friends  
10 of Thomas Larry, did you?

11 A. Correct.

12 Q. With respect to the SSSQ, are you aware of who has  
13 developed this test and who revised it and distributed it  
14 and for what purpose?

15 A. Yes. I mean, I don't know that personally but I am  
16 aware of the information.

17 Q. You are familiar with a Dan Linkenhoker, one of the  
18 two people who developed the test?

19 A. Yes.

20 Q. The other person is deceased?

21 A. I didn't know that.

22 Q. Are you familiar with an affidavit that was given  
23 concerning this SSSQ and what it is to be used for and  
24 what it is not to be used for in North Carolina?

25 A. No.

1 MR. SAUNDERS: Objection, Your Honor. He said  
2 he's not familiar with it.

3 THE COURT: Overruled. His answer was no.

4 Q. You said you were not familiar with that?

5 A. Correct.

6 Q. Based on -- when you get a test, it comes with an  
7 instructional packet or a manual and you read that on the  
8 SSSQ?

9 A. Yes.

10 Q. Based on the information that came with it, is it  
11 true that that test is not recommended to be used alone  
12 without other test to determine under 15A-2005 whether a  
13 person has adaptive deficits?

14 A. Let me pull that apart. Almost all psychological  
15 tests will have the same caveat, "this test is not to be  
16 used alone and in isolation". I don't know of any  
17 psychological test that makes specific reference to a  
18 North Carolina statute. So, it's a standard caveat and  
19 it's true that I don't know of any test in the manual  
20 that refers to a statute, let alone a North Carolina  
21 statute.

22 Q. Let me just ask a direct question and you answer yes  
23 or no. Are you aware that the SSSQ without an objective,  
24 ominous test, such as Adaptive Behavior System, Violence  
25 Scales, or without other standardized supplemental



1 psychological tests, do not provide the degree of content  
2 validity, critical high stakes assessment of mental  
3 retardation for criminal appellees. Are you aware of  
4 that?

5 A. That's not from the manual.

6 Q. Do you dispute that?

7 A. Do I dispute? That's the first I've heard it. Do I  
8 dispute it? No, basically I agree that any test used in  
9 isolation -- or you cannot use a single test in isolation  
10 to combine sources of information.

11 Q. And you've told us you did not give the Violence  
12 Scales, Adaptive Behavior System, or even a test for  
13 adaptive behavior?

14 A. I did not do another test of adaptive behavior but I  
15 did other procedures and assessments of adaptive  
16 behavior.

17 Q. You heard Dr. Fisher relied on his clinical judgment  
18 to come to the conclusions on adaptive behavior. Correct?

19 A. Yes.

20 Q. And you, yourself, also used your clinical judgment?

21 A. In some of those areas, yes.

22 Q. And the only thing additional that it appears you've  
23 used is the SSSQ?

24 A. I don't know exactly but that's clearly one of the  
25 major differences.

1 Q. Just asking the open question. Did you use any other  
2 source on the adaptive behavior determination that you've  
3 given us other than your clinical judgment and the SSSQ?

4 A. Yes, I used the review of the DOC records  
5 extensively. I used the report from Dr. Hoover. I used  
6 the affidavits from family members and I used his school  
7 records.

8 Q. Let me just highlight just a few of those ten that  
9 you brought to us. On functional academics, the SSSQ  
10 does not address that?

11 A. Correct. Not directly.

12 Q. So you relied primarily on school records?

13 A. School records, DOC records, and my own assessment  
14 of him during testing where I observed him read and write  
15 things.

16 Q. And it would be your opinion that a grown man who  
17 fails the first grade, fails the fourth grade, and drops  
18 out of school in the sixth grade at age 16 does not have  
19 a functional academic deficit?

20 A. Not necessarily.

21 Q. And you put in your report, "mild impairment"  
22 concerning that area?

23 A. Yes.

24 Q. But you wouldn't go any further than that?

25 A. Yes. He can read and write, not very well, but he

1 can -- he does have some basic literacy skills so he is  
2 impaired to some degree but not significantly.

3 Q. With respect to self-direction, you have indicated  
4 in your report, "no impairment" but you also highlighted  
5 testimony that while he was in prison he was in trouble  
6 or a problem in prison concerning drugs and sexual  
7 assaults and various things?

8 A. Correct.

9 Q. And those would involve poor self-direction on  
10 Thomas Larry's part, would it not?

11 A. Well, to kind of flip it the other way, he succeeded  
12 -- he attempted to get marijuana and succeeded in getting  
13 it. That's self-direction. Not toward an amiable goal  
14 but it is self-directed activity with a successful  
15 outcome.

16 Q. Is it fair to say that he had direction, just not  
17 good direction?

18 A. Poor decision making.

19 Q. And doesn't that overlap poor self-direction?

20 A. No. His decision making was not poor because of  
21 cognitive abilities. It was because of a lack of morals.

22 Q. With respect to self-care, you testified that the  
23 SSSQ did give you information on that?

24 A. Yes.

25 Q. And your opinion would be under self-care, "none,

1 but it's possible that it exists" if I wrote down your  
2 words correctly?

3 A. Right. There could easily be some mild impairment  
4 if he were to be living independently in the community.  
5 There may be areas of living, for example, writing,  
6 balancing a checkbook where he's impaired in that but we  
7 don't know and we will probably never know.

8 Q. Anything in your resources that you looked at that  
9 would indicate that he had the ability or the wherewithal  
10 to use a bank account, get a driver's license, operate a  
11 car, or do those things that would fall under the self-  
12 care umbrella?

13 A. Yes. On the SSSQ, he could identify a correctly  
14 written check and identify an incorrectly written check  
15 so he at least had some basic information about how to  
16 write a check. I don't know about driving or any the  
17 other things.

18 Q. Anything in your record search that indicated he  
19 ever had a driver's license?

20 A. No, I don't think I came across that.

21 Q. And again nothing in your investigation revealed  
22 that while outside of prison Thomas Larry has ever lived  
23 independently and maintained his own household?

24 A. He has but again not for very long.

25 Q. If you could tell us when and where?

1 A. I don't know exactly where. I know he lived with  
2 girlfriends. He lived on the streets so that's --  
3 that's not very functional but he lived with other family  
4 members, different, you know, circumstances. Living on  
5 the street is not necessarily part of being mentally  
6 retarded. That's again a choice that people make when  
7 they alienate their family and their friends and have no  
8 place to go, that's where they end up.

9 Q. So in your opinion Thomas Larry living on the  
10 streets or living with family or living with friends  
11 would not show a deficit in living skills?

12 A. No, not necessarily especially after an extended  
13 incarceration. You would not expect someone who had spent  
14 ten years in prison to jump back into society and set up  
15 an independent household.

16 Q. With respect to work you testified you had  
17 absolutely no opinion as to whether or not he did or did  
18 not have a deficit there?

19 A. Correct.

20 Q. You can't say he did, can't say he didn't?

21 A. I'm inclined to say he didn't because he had held  
22 jobs in correctional settings and again he had some jobs  
23 in the community. I don't know why he lost them other  
24 than he got incarcerated. I don't have information to  
25 suggest that he was unable to perform the duties.

1 Q. So the bottom line is your opinion is you have no  
2 opinion?

3 A. Yes.

4 Q. You did find deficits in health and safety but you  
5 classified those as mild?

6 A. Correct.

7 Q. You don't dispute there is some impairment there?

8 A. In some isolated areas, yes.

9 Q. Again, that's your judgment call on how severe or  
10 how mild you make that?

11 A. All of this is kind of a judgment call on severe,  
12 mild, none. Yes.

13 Q. Is it fair to say that any person in your position,  
14 whether it's you or Dr. Fisher, your personal opinion and  
15 judgment plays a large part in the conclusions you reach?

16 A. I like to think that at the professional level, Dr.  
17 Fisher and I used our professional judgment.

18 Q. With respect to -- you've worked on -- you know the  
19 difference between post-conviction and a pre-trial case?

20 A. Yes.

21 Q. And that post-conviction is what Thomas Larry is?

22 A. Yes.

23 Q. He's already been convicted and is on death row?

24 A. Yes.

25 Q. Have you worked on other post-conviction cases?

1 A. Yes.

2 Q. Is it fair to say at least 13?

3 A. Yeah, between ten and 15. I don't know exactly how  
4 many.

5 Q. I'll run through these real quick. Tell me if any  
6 of these are incorrect. You worked on Frank Chambers,  
7 post-conviction?

8 A. Yes, not in regard to mental retardation.

9 Q. Pardon?

10 A. Not in regard to mental retardation.

11 MR. SAUNDERS: Your Honor, I wonder if we could  
12 confine it to that issue?

13 Q. How many have you worked on that concerned giving an  
14 opinion on whether or not the individual was mentally  
15 retarded or not?

16 A. Approximately ten. I'm not entirely sure.

17 Q. All ten of those as a witness for the State?

18 A. Yes.

19 Q. All ten of those you opined that the person was not  
20 mentally retarded?

21 A. No. Five or six I have said they were mentally  
22 retarded.

23 Q. In post-conviction?

24 A. Yes.

25 Q. Can you give me the name of one or two?

1 A. Houston Clodfelter -- these are cases in this area  
2 so you might know. I'm not recalling his name but he is  
3 also from this area. Anthony Bone, although that isn't,  
4 I don't think, completely processed. If you can have the  
5 names I can tell you what I found.

6 Q. Melony Anderson? Is that a Forsyth County case?

7 A. No, it was not Forsyth County. I said that she was  
8 not mentally retarded although that was very close.

9 Q. Dwight Robinson?

10 A. Dwight Robinson is not completed.

11 Q. Clinton Smith?

12 A. Not completed.

13 Q. Lorenzo Norwood?

14 A. My review was that he was mentally retarded.

15 Q. Norris Taylor?

16 A. Not completed.

17 Q. Jerry Cummings?

18 A. Excuse me?

19 Q. Jerry Cummings?

20 A. Never heard of him.

21 Q. Henry McConnell?

22 A. Never heard of him.

23 Q. Anthony Bone?

24 A. Mentally retarded.

25 Q. Anthony Hipp?



1 A. Have not done anything.

2 Q. Timothy Gill?

3 A. Gill was -- he was in this area. Correct? No,  
4 Timothy Gill was not in this area.

5 Q. Was not?

6 A. No. There are actually other cases that -- I'm  
7 sorry, not post-conviction but there are also some pre-  
8 trial cases that I've been involved in.

9 Q. You did not do Frank Chambers for mental  
10 retardation?

11 A. That wasn't the primary focus, no.

12 Q. Did you testify at his mental retardation hearing,  
13 post-conviction?

14 A. He had a post-conviction hearing but it wasn't --  
15 it was prior to the mental retardation law so it was ---

16 Q. Since the last has changed you've not testified in  
17 his case?

18 A. Correct.

19 MR. CAUSEY: That's all the questions I have.

20 THE COURT: Redirect?

21 **REDIRECT EXAMINATION by MR. SAUNDERS**

22 Q. Dr. Hazelrigg, there was one out of High Point you  
23 and I were talking about earlier that Howard (inaudible)  
24 did?

25 A. That was one of the ones he has mentioned, Bone or

1 Norwood, I think.

2 Q. You found that he was mentally retarded?

3 A. Yes.

4 Q. And the WAIS-III you said it doesn't elevate the  
5 score, it just makes it more accurate?

6 A. Correct.

7 Q. That's when it has been revised?

8 A. Correct.

9 MR. SAUNDERS: That's all I have on redirect.

10 THE COURT: Other questions?

11 MR. CAUSEY: No.

12 THE COURT: Do you seek to release the witness?

13 MR. SAUNDERS: Yes.

14 THE COURT: Any objection?

15 MR. CAUSEY: No.

16 THE COURT: You're free to leave. You may step  
17 down. Further evidence from the State?

18 MR. SAUNDERS: No, sir.

19 THE COURT: Will there be rebuttal for the  
20 defense and do you want to do it now or in the morning?

21 MR. KILLIAN: Your Honor, the rebuttal of Dr.  
22 Fisher should be very brief. Just three or four  
23 questions.

24 THE COURT: Well, we'll do that and have closing  
25 arguments thereafter.

1 MR. SAUNDERS: Judge, I hate to impose but if  
2 that's all it's going to be is three or four questions,  
3 I'd like to hear it today while Dr. Hazelrigg is here.  
4 He won't be here in the morning.

5 THE COURT: I'm trying to be cognizant of the  
6 court personnel.

7 MR. SAUNDERS: I understand but since they said  
8 just three or four questions, Judge.

9 THE COURT: How long do you think it will take?

10 MR. KILLIAN: About five or ten minutes.

11 THE COURT: All right.

12 **REBUTTAL DIRECT EXAMINATION by MR. KILLIAN of DR. FISHER,**  
13 **WHO WAS PREVIOUSLY SWORN.**

14 Q. Dr. Fisher, just a couple of questions. You've heard  
15 some testimony about a diagnosis of a borderline  
16 personality disorder and antisocial disorder?

17 A. Yes.

18 Q. Is that correct?

19 A. That's correct.

20 Q. Is it unusual for a person with mild mental  
21 retardation to have either one of those problems?

22 A. No.

23 Q. When you administered the WAIS-R to Mr. Larry, what  
24 was your opinion about his effort?

25 A. My recollection is that his effort was good and

1 consistent. I was surprised at that part of it in his  
2 case. My recollection is that he tried consistently  
3 across sessions and I would include both on the WAIS test  
4 and in his telling me about background, you know,  
5 schooling and those kind of things.

6 Q. And Dr. Hazelrigg mentioned something about norms  
7 and standards?

8 A. Yes.

9 Q. As far as the WAIS-R goes, when was that test  
10 standardized or normed?

11 A. In the '80's. I don't know the exact date.

12 Q. And based on your education, experience, and  
13 training and research, does the fact that the test was  
14 last normed in the '80's, would that have any effect on  
15 the score that Mr. Larry -- that you gave him? The full  
16 scale IQ of 69?

17 A. Yes. My understanding and again I think I've gone  
18 through a lot of research on this and I hope I'm correct  
19 on this but it's my understanding --

20 MR. SAUNDERS: -- Judge, if this is just going  
21 to be speculation, I'm going to object.

22 THE COURT: Overruled. Go ahead.

23 THE WITNESS: I had a conversation with Dr.  
24 Hancock yesterday that as you move away from the date of  
25 standardization, so if it's five years after or ten years

1 after, you would expect the IQ to increase to some  
2 extent. Therefore, if there is any change in the IQ  
3 score that you have that is distant from that date of  
4 standardization, it would be a change in modification in  
5 the direction down.

6 So that if the WAIS-R is given -- this is my  
7 understanding of this material that I have reviewed -- if  
8 it is given ten years after the standardization and the  
9 other one was given one year after, you'd expect the  
10 score -- for the same person you would expect the score  
11 to be higher for the one given ten years after because  
12 you have an increase in IQ expected over that time. The  
13 Flynn affect.

14 Q. And in Mr. Larry's case, what does that mean as far  
15 as --

16 A. -- That means if you interpreted, if you said well  
17 what we do know is that the WAIS-R was given this many  
18 years, a significant number of years after the date of  
19 standardization, then it's going to interpret which way  
20 it might be affected. It would be affected in the  
21 direction down.

22 Q. And that's called the Flynn affect?

23 A. Yes. Well, I'd rather state it just the way I  
24 stated it.

25 Q. Does that mean you actually deduct points off the 69

1 he got?

2 A. They have different formulas for how much you would  
3 deduct but it is a deduction as opposed to an addition.

4 Q. Did you use the SSSQ as part of your evaluation of  
5 Mr. Larry's adaptive skills?

6 A. I did not.

7 Q. Why not?

8 A. The author says don't use it.

9 MR. KILLIAN: That's all.

10 **REBUTTAL CROSS EXAMINATION by MR. SAUNDERS**

11 Q. The author says don't use it by itself?

12 A. When I read the affidavit --

13 Q. -- He didn't say don't use it, he just said don't  
14 use it by itself? Just give the SSSQ and walk out?  
15 That's what it means, isn't it, Dr. Fisher?

16 A. No. My interpretation from his affidavit was he's  
17 saying don't use that for the assessment of adaptive  
18 behavior for criminal defendants when you're determining  
19 retardation. That's how I read it.

20 Q. Only?

21 A. I know he said that and I didn't get that. I got him  
22 saying don't use it for the assessment of adaptive  
23 behavior functioning for criminal defendants.

24 Q. There are people who have borderline personality  
25 that are not mentally retarded?

1 A. Yes.

2 Q. Plenty of people who have antisocial personality who  
3 are not mentally retarded?

4 A. Yes.

5 Q. Just because he did good consistently on your test  
6 doesn't mean he was putting forth maximum effort does it,  
7 Dr. Fisher?

8 A. Correct.

9 MR. SAUNDERS: That's all I have.

10 THE COURT: Redirect?

11 MR. KILLIAN: No, Your Honor.

12 THE COURT: Seek to release him?

13 MR. KILLIAN: Yes.

14 THE COURT: Any objection?

15 MR. SAUNDERS: No, sir.

16 THE COURT: You're free to leave. Further  
17 evidence on rebuttal for the defense?

18 MR. KILLIAN: No, Your Honor.

19 THE COURT: We'll start out with closing  
20 arguments in the morning at 9:30. Madam Sheriff, you may  
21 recess for the evening.

22 WHEREUPON, this matter was recessed until 9:30 a.m. June  
23 3, 2003.

24

25 (June 3, 2003.)

1 (DEFENDANT AND HIS COUNSEL IN COURTROOM.)

2 THE COURT: Closing statements in the motion for  
3 appropriate relief? Does the defendant waive opening?

4 MR. CAUSEY: Yes, Your Honor.

5 THE COURT: Mr. Saunders?

6 MR. SAUNDERS: Thank you, Your Honor. The first  
7 thing I'd like to point out to the Court is that in view  
8 of the defendant's poor grades in school, in view of the  
9 fact that he quit school after the sixth grade, in view  
10 of the fact that he has been continuously almost his  
11 entire adult life since '72 until now until the time he  
12 committed this crime, until 15A-2005 was passed, this  
13 defendant's mental retardation was never in question.  
14 Never. Not until he could derive some benefit from it,  
15 from the statute, has it now become an issue in his life.

16 Even at his trial, in 1995, where he had a  
17 psychologist evaluate him and I contend did a thorough  
18 job and had access to the same school records, talked to  
19 family members, it was never an issue. Never even  
20 broached. Dr. Hoover never mentioned it. It never came  
21 up in the trial.

22 On the contrary, Dr. Hoover diagnosed this  
23 defendant with an antisocial personality disorder and  
24 then Dr. Hazelrigg testified, Judge, this defendant's  
25 history is replete with instances of antisocial



1 personality disorder. Continued criminal activity,  
2 continued lying, irritability, aggressiveness, and  
3 disregard to the safety of others. Irresponsibility in  
4 staying or keeping work.

5 So, you know, I think in perspective it's  
6 important to keep all that in consideration when the  
7 Court makes its decision about this defendant who is  
8 claiming mental retardation.

9 Of course the Court knows the statute. There's  
10 two things that the defendant has to show. First, of  
11 all, an IQ of 70 or below and significant deficits in two  
12 or more adaptive skills areas. With respect to the IQ  
13 test, Judge, you have two before you. You have one given  
14 by Dr. Hazelrigg, the WAIS-III, which was 74, and you  
15 have one given by Dr. Fisher, the WAIS-R, which was a 69.

16 Of course, the WAIS-III was more updated. It  
17 was designed with more questions to make it more  
18 accurate. Not to elevate the score but to make it more  
19 accurate and there was less of a margin for error. I  
20 think it was kind of instructive that Dr. Fisher spent  
21 more time trying to validate his test than he did on this  
22 defendant.

23 Dr. Hazelrigg did a screening test. Dr. Fisher  
24 didn't. As Dr. Hazelrigg testified, there is no single  
25 test, no generally accepted test, to determine if a

1 person is malingering. There are about three of them.  
2 None of the psychologists recognize one but there's at  
3 least three that can be given. The point is Dr.  
4 Hazelrigg gave one. Dr. Fisher didn't.

5 I think what the Court can glean from that is  
6 more of an effort on Dr. Hazelrigg's part to get to the  
7 bottom of the matter and an issue as serious as this,  
8 Judge, I think there ought to be someone who is going to  
9 do all he can to ensure what he's relating to the Court  
10 is accurate. Not only in his clinical judgment but in  
11 testing that he has given.

12 As Dr. Hazelrigg testified, this is not a test  
13 for memory. This is a test for motivation. This  
14 defendant only scored nine which was even below what Dr.  
15 Hazelrigg testified that many clinically retarded people,  
16 or people with mental impairments, have done in the past.  
17 They have scored a ten and 12 but he only scored nine  
18 which Dr. Hazelrigg shows is motivation. In other words,  
19 he gleaned from that that this defendant is not going to  
20 be giving his maximum effort.

21 So before Dr. Hazelrigg begins his IQ tests  
22 with the more updated version and the more accurate test,  
23 he gives him a screening test. Dr. Fisher didn't. They  
24 may explain to you, well, Dr. Fisher, he's an expert in  
25 mental retardation. I would contend this goes to the

1 analogy of whether or not you have a good athlete that is  
2 going to give you 100% like Dr. Hazelrigg or a super star  
3 that is going to give you 50%. Which one would you  
4 rather rely on? Which one would you rather go into the  
5 game with? The guy that's going to give you 100%, which  
6 is what Dr. Hazelrigg did, and they're going to question,  
7 you know, whether or not the screening test is reliable  
8 or not. The point is, Judge, he gave one and he gave  
9 that extra effort.

10 I think what you have, Judge, is an IQ score of  
11 74 from the updated, more accurate, less margin of error,  
12 from someone who didn't give their maximum effort. I  
13 think it's -- I think it's probably comparable, Judge, to  
14 those screening tests that he got in DOC because of the  
15 nature of the WAIS-III. Even though there were screening  
16 tests in DOC, you know he had scores in the 80's, this is  
17 the one that is more accurate where the defendant didn't  
18 put forth his maximum effort. I would contend they don't  
19 meet that criteria of 15A-2005.

20 As to the adaptive skills, Judge, once again  
21 Dr. Hazelrigg gave him the SSSQ, the Street Survival  
22 Scales Quiz questionnaire. Dr. Fisher didn't. Once  
23 again, Judge, I think it's an effort to try to determine  
24 whether or not the defendant does have any deficits in  
25 adaptive functioning because, as both of them indicated,

1 there are some areas that it's just hard go gauge like  
2 communication, although Dr. Hazelrigg got this  
3 defendant's testimony from his trial. Dr. Fisher didn't  
4 which would give you some indication of the effort put  
5 forth by Dr. Hazelrigg and whether or not he was actually  
6 trying to determine what this defendant's communication  
7 skills were.

8 I believe Dr. Fisher didn't give an opinion  
9 about that and Dr. Hazelrigg determined there was no  
10 impairment. Functional academics, Dr. Fisher said well  
11 he failed first grade, failed the fourth, and only went  
12 to the sixth so he has functional academics.

13 The first thing Dr. Hazelrigg pointed out is  
14 that when he got to the sixth grade he made B's and C's.  
15 Clearly the ability is there. I think he had the extra  
16 motivation in the sixth grade. I think common sense will  
17 tell you, Judge, that when somebody gets to be 14 and  
18 they are in the sixth grade, they don't want to be in  
19 elementary school any more so they're going to put forth  
20 a little more effort. I think that's some indication as  
21 to why he did well in the sixth grade. He felt like he  
22 needed to to get out of elementary school.

23 But there are other reasons why he didn't make  
24 good grades. I would contend to you, as his first grade  
25 teacher said, he didn't listen well, he didn't follow

1 directions well. His sister said he didn't attend  
2 school. His sister said if he wasn't interested in  
3 something, he just wouldn't try and I think that's  
4 symptomatic of the grades in school. In art, music and  
5 physical education, he was satisfactory in all of those.  
6 Never needed improvement in any of those, never got a  
7 "U". Things that he liked to do, he did well in as his  
8 sister indicated. If he liked something, he would excel  
9 in it, if he didn't you could forget it.

10 Dr. Hazelrigg said he could read and write.  
11 Ms. Mixon said he was in the slow learning range and his  
12 sister testified that he wrote letters from prison. You  
13 know, he can read and write. He has some mild impairment,  
14 Judge, because he only goes up to the fifth grade level  
15 and I would contend to you that's not significant  
16 impairment the way the statute requires.

17 His social skills, Dr. Hazelrigg said he was  
18 generally demonstrative and friendly. He maintained eye  
19 contact. His conversation was (inaudible) with the  
20 appropriate give and take. He listened intently to the  
21 questions and answered relevant. Social indications and  
22 interactions, for instance, explained how he was getting  
23 along with the another inmate who does not like him. He  
24 was also able to maintain relationships with his peers  
25 without conflict. He said there was no impairment.

1           His first grade teacher said he works and plays  
2 well with others. Now when he got frustrated, he acted  
3 out and threw rocks and turned over checkerboards.

4 Judge, that's the antisocial disorder. That's not an  
5 inability to do the work but an inability to get along.  
6 His sister said he understood the rules. He just didn't  
7 like to follow them. Ms. Mixon said he had average  
8 social comprehension and judgment.

9           Self-direction. I believe Dr. Fisher said  
10 because he makes poor choices and wrong choices he didn't  
11 have any self-direction. Dr. Hazelrigg said it's not an  
12 issue of choices, Judge. It's an issue of does he have  
13 the ability or the skills. Even with his poor choices,  
14 Dr. Hazelrigg said he had a plan and he implemented the  
15 plan such as smuggling drugs into the school.

16           Dr. Hazelrigg also said he had a routine in  
17 prison which exercise, socialization and recreation. He  
18 said there was no impairment there.

19           Independent living, Dr. Fisher said -- well, he  
20 said the same thing here that he said about his work  
21 skills. He said he hasn't, so therefore he can't. I  
22 would contend the two don't necessarily follow. The SSSQ  
23 test that Dr. Hazelrigg gave said that he was impaired as  
24 far as tools were concerned but that was because of his  
25 inexperience with them.

1           His scores on domestic skills, time monitoring,  
2           measurements were in the average range. So I would  
3           contend he doesn't have any significant impairment there.

4           His self-care, the SSSQ about basic concepts  
5           and functional skills were in the average range. Dr.  
6           Hazelrigg said there was no impairment. His sister said  
7           he didn't have any trouble taking care of himself. He  
8           just chose not to.

9           On health and safety, Judge, once again his  
10          sister said he didn't have any trouble taking care of  
11          himself. I thought what was interesting here from her  
12          testimony, Judge, she testified that a lot of times he  
13          just stayed gone all day long and nobody would know where  
14          he is and then he'd come home at night. Judge, to me  
15          that indicates he would have had the ability to take care  
16          of himself and that he was aware of the dangers that were  
17          out there that could pose a threat to him. He avoided  
18          them. He was never brought home by the police. They never  
19          had to go get him.

20          Judge, at an early age, I think he exemplified  
21          the ability to take care of himself, to look out for his  
22          safety, and to essentially do what he's done all his life  
23          which is what he has wanted to.

24          His leisure skills, Dr. Fisher didn't give an  
25          opinion about that. I would remind the Court that his

1 sister said he was a good athlete and was artistic. Dr.  
2 Hazelrigg said that he had some self-direction and that  
3 included recreation in the Department of Corrections.

4 Work skills. Once again I think this is where  
5 Dr. Fisher said that he hasn't, therefore he can't. He  
6 talked about he never had any need for work. I don't  
7 know what a lot of blue collar workers would think about  
8 that statement. I don't think a lot of blue collar  
9 workers would think they don't have any need for work and  
10 I don't think they're mentally retarded. The DOC  
11 records, Judge, would reflect that he had worked at work  
12 release jobs and he violated them twice.

13 I think even in prison we get back to what the  
14 sister said. He understood the rules, he just didn't  
15 follow them.

16 There was also his statement on July 1st of '76  
17 when he was incarcerated for an armed robbery, the DOC  
18 records said, "defendant doesn't like anyone to place any  
19 type of restrictions on his movements and/or actions" so  
20 it goes back to even in the work environment, Judge.  
21 There are rules that you have to follow and he don't like  
22 to follow rules and he don't like for anybody to place  
23 any restrictions on his movements or actions so,  
24 therefore, he's not going to be a very good worker just  
25 because of that. Not because of any deficit in his



1 adaptive skills.

2 As I said before and as his sister has said,  
3 you know if he wasn't interested, you could forget it.  
4 Dr. Hazelrigg said he never put forth maximum effort.  
5 Ms. Mixon said he tended to give up very easily and he  
6 tended to give up fairly easy on difficult tasks.

7 Judge, sometimes work is hard and if that's a  
8 difficult task, then this defendant would not want to do  
9 and would give up easily and make another choice of going  
10 out and taking somebody's money that they had worked for.  
11 So, once again, it all comes back down to, you know, his  
12 choices in life and his desire to even attempt to become  
13 a decent member of society. He has chosen not to do that  
14 and that was by his own choice.

15 Even in DOC, Judge, he had the ability to  
16 utilize community services as he got married twice while  
17 he was in DOC. He got work release while he was in DOC.  
18 He had the ability to reach out. I believe there was one  
19 other instance where Dr. Hazelrigg's score on the SSSQ of  
20 public services was in the average range. The bottom  
21 line on all these adaptive skills, I think there were two  
22 where Dr. Hazelrigg gave mild impairment. The rest of  
23 them, except for home living, I think he gave him no  
24 impairment. He didn't opine about that because the  
25 defendant had never done much of it, Judge. But I would

1 say not only has the defendant not proven his case on the  
2 IQ prong of the statute, he hasn't proven his case on the  
3 adaptive skills part. He's got to do both and I would  
4 contend he hasn't done either and I would ask you to deny  
5 his MAR. Thank you.

6 THE COURT: For the defense?

7 MR. CAUSEY: Yes, good morning, Judge. I will  
8 speak on the IQ tests and then Mr. Killian is going to  
9 pick up where I leave off and talk about the ten items in  
10 the statute.

11 With respect to the IQ tests, I guess the main  
12 point I would like to make to the Court is I don't think  
13 when you're looking at the WAIS-R and the WAIS-III that  
14 we're looking at an apple and an orange. I think we're  
15 looking at two different kinds of apples, a Washington  
16 State versus a Golden Delicious.

17 The reason I say that is whenever we heard the  
18 reasons that Dr. Fisher gave the WAIS-R and then when Dr.  
19 Fisher told what the differences were to the WAIS-III and  
20 why it was changed and what made it different and you  
21 heard what those differences are, it's not a situation  
22 where we've got a new test and the old one is just  
23 obsolete and it's basically useless and it's got an  
24 expiration date and we need to throw it away.

25 They were both produced by the same company,

1 was written by the same company, and from what we heard  
2 from Dr. Fisher after speaking with 30 colleagues and  
3 experts, it is still widely used. A lot of judgment goes  
4 into what these two doctors do. There are objectional  
5 calls that they made based on their training and  
6 experience and you heard Dr. Fisher's training and  
7 experience and he made a judgment call to use the WAIS-R.  
8 It's a test he's familiar with. He's used it extensively  
9 and his reason for doing that is that when someone like  
10 Mr. Larry comes along who has been incarcerated as much  
11 as he has been, Dr. Fisher was expecting to find another  
12 WAIS-R score in his records somewhere. So he gives the  
13 test that he believes would give him the best basis to  
14 compare his score with previous scores.

15 It's unfortunate that after he did it, he  
16 couldn't find those scores but that was his reason and  
17 motivation for giving it. You've heard him say his  
18 reasons for giving it and you've heard Dr. Hazelrigg say  
19 what the differences are and I guess it's kind of good  
20 that he got both tests, both the modern version and the  
21 earlier version.

22 Instead of you having two WAIS-III's to decide  
23 whether they're the same or different or why they're the  
24 same or different, now you've got the best of both  
25 worlds. You've got a WAIS-R with a 69 and you've got the

1 WAIS-III with Dr. Hazelrigg's scores and you can then  
2 analyze the differences and say are these test scores  
3 contradictory to each other or are these test scores  
4 consistent with each other?

5 I'd like to start out and talk about common  
6 ground that both of these doctors shared. I don't think  
7 we're scoring any points or doing any good by saying well  
8 we believe Dr. Fisher and disbelieve Dr. Hazelrigg. I  
9 think if we look at what both doctors do agree on, what  
10 that common ground is, that will kind of lead us down  
11 this path on the IQ testing to figure out are these tests  
12 consistent with each other, are they meaningful, and what  
13 do they tell us.

14 Dr. Fisher has reported thus that whenever he  
15 gave the test he would not give a REY test or these other  
16 tests and you've heard there is no generally accepted  
17 test for malingering. He chooses after 30 years of  
18 experience to use his own judgment.

19 Dr. Hazelrigg is not there when this test was  
20 given by Dr. Fisher. He's not there when Dr. Fisher  
21 questions Thomas Larry about these things that he  
22 determines is not malingering. I think we have to rely on  
23 Dr. Fisher's 30 years and his judgment so I feel like he  
24 was not malingering. I feel like he gave his best effort  
25 on these tests.

1           Now his scores on the test were 69. Now it's  
2 not like we start out and say we have to have a 70 or  
3 better to get us there. The statute says 70 or better. We  
4 tell the doctor to test him and tell us what we've got.  
5 He says we've got a 69. We gave Dr. Hazelrigg the data,  
6 the testing scores, the underlying sub-scores and I asked  
7 Dr. Hazelrigg were you on common ground? Did you find  
8 anything in there to show that Dr. Fisher has scored the  
9 testing improperly? Did you find anything to show that  
10 he interpreted the test improperly? Again, looking at  
11 the judgment. It's not just the numbers, it's  
12 interpretation as well, and he said no. I said nothing  
13 to say that Dr. Fisher has scored it or interpreted that  
14 test wrong.

15           You know the WAIS-R is a scientifically  
16 administered test. No indication that it was improperly  
17 given in a group setting or that Dr. Fisher was not  
18 licensed so for all practical purposes we've got a valid  
19 test score of 69. Dr. Hazelrigg just doesn't like that  
20 particular version of the test. Doesn't like that  
21 particular apple.

22           If we knew nothing else at this point, except  
23 that he got a 69 on the WAIS-R, I'd say, Judge, we're  
24 going to give him a second test and let me tell you a  
25 little bit about the differences between those tests and

1 I want you to use your intellect and your common sense  
2 and your reasoning and I want you to guess and tell me  
3 what you think he's going to score on the second test.  
4 We'll see where we go with that.

5 If I said we're giving him a second test, nine  
6 months later and there's going to be some differences,  
7 this is the same root test with some differences. It's  
8 going to be administered the same way. The test giver is  
9 going to read you directions, which are going to be  
10 similar directions to the previous test. He's going to  
11 read the questions and Mr. Larry will give answers and  
12 then the test taker will write those down. So we're  
13 using the same format, some of the exact same questions,  
14 some of the exact same areas but we're going to change  
15 them a little bit. I'm going to give Mr. Larry more time  
16 on some of these sections that are timed and I'll ask you  
17 what do you think would happen to Mr. Larry's total  
18 score?

19 Giving him more time. He's a slow learner.  
20 Should he do worse, the same or better? I think we would  
21 expect, common sense if that's all we know, that he's  
22 going to do a little bit better. We don't expect him to  
23 do ten points better based on what we know but a little  
24 bit, maybe a point.

25 If I say, Judge Spivey, we're also going to

1 give him easier questions because the second time is  
2 designed to give easier questions if he were to fall in  
3 this mildly mentally retarded range. We're trying to  
4 separate those people out and for that reason this test  
5 is different and we're giving them more time and we're  
6 giving them easier questions.

7           What would you expect Thomas Larry to do on the  
8 test if you gave him easier questions? Would you expect  
9 him to do worse, the same, or better? I think we would  
10 expect him to do maybe a little bit better. Maybe  
11 another point. Again, this is common ground. This is  
12 what Dr. Hazelrigg told us, Dr. Fisher doesn't dispute  
13 it. The WAIS-III is easier. It has easier parts and it  
14 has more time. So just those two factors alone we would  
15 expect a slight increase on test number two.

16           Also, we talked about the practice effect and  
17 both doctors acknowledge it exists. They told us what it  
18 was and you can't really crawl into anybody's head and  
19 say Thomas benefited from the practice effect. Did he do  
20 better because he's heard these directions before and  
21 he's been through this before and any of us, who have  
22 taken tests whether it's the SAT or what, we know that  
23 the first time we take it there's test anxiety because  
24 we're unfamiliar with it and it's a nerve racking  
25 experience. But if you repeat the test six months later

1 and take it a second time, usually your score goes up and  
2 that's the practice effect. It could be from studying in  
3 that situation but if you just look at the mere fact  
4 you're taking the test again, you're more familiar with  
5 the instructions, you're more relaxed when taking the  
6 test, slight marginal increase.

7 Those three areas are things that are not in  
8 dispute. Those are common ground areas. The practice  
9 effect, easier questions, more time.

10 So if we know we've got a 69 and he takes the  
11 second test nine months later and those are factors that  
12 are not in dispute, what would you guess his score would  
13 be? You'd probably guess he's going to score maybe  
14 three, maybe four, perhaps five points higher. You  
15 wouldn't expect him to do worse. After all, this is an  
16 easier test.

17 So if you take the 69 and you say, yeah, maybe  
18 he can do three, four, five points better, we would  
19 expect him to do maybe a 73, 74, or 75. And guess what?  
20 That's what he did. He got a 74. So that's why I said I  
21 don't think we're looking at apples and oranges. It's  
22 kind of like a WAIS versus a (inaudible). We've got two  
23 different versions of the WAIS.

24 Our doctor actually gave the more difficult  
25 version. If the WAIS-III is easier, then the WAIS-R must



1 be harder. If the WAIS-III has more time, the WAIS-R has  
2 less time. If he's not taking it for the second time,  
3 like the WAIS-R, he has no practice effect. So I think  
4 we would expect a little bit lower score on the WAIS-R  
5 versus the WAIS-III and I think we can see that by using  
6 both tests, we've got the benefit of that when the scores  
7 that you see are not inconsistent but are in fact  
8 remarkably consistent with what you would expect and  
9 that's based on common ground.

10 Now that's not saying you should believe Dr.  
11 Fisher and disbelieve Dr. Hazelrigg. Let's look at the  
12 two scores with the standard deviations and see if these  
13 inconsistencies stay. And, again, the 69 that was on the  
14 WAIS-R has a five point deviation. If we subtract and  
15 add five points, we can see a range of 64 to 74. Again,  
16 the doctors' common ground said the numbers they have  
17 given you is not an exact replica of Thomas' IQ. We  
18 can't do that. We can give you a number that's  
19 representative to a degree of confidence and so we have a  
20 slightly different degree of confidence on the WAIS-III.

21 Again, as you pointed out, it's five points up  
22 but only four points down and even if we take that as  
23 being true, that's in a range of 70 to 79. Both tests  
24 overlap the 70. If these tests were inconsistent, if one  
25 represented maximum effort and one represented less than

1 maximum effort, we'd probably would not see an overlap in  
2 the scores. Those two ranges would have a separation.  
3 That's what you would expect. Common sense tells us  
4 that.

5 THE COURT: How do you get they overlap at 70 if  
6 it overlaps from 70 to 74?

7 MR. CAUSEY: Well, what if that's the common  
8 number that both of these have at that range.

9 THE COURT: Seventy to 74?

10 MR. CAUSEY: Right, but 70 is the critical  
11 number.

12 THE COURT: That's the lowest one?

13 MR. CAUSEY: Exactly. If we didn't have that  
14 overlapping of 70, say our test was 64 to 74 and their  
15 test was 71 to whatever that would represent -- 80? We  
16 wouldn't have an overlap age of 70. Seventy is the key  
17 number that the statute gives us. That's the point I'm  
18 making to the Court. They do overlap at other numbers  
19 but what is imperative is we established a 69 through our  
20 evidence.

21 The point I want to make is has the State's  
22 doctor reviewed that? Has he disproved that and I would  
23 say no because when you look at his range, they do  
24 overlap and they do overlap at 70. I'm not a believer in  
25 coincidences whether it's this test or anything. I don't

1 believe in coincidences. These tests are rigorous. I  
2 don't know who has designed them or how long they took  
3 but this isn't just something they knocked out on a  
4 processor and started selling to the doctors. They have  
5 got these standard deviations or errors of measurement  
6 that go in there that are for a reason and they're based  
7 on statistics, analysis, and prior testing.

8 I think the fact that when you factor that in  
9 to both of these scores and we've got scores that in a  
10 tight range -- a five point range, 69 to 74 -- when you  
11 look at that standard deviation and that they do in fact  
12 overlap, I do not call that a coincidence. That's what  
13 the testing is designed to weed out. That's what the  
14 testing is designed to show. It either does or it  
15 doesn't. It's not a coincidence.

16 So they do overlap at 70. If we have a five  
17 point standard deviation coming down like we did going up  
18 on the WAIS-III, we have an overlapping of 69 and 70 and  
19 we didn't see the overlap at the upper range but because  
20 they do, it does not disprove the 69. I say we've proven  
21 the 69. Their evidence hasn't knocked that out of the  
22 water. Actually their evidence is consistent when you  
23 look at the practice effect, the more time, easier  
24 questions, that higher scale is what you would expect.

25 With that, I look at his school records. Not to

1 talk about the list but to talk about do they dispute his  
2 IQ and again this is some of the questions I asked Dr.  
3 Fisher or Dr. Hazelrigg towards the end and again I'm on  
4 common ground. Haven't left it at all.

5 I said when you talk about this group of people  
6 that we have labeled mentally retarded, 85% fall into the  
7 mildly mentally retarded range. That's a lot of that  
8 percentage. That means 15% are below 50, severe mentally  
9 retarded. We're talking about the mild range, 50 to 70.  
10 Actually we're talking about someone who is scoring up at  
11 the upper end of the mild range so it's borderline. We  
12 contend he's below that range.

13 I asked Dr. Hazelrigg do people that are in  
14 that 85% typically can achieve academic excellence up to  
15 the sixth grade level and he said that is correct.  
16 That's the grade level Thomas Larry went to so we have  
17 that as a basis of comparison.

18 I followed up with a question do people within  
19 that 85% group, in the mild mental retardation, also can  
20 score at that grade level in the B and C range on  
21 subjects and he said yes, that is correct. You've got  
22 that records and that's exactly what Thomas Larry did.  
23 So his grades are not inconsistent with the IQ testing of  
24 mild mental retardation. Actually they're exactly where  
25 you would guess they would be if you had to guess.

1           Then when you back that up and look at his six  
2 years, or sixth grades, actually those six grades took  
3 him eight years. He failed the first and he failed the  
4 fourth so he's got the six years plus the two years of  
5 repeating and you've got to ask yourself what does it  
6 take for a kid to fail the first grade. What must their  
7 level of learning be? What they're exposed to, what  
8 they're asked to grasp, what they're asked to understand.  
9 There are some wild kids, some bad kids back in the  
10 class, but what must it take to fail first grade? You  
11 don't go to grade two. What performance must you show to  
12 and exhibit to be held back? It takes a lot and I would  
13 contend that factor and that factor alone should raise  
14 some questions in your mind saying is this kid more of a  
15 69 versus a 74? Those grades, the fact he was held back  
16 in grade one, the easiest grade you'll ever encounter,  
17 and being held back.

18           Being held back in the fourth and you've got  
19 his grades and you can see even though he was promoted, a  
20 lot of these promotions you could probably raise an  
21 eyebrow and saying he obviously didn't grasp second grade  
22 but was promoted to third and obviously didn't grasp  
23 third grade but was promoted to fourth and at some point  
24 held back. So I would contend these grades are  
25 consistent with mental retardation at the mild level.

1           Also, his scoring. Ms. Mixion basically told  
2 us when he was 16 years old she administered the testing  
3 and her purpose is to decide -- he's 16 years of age.  
4 Remember he completed the sixth grade. Most kids are 12  
5 years old, he's 16. She tried to determine from her  
6 testing does he continue in the academic environment to  
7 the seventh grade or does she decide to track him into  
8 vocational rehabilitation. Based on her analysis at that  
9 point, she said he doesn't need to be going into the  
10 academic environment. He needs to be going into  
11 vocational rehab. That again is consistent with the  
12 testing of mild mental retardation.

13           With that, I feel that we have met our burden  
14 by a preponderance of the evidence, showing an IQ on the  
15 standardized test of 70 or below. I would contend the  
16 State's doctor has not refuted that. In fact, his  
17 testing is consistent with that. Based on our test being  
18 harder, stricter time limits, no practice effect. With  
19 that, I believe we have led ourself into the ten items on  
20 the statute and I will let Mr. Killian take over. Thank  
21 you.

22           THE COURT: Mr. Killian?

23           MR. KILLIAN: Before I begin, Mr. Causey  
24 mentioned the IQ test. If you look at Defendant's  
25 Exhibit 5, the DSM-IV, I think that sort of backs up what

1 we've been saying all along about this issue of what is  
2 the so-called (quote) "IQ test". The DSM-IV, I think by  
3 all case workers in mental health is considered sort of  
4 the Bible of mental disorders.

5 When you look under diagnostic features and  
6 keep in mind that the statute of North Carolina follows  
7 pretty closely what the DSM-IV diagnoses as mental  
8 retardation. In fact, the domains, the ten areas, are  
9 about -- just almost identical.

10 One of the first criteria talks about in the  
11 DSM-IV is "general intellectual functioning as defined by  
12 the intelligence quotient obtained by assessment with one  
13 or more" -- it doesn't say the only. It says one or more  
14 of the standardized, individually administered  
15 intelligence tests." Down lower it talks about this  
16 measurement error we've talked about where it says, "a  
17 Wechsler IQ of 70 is considered to represent of 65-75."

18 So, in looking at Dr. Hazelrigg's report, he  
19 discounts basically, totally Dr. Fisher's IQ testing by  
20 saying, I believe his word was (quote) "it's not  
21 reliable, it's obsolete". That's his opinion. That  
22 contradicts what the DSM-IV says where it says you've got  
23 to use a WAIS-III, you've got to use the WAIS-R, you've  
24 got to use the Stanford-Binet. It doesn't say that. So,  
25 that's the reason Mr. Causey mentioned clinical judgment.

1           Now what is the judgment of these two  
2 witnesses? In August, 2001 before the statute was even  
3 passed, Dr. Fisher has spent 30 years -- two years in IQ  
4 testing in the Ph.D. program. Many years classifying  
5 prisoners for the Department of Justice at both the  
6 federal and state level, identifying and evaluating those  
7 prisoners who may be mentally retarded.

8           Dr. Hazelrigg doesn't come on the scene until  
9 August 2001. That's when Hazelrigg gets into the  
10 business of determining whether defendants have mental  
11 retardation or not. Not before this law was passed. So,  
12 Your Honor, if you look at these two witnesses -- and  
13 again the diagnosis of mental retardation involves an  
14 awful lot of clinical judgment and I asked Dr. Fisher  
15 that. You just can't say he's got a 69, he's got a 74,  
16 he is or he isn't. Dr. Fisher said well, that raises a  
17 red flag. The doctor then looked at his background.  
18 What he did or didn't do before he reached the age of 18.  
19 Again, that follows the statute. IQ and adaptive skill  
20 deficits have to be present or manifested, I think,  
21 before the age of 18.

22           Now, Dr. Fisher and Hazelrigg, both of them are  
23 here listening to Carolyn Larry but Dr. Hazelrigg seems  
24 to pick and choose and ignore what she said. I don't  
25 think she ever recalled anything as a basis of his



1 opinion from her or her affidavit other than he said he  
2 stole, he lied, or he threw rocks at me and was mean.  
3 That's not all of what she said and that gets me down to  
4 the adaptive skills.

5 Dr. Hazelrigg administered this SSSQ and claims  
6 that it's similar, he uses it to screen, whereas Dr.  
7 Fisher interviews the defendant, reviews affidavits.  
8 Those type of things.

9 Now talk about proper use of tests. Let's  
10 compare what these tests are like. You've got the  
11 deficits that we have pled and claimed in our Motion for  
12 Appropriate Relief. You've got the statute, 15A-2005,  
13 the DSM-IV which contain the ten domains -- what I call  
14 domains or ten skill areas. You've got the SSSQ skills  
15 but what is lacking, Judge? You see the SSSQ doesn't  
16 even address 70% of the same domains that are addressed  
17 by the statute and by the DSM-IV so right off the bat I  
18 think you should call into question Dr. Hazelrigg's use  
19 of that as being an appropriate tool to rely on, I  
20 contend, to assess Mr. Larry's adaptive skills in these  
21 areas.

22 Now there are three of them that overlap, seven  
23 that don't. I think Mr. Causey asked Dr. Hazelrigg on  
24 the stand and he, begrudgingly, did admit yes there is no  
25 separate area for functional academics on the SSSQ.

1     There's no functional area for social skills, self-  
2     direction. Self-care I think he said it may go into  
3     health or first aid and safety, communication or leisure  
4     skills. No, nothing comparable. Nevertheless, he seems  
5     to stake himself out that that is the end-all, be-all of  
6     the adaptive skills area.

7             However, look at the statute and look at the  
8     DSM-IV. What does it tell you? The statute practically  
9     mirrors that. Now, in those areas we look at the -- I  
10    apologize I don't have lines drawn so I could lead you to  
11    that -- but if you take a more detailed look at these,  
12    let's do that.

13            Functional academics. Dr. Hazelrigg, page two  
14    under school, in his report as far as functional  
15    academics, he said "Mr. Larry did poorly in school. He  
16    appears to have repeated the first and fourth grades."  
17    Read that next line, Judge. "While he did not fail  
18    classes completely, he earned mainly D's, some C's and a  
19    few B's." I beg to differ because when I read those  
20    grades, the first grade, he flunked reading completely.  
21    Next grade he repeated the first grade and got a D.

22            In arithmetic, fourth grade, he failed  
23    completely. Not a semester, not a quarter. He failed  
24    completely. There's another F. Language grades, third,  
25    fourth, fifth and sixth -- third, fourth and fifth there

1 are D's and in the sixth, a C. Again, consistently  
2 important in the fifth grade in science and social  
3 studies, he gets D's. When you look at the school  
4 records here, what is a D? A D is below unsatisfactory,  
5 I believe. So right there you've got to question Dr.  
6 Hazelrigg's conclusion that he had (quote) "mild  
7 impairments in this area".

8           The other thing I thought was interesting in  
9 Dr. Hazelrigg's report about the schools is he talks  
10 about on page seven, under sub-paragraph H, academics.  
11 "He has good arithmetic skills". Well, what did he get  
12 in his grades in arithmetic? F, D, D, F, all the way  
13 through except for the sixth grade.

14           Now what does Dr. Hazelrigg attribute that to?  
15 He says three things. Illegal behavior. Now I never  
16 heard him say what Mr. Larry was doing illegal in the  
17 first grade. Was he out here robbing banks, holding up  
18 drug stores? Killing people? Of course not. How does  
19 he attribute that in the second grade? Again, was there  
20 any evidence that he was engaged in illegal behavior in  
21 the second grade or the third grade?

22           Now, he says that prong is gone. That doesn't  
23 make sense. Now he may can say that in the sixth grade  
24 but not in the first, second, third and fourth.

25           He next says conduct disorder. Look at these

1 grades and they have sections for conduct, I think,  
2 except for the first grade. In most of them he got  
3 satisfactory. I think in a couple of quarters he got an  
4 N, which according to the school means "needs  
5 improvement". But overall he got S's all the way through  
6 so where does that conduct disorder fit in if he's  
7 getting those type of grades on conduct?

8 Finally, drug use. He says he starts shooting  
9 heroin, he starts doing this in the fourth grade. Your  
10 Honor, what is funny about that is his best grades come  
11 in the sixth grade when he is so far under the influence  
12 of heroin and marijuana. What about the first grade?  
13 Does he contend he was shooting heroin in the first  
14 grade? Of course not. Second grade, no. Third grade,  
15 no. Fourth grade, maybe, but they can't dispute and they  
16 can't account for why those first, second and third  
17 grades were so low. So I think you've got to temper Dr.  
18 Hazelrigg's opinion with those hard facts from the school  
19 records and these school records were made up, not by Mr.  
20 Larry, he wasn't thinking about killing somebody in the  
21 first grade. That's about how ludicrous it is, Dr.  
22 Hazelrigg's position is on that.

23 Secondly, we must look at other deficits. They  
24 talk about functional academics. Social skills. When  
25 you look at our pleadings, the motion we filed back on

1 January 3rd of 2001, Your Honor, I incorporated and set  
2 out the ten domains and what they mean according to the  
3 AAMR. When you look at social skills, the AAMR -- which  
4 I think Dr. Fisher said was generally accepted by  
5 scientific authority in the field of psychology, it is a  
6 reliable authority -- what does it say -- and this is on  
7 page seven of our motion. "Social skills deal with,  
8 among other things, making choices, understanding honesty  
9 and fairness, controlling impulses, conforming conduct to  
10 laws, violating rules of laws and displaying appropriate  
11 socio-sexual behavior." That's the AAMR on page 40.  
12 That's not from Dr. Hazelrigg, that's not from Dr.  
13 Fisher. That's what the AAMR says.

14 What do we see consistently from Mr. Larry?  
15 Difficulty with impulse control. Not getting along with  
16 others. His sister said he had no friends. Incapable of  
17 learning from past mistakes. Repeated rule violations in  
18 DOC. In 1987, his case manager writes, "Larry appears to  
19 have poor judgment, poor long range planning, and to be  
20 generally inept at handling his problems as well as the  
21 inability to learn from his experience".

22 THE COURT: Who said that?

23 MR. KILLIAN: His case manager at DOC. This was  
24 in 1987, Your Honor. There's the social skills prong.  
25 Now we look at the other ones. Self-direction. The AAMR

1 says factors you've got to look at about that are making  
2 and following a schedule, making choices, completing  
3 necessary required tasks, seeking assistance when needed,  
4 resolving problems, confronting familiar and novel  
5 situations.

6 Now, you remember what his sister said. He  
7 built a model car. Almost had it completed. Asked him to  
8 stick a little piece on and he just couldn't quite  
9 understand how that piece went on, even though to them it  
10 appeared easy. He gets frustrated and smashes the car.  
11 Again, gave up easily on tasks. Ms. Mixion testified to  
12 that and I think that has been established.

13 Needed structure. Unable to make decisions on  
14 his own. Carolyn Larry, remember what she said. Had to  
15 tell him what to do, tell him what to do. Don't put  
16 those old clothes on, put on the clothes I laid out for  
17 you. Wash yourself, wipe yourself. Do chores like your  
18 other brothers and sister do. He never did that. He  
19 never lived independently. Never had a driver's license.  
20 Never had a checking or savings account.

21 Then we go to the area of self-care and in the  
22 second of the domains of the AAMR, that defined as skills  
23 eating, dressing, hygiene and grooming. He flunks almost  
24 all of those. His sister, remember said, he wet the bed  
25 until he left home in the seventh grade and his mom had

1 to tell him don't put those dirty underwear on. Put a  
2 clean pair on. Wear those clothes. Get dressed. Wash  
3 your hands. When you go to the bathroom, wash your  
4 hands. Before you eat, wash your hands. Wipe yourself.  
5 And he had those problems consistently, just not in the  
6 first grade, but all through, according to Carolyn Larry,  
7 up till the time he left.

8 Darlene Mixon in her report mentioned  
9 disheveled appearance. Did not take care of clothes. This  
10 again goes back to before the age of 18.

11 Dr. Hazelrigg seems to concentrate on what he  
12 can do now. Well, where is he now, Your Honor? Where  
13 has been in the last eight years? Death row. It doesn't  
14 take much independent living to function on death row.  
15 He's told when to get up, I submit to you. He's told when  
16 to go to bed. Lights out. Get up. Told when to eat. He  
17 doesn't have a choice of when he's going to go eat. I'm  
18 going to go down to Hardee's or down to McDonald's. He  
19 eats what is there. He has a very, very restrictive  
20 routine.

21 That's not the same as being out here whether  
22 you're on the street or living at home and having those  
23 capabilities of independent living.

24 Why is this important? Because as Dr. Fisher  
25 has testified, it's clinical judgment. You look at the IQ

1 scores to overlap. They raise a red flag. We follow the  
2 prong on down and look at the other factors that come  
3 into play.

4 Dr. Hoover, the psychologist in 1994, 1995,  
5 never did an IQ test on Mr. Larry. And it is, when you  
6 look at Dr. Hazelrigg's report, he finds two impairments  
7 but then he goes on to say they are (quote) "mild". Does  
8 this look mild to you, Judge? Failed the first grade.  
9 Two F's, more D's than C's throughout his school career.  
10 Not having proper hygiene. Those are factors that should  
11 lead you as part of the score, and after hearing all the  
12 testimony to conclude he does have deficit skills in at  
13 least two of these areas.

14 Never had a job. Even when he was out I think  
15 the longest job he had was for three months, I believe he  
16 testified to. He doesn't have those skills. Home living,  
17 again, he probably all three of those deficits and he  
18 satisfied the domains for that on the SSSQ.

19 Community resources. He has had problems with  
20 that. This whole business about the SSSQ, that is an  
21 apple and an orange from the domains. You've got the big  
22 gap here where seven out of ten aren't covered by the  
23 SSSQ. That is not an appropriate and reliable authority  
24 for that.

25 This business about effort, Dr. Hazelrigg when



1 he does the SSSQ and also in his report, he seems to note  
2 that Mr. Larry -- and this is in his report -- never had  
3 any moments of inappropriate affect. Always very serious  
4 about important issues. This is page three. That his  
5 memory was fully intact for both recent and remote  
6 events. He did not complain of forgetfulness and  
7 demonstrated an excellent attitude during the interview.  
8 Did not show any signs of (inaudible) thought process.

9 But then later on he goes on to say after the  
10 psychological testing on page four that his effort level  
11 was low but without a purposeful attempt to show an  
12 impaired score. Again, that's his opinion.

13 He talks about the obsolete version and what  
14 does he say at the top of page four when Dr. Hazelrigg  
15 apparently is getting into strategy of lawyers, he says  
16 Mr. Larry explained that he did not fully understand the  
17 strategy his attorneys were using cause he did not  
18 believe he was mentally retarded. He did not like being  
19 labeled retarded.

20 Your Honor, for someone conditioned at that  
21 level of mild, mental retardation, they would not like  
22 being labeled that. No one would. So in terms of the  
23 SSSQ he seems to give good effort but when it comes to  
24 the IQ test, he says no, he does not report maximum  
25 effort.

1 I think what's also important to keep in mind,  
2 Your Honor, I am going to quote from Atkins, Atkins vs.  
3 Virginia. The Supreme Court, in talking about this  
4 issue, this is at 122 Supreme Court 2250, also fits Mr.  
5 Larry to a tee. (Quote) "Due to their impairment,  
6 defendants with mental retardation have diminished  
7 capacity to understand and process information,  
8 communicate, to abstract from mistakes and learn various  
9 control impulses and to understand the reactions of  
10 others. There is abundant evidence that they often act  
11 on impulse and that in group settings they are the  
12 followers rather than the leaders". Almost fits his  
13 description of the way Mr. Larry has been with all due  
14 respect to Mr. Larry.

15 In closing, Your Honor, based on the statutory  
16 grounds in 15A-2005, we would ask you to find that he has  
17 met his burden of proof by a preponderance of the  
18 evidence. That he has an intelligence quotient score of  
19 70 or below given on a scientifically recognized  
20 individually administered IQ test. That he has met the  
21 language in the area of functional academics, self-care,  
22 social skills, and work at least and has therefore met  
23 the requirement to meet at least two of those. Dr.  
24 Fisher testified in this opinion question that both of  
25 those were manifested before the age of 18.

1           Your Honor, we'll (inaudible) all these in from  
2 Dr. Fisher because he looked at what Mr. Larry was before  
3 he was 18. Dr. Hazelrigg seems to focus on now, now, now  
4 when he's 46 or 47 years old on death row in prison.

5 That doesn't get us where we need to be. To do a  
6 thorough and unbiased and fair evaluation, we've got to  
7 go back before he's 18 and that's why you would talk to  
8 his sister, talk to his mother. Call Dr. (Inaudible),  
9 call Ms. Nixon, which Dr. Hazelrigg didn't do. I don't  
10 even think according to his report he reviewed the  
11 affidavits and the scores of information from any of the  
12 family members that were filed with the original MAR.

13           So based on the statutory grounds, Your Honor,  
14 and on the US Constitution and the 14th Amendment and the  
15 Atkins case, we would ask the Court to grant the motion  
16 and impose a life sentence for Mr. Larry. Thank you.

17           MR. KILLIAN: May I add one brief item?

18           THE COURT: Yes, sir.

19           MR. KILLIAN: On three of these areas that we  
20 proposed to the Court showed evidence that he has  
21 deficits in, we do say he does have a deficit in the work  
22 area. I wanted to highlight to the Court what Dr.  
23 Hazelrigg's testimony concerning that was.

24           On the work area, he said he had no opinion one  
25 way or the other so I would contend on that note we

1 presented evidence by a preponderance of the evidence  
2 that he has a deficit in work skills. The State's  
3 witness has not offered anything to contradict that and I  
4 would contend we have shown that by default.

5 With respect to functional academics, we  
6 contend there is a deficit. Dr. Hazelrigg says, yes,  
7 there is impairment so we have some sort of agreement.  
8 Both sides agree there is an impairment on the academics.  
9 Our doctor says it's severe. Dr. Hazelrigg would look at  
10 those records and say it's mild.

11 So, again, we're not arguing is there  
12 impairment in the area of academic function but how  
13 severe it is. Both doctors acknowledge impairment.

14 The same thing with health and safety. We  
15 contend impairment. Dr. Hazelrigg says, yes, there is  
16 impairment but again he would label it as mild so again  
17 the Court is not having to decide if the doctors agree on  
18 impairment in academics and health care. It's what the  
19 degree of impairment there is so I would contend on those  
20 points it's important to understand both sides are not in  
21 disagreement on that.

22 The work history they can't offer anything to  
23 say it doesn't exist. Thank you.

24 THE COURT: I would commend the respective  
25 attorneys' for the excellent arguments you have made for

1 your contrary positions. What I want to do in the record  
2 to resolve this matter is to take some time now -- I'll  
3 let you know that yesterday evening I reviewed the  
4 testimony of all the witnesses at length and reviewed  
5 each exhibit that was introduced.

6 Also, I reviewed his entire Winston-  
7 Salem/Forsyth County school record at length, his entire  
8 Department of Corrections record, and reviewed some of  
9 the exhibits in the court file such as the transcript of  
10 Dr. Hoover's trial testimony, the affidavit of Carolyn  
11 Larry who testified in this hearing and that affidavit  
12 was referred to, and the affidavit of Dr. Fisher filed  
13 January 28, 2002.

14 Also, what I want to do at this time is recess  
15 for a period of time and I'll go back and make some  
16 findings of fact and conclusions and come back and  
17 announce it on the record while we're all here together.  
18 So for that purpose, Mr. Sheriff, we'll be in recess for  
19 one hour. That should give me time and we'll come back  
20 in and I'll place on the record the Court's findings.  
21 (RECESS WAS OBSERVED.)

22 THE COURT: Again, I appreciate the excellent  
23 presentation by all the attorneys. In order to try to  
24 make this as easy on everyone as possible, except the  
25 court reporter who has to take it all down, I'll make the

1 findings of fact and conclusions while everyone is  
2 present. I apologize in advance because the findings of  
3 facts are lengthy but I'm trying to pare them down.

4 THE COURT: The Court will find it sits in this  
5 matter pursuant to a Motion for Appropriate Relief  
6 alleging pursuant to 15A-2005 that the defendant is  
7 mentally retarded and that his penalty of death should be  
8 set aside in lieu of a life sentence.

9 The Court will find in this hearing that it  
10 heard from Darlena Mixon, a Forsyth County resident since  
11 1964, and a retired school teacher. The evidence would  
12 tend to show that she has done numerous evaluations and  
13 she had done one on this defendant for purposes of  
14 special education placement and referral.

15 The Court will further find that during the  
16 course of her testimony the State and the defendant  
17 stipulated that the results of the test that she  
18 performed and two other tests that were administered at a  
19 younger age by unknown persons will be excluded from  
20 consideration for purposes of this hearing. So for all  
21 practical purposes nothing further from her testimony was  
22 of quality.

23 The Court will further find that it heard from  
24 Carolyn Larry of Charlotte, sister of the defendant. She  
25 being an LPN at North Central Family Medical Center in

1 Rock Hill, SC for the past year and a half and previously  
2 worked at Carolinas Medical Center in Charlotte for six  
3 or seven years. She attended the Winston-Salem/Forsyth  
4 County school system until she moved to Charlotte in  
5 1989.

6 She is the sister of the defendant. They had  
7 two other brothers, both of whom are deceased. She  
8 indicated that their mother raised them in Happy Hill  
9 Gardens here in Winston-Salem. That their mother worked  
10 in the laundry at Baptist Hospital during this time. She  
11 indicated that the children all attended Diggs Elementary  
12 School, which was still segregated at that time. She  
13 indicated that she actually, though younger than the  
14 defendant, passed him in the first grade and stayed ahead  
15 of him through the remainder of her school career. She  
16 indicated her belief that he had failed the first and  
17 fifth grade. The testimony later indicated it was  
18 actually the first and fourth.

19 She indicated that their mother was stern and  
20 that their mother assigned them chores and that she kept  
21 a neat home and that her recollection was the defendant  
22 would not do his chores and they would have to assist  
23 him. Further, that at times he did not bathe on time or  
24 he did not lay his clothes out appropriately as  
25 requested.

1           She indicated her recollection that the  
2 defendant would have to sometimes stay inside while the  
3 other children were out playing because their mother  
4 would make him stay in and help him with his homework.  
5 She testified that the defendant wet his bed and that he  
6 was a bed wetter. That the mother would have to make  
7 sure that he got his wet clothes off in the morning. The  
8 Court will note that during the testimony of the hearing  
9 no age was given; however, it was later indicated during  
10 the testimony that this at least went through the period  
11 of the sixth or seventh grade.

12           She indicated that often her mother would have  
13 to tell him the same things every day. For instance, that  
14 he should not swim in Salem Creek though he chose to do  
15 so voluntarily. She also indicated from her recollection  
16 that their mother would have to tell him to take his  
17 bath. Again, I will note that no age parameters were  
18 given for this elicited conduct.

19           Regarding chores, she indicated her mother  
20 would put a list of chores on the refrigerator and that  
21 most of the time the defendant didn't do his  
22 appropriately. His chores would tend to be washing the  
23 dishes, emptying the trash can, or sweeping and that they  
24 would often have to chip in and do some of his chores or  
25 all of them.



1           She further testified that she recalled playing  
2 board games with the defendant and that when losing he  
3 would get mad and even though he understood the rules, he  
4 would accuse them of cheating or simply knock the board  
5 over ending the game. Consequently, the other children  
6 sometimes did not like playing with him. She also stated  
7 her recollection regarding outside games if you were  
8 winning that the defendant would often get mad and throw  
9 a rock at you and run off.

10           She also recalled an incident where they were  
11 building a model car and the defendant was trying to put  
12 a piece of the car on that was the wrong piece and he  
13 eventually got mad and just tore up the car. Again, no  
14 time parameters were specified.

15           She also testified that at a young age, as born  
16 out by the Department of Corrections records, he was sent  
17 to training school for a period of time. She did recall  
18 an incident where he and others vandalized their own  
19 elementary school, Diggs Elementary, by throwing eggs,  
20 paint, syrup, and other items on the floors. Part of  
21 their punishment was to clean it up and she recalled that  
22 she and her siblings had to go and assist. She indicated  
23 that she never knew him to have a North Carolina driver's  
24 license and that she had never seen him drive. However,  
25 the Court will note that among his many convictions are

1 convictions of no operator's license and unauthorized use  
2 which would tend to indicate he has operated a motor  
3 vehicle.

4 She indicates that she recalls that he had a  
5 job for two weeks at one time, again, this being in his  
6 young life. The Court would further note that prison  
7 records would indicate that he had a job allegedly held  
8 for three months at one point.

9 She does recall the defendant being gone for  
10 long periods of time to training school. She does  
11 indicate further that he would often become missing from  
12 school. However, he would always return at night and  
13 would sit up and his mother would have to tell him to go  
14 to bed. She also recalled that her mother would always  
15 send him back to the bathroom to wash his hands after  
16 using the bathroom and that she often had to tell him  
17 that.

18 She indicated that from her recollection  
19 regarding school attendance that they would always go to  
20 school together. At recess or at lunch she often would  
21 not see him there and she wouldn't see him after school.  
22 She made the assumption that he left school and that he  
23 sometimes stayed away from home until about dark when he  
24 would always return. She testified that he was never  
25 gone overnight. That he would always come back.

1           She further testified and these are portions of  
2 her affidavit where she admitted that he was good at  
3 track, softball, art, painting and drawing. She testified  
4 in her affidavit and in her testimony that if he liked an  
5 activity, he could excel. If he didn't, you could forget  
6 it. Further, that he understood the rules. That he just  
7 didn't choose to follow the rules. Her exact testimony  
8 in her affidavit was "he was mean". However, she  
9 explained that to mean that he just wanted to do things  
10 his way and if he didn't get his way, he would do things  
11 to them. She also indicated that he would sometimes  
12 steal from them and then lie about where he got the item,  
13 saying that he found it.

14           She also agreed in her affidavit that he didn't  
15 have trouble taking care of himself, he just didn't want  
16 to do it. That he wanted things done his way.

17           The Court will further note from reviewing her  
18 affidavit, which is part of the court file, there were  
19 some passages that were of use to the Court. First of  
20 all, (quote) "he can read and write. He has a beautiful  
21 handwriting". "Mike didn't have any trouble taking care  
22 of himself although he left the bathroom dirty no matter  
23 how many times you told him to clean it up". "He wet the  
24 bed until he left the house in the seventh grade when he  
25 went to training school". "He could get around the

1 neighborhood. He taught me how to ride my bike". "He was  
2 very protective of me and made sure I didn't cross the  
3 street or talk the strangers without him around". "I  
4 don't remember him being in school. He used to cut even  
5 in elementary school. I think he had bad grades because  
6 he never went to school". "He was really good at track,  
7 softball, and swimming. He was really good at art,  
8 painting, and drawing. If he wanted to do something, he  
9 excelled but if he wasn't interested, you could forget  
10 it". "I don't know anything about him at work or at home  
11 because he was always incarcerated". "Mike understands  
12 the rules but he didn't follow them". "He is very  
13 manipulative of our mother. He asked her to put the house  
14 up to get him out of jail" (end quote). Again, those  
15 passages come from her affidavit signed on January the  
16 16th, 2002. They are in the court file.

17 The Court further heard from Dr. Brad Fisher.  
18 The Court will note there was an extensive review of his  
19 CV which was introduced into evidence and he was  
20 eventually admitted several pages later as an expert in  
21 psychology and in the field of mental retardation.

22 The witness testified that he reviewed the  
23 definition of mental retardation in 15A-2005, the DSM-IV,  
24 and the American Association of Mental Retardation. He  
25 indicated that the definition in each was similar. That

1 in the adaptive skills limitation categories the words  
2 were the same or similar and the DSM-IV has twelve areas  
3 or domains.

4 He indicated that he evaluated the defendant  
5 for a determination and evaluation of intelligence and he  
6 attempted to administer an IQ test in at least two  
7 sessions so that he could make some opine as to the  
8 defendant's malingering. He further requested that the  
9 attorneys for the defendant send him any data that might  
10 be relevant to his evaluation. He thought that this  
11 information might be particularly important as it goes to  
12 some determination as to the "before 18" prong of the  
13 test because this data would be needed for those  
14 purposes.

15 In his report, he indicates that he reviewed  
16 the following information: the affidavit of the  
17 defendant's mother, Daisy Larry. A summary of data by  
18 Katrina Kuzyszyn; correspondence and materials' summary  
19 to Dr. Tim Hancock; school records, the psychological  
20 evaluation by Darlena Mixon. He also looked at the  
21 classification from 1970 which were, I believe, part of  
22 the stipulation that would be excluded and the 1987 and  
23 1989 classification evaluations in the DOC.

24 Interestingly, the witness did not look at the  
25 affidavit of his sister or evaluate any of the

1 information that was provided or testified to by Dr.  
2 Hoover in the sentencing phase of his original trial. In  
3 fact, he indicated he was not even aware that Dr. Hoover  
4 had evaluated the defendant in any way, shape, or form  
5 and was not aware of his testimony.

6 He indicated that he administered the IQ test  
7 on December of 2001 and January of 2002, taking a total  
8 of two to three hours time. He indicated he gave him the  
9 Wechsler Adult Intelligence Scale-R which I will refer to  
10 as the WAIS-R. He indicated that this has eleven sub-  
11 tests that result in a total test score. That he read the  
12 directions to each sub-test and wrote down the answers.  
13 He indicated in his practice he had used the WAIS-R for a  
14 long period of time.

15 That he made an effort to determine if the  
16 defendant was malingering. He did not give him the  
17 Adaptive Behavior Area System Test because he did not  
18 feel that it was applicable to the defendant because he  
19 had been in prison for so much of his life and that test  
20 focused on areas such as use of checkbooks and the like.  
21 He simply had no experience in these areas and therefore  
22 he was not given this ABA System Test. However, the  
23 witness did determine that in his opinion the defendant  
24 was not malingering when he put his answers together with  
25 all the data to form his opinion.

1           He indicated that he used the WAIS-R test  
2       instead of the more current WAIS-III because he could  
3       better determine the issue of malingering by comparing it  
4       with previous WAIS-R's. Interestingly, the witness did  
5       not try to attempt to see if there had been any WAIS-R's  
6       given previously. He just made the assumption that there  
7       might have been and as it turned out there were no prior  
8       WAIS-R's for any comparison for purposes of malingering  
9       or otherwise. He testified that there is no authority  
10      that the definitively states whether or not the WAIS-R or  
11      the WAIS-III would be the better IQ test under these  
12      circumstances.

13           Again, regarding malingering, this witness  
14      concluded that the defendant was not malingering. That he  
15      was giving his best effort.

16           He further testified that on the WAIS-R he  
17      received a full scale score of 69 with a standard error  
18      of plus or minus five. The witness testified that there  
19      is no absolute IQ number. That there is always a plus or  
20      minus standard of error or range of competence. He  
21      indicates that this range of competence is established by  
22      the American Association of Mental Retardation. He  
23      testified then that with a score of 69, the range of  
24      competence on this test would be 64 to 74.

25           The witness admitted that his determination of

1 IQ includes some clinical judgments in some areas and  
2 this goes to the second prong of the test under 15A-2005.  
3 He testified that regarding functional academics the  
4 defendant had repeated the first and fourth grade. That  
5 he had stopped in the sixth grade and that his grades  
6 were consistently low. That the defendant had not held a  
7 job for more than three weeks. That when he worked, it  
8 was menial labor. That it required no complex thought  
9 process. The witness testified that he was not familiar  
10 with any job the defendant had held for three months as  
11 indicated by the DOC records.

12           Regarding self-care, he testified that from his  
13 review of the evidence that the defendant would only  
14 change or wash if pushed to do so. Regarding use of  
15 community resources, he indicated that when offered  
16 vocational training in training school, that the  
17 defendant refused to take it.

18           Regarding social skills, he indicated that as  
19 an expert witness he was shy of that area because the  
20 defendant was a self-described loner. Further, regarding  
21 home living, he indicated that the defendant had never  
22 lived in his own household due to his again frequent and  
23 consistent incarceration.

24           Regarding leisure skills, the witness indicated  
25 he had no opinion and that he never really used this



1 particular domain very much.

2 In communications, he indicated that the  
3 defendant could in fact talk and that he didn't delve  
4 into this area very deeply.

5 He further indicated that since the defendant  
6 has fallen near the line, he looked closely at the  
7 testimony of family and friends. Again, his report  
8 indicates that would have been the affidavit of his  
9 mother, Daisy Larry.

10 The witness admitted that he did not review Dr.  
11 Hoover's reports that were made for purposes of the  
12 defendant's trial or his testimony at that trial. He  
13 further admitted he did not review the defendant's  
14 testimony at the sentencing hearing of that trial because  
15 he didn't think it would be helpful. He did indicate that  
16 he looked at the DOC records but he did not have specific  
17 recollection of the beta IQ score. He did admit that in  
18 1987 the defendant had a screening test beta test IQ  
19 score of approximately 88.

20 He further admitted on cross examination that  
21 nowhere in the DOC records was there any indication that  
22 the defendant had scored in the mentally retarded range  
23 on any IQ test, screening or otherwise, although in his  
24 experience he said the DOC does not tend to give  
25 individualized IQ tests.

1           He admitted that he did not give the defendant  
2 any substantive test for malingering but he gave his  
3 opinion based on his clinical analysis. He chose not to  
4 use the Rey 15 or any other test. In fact, he indicated  
5 he was not aware of other tests. He based his opinion on  
6 the following inquiry. "Was the data reliable from the  
7 two sessions he was with the defendant? Was the evidence  
8 consistent with other information I saw in the reports  
9 and otherwise? On the reports data was there other  
10 information reporting paradoxical symptoms?" And he also  
11 considered clinical judgments.

12           The witness testified that he felt in  
13 considering all these things that it gave him a clear  
14 clinical assessment of the defendant. He said that he  
15 intentionally did not give the defendant a malingering  
16 test because he thought his clinical evaluation based on  
17 these criteria would be more conclusive.

18           He testified that the WAIS-III, the more  
19 current test, has more questions that are designed and  
20 directed to those who fall in the 70 and below line to  
21 give a better continuum in this area and also has a built  
22 in component to attempt to compensate for the general  
23 increase in IQ over time. He indicated in his testimony  
24 that for prisoners he thought he was doing a better job  
25 by using the WAIS-R because again he could compare it to

1 previous tests but again in this incidence he didn't  
2 check to see if there were previous tests and it turned  
3 out there were none.

4 The witness did also admit on cross examination  
5 that he had to make clinical judgments regarding his  
6 opinions on adaptive behavior shortcomings although he  
7 did not interview the defendant's sister or teachers.

8 Regarding functional academics, he did concede  
9 that not attending school may be a reason for poor  
10 grades. He admits that a teacher, Eleanor Morris, in the  
11 first grade had indicated that the defendant doesn't  
12 listen well but that he works and plays well with others.  
13 He further admitted that the records would seem to  
14 indicate that when the defendant repeated the fourth  
15 grade, he had started his drug abuse which I believe was  
16 reported to be heroin at age twelve. He conceded that  
17 the defendant had not held down a lengthy job because he  
18 had in fact been in prison for most of his life.

19 Regarding the area of self-direction, again his  
20 opinion was that he was incapable of independent living.  
21 That was his interpretation of the record. However, he  
22 did not confer with either of the defendant's wives and  
23 conceded that the defendant did in fact elect to continue  
24 committing crimes instead of working or attempting to do  
25 something of a positive nature. The witness testified

1     that he did not think that things in prison were  
2     particularly self directed but he could not recall any  
3     dramatic passages of classification even though the  
4     defendant did make honor grade at one point.

5             Regarding social skills, it was admitted that  
6     the defendant apparently got along well with the other  
7     inmates and wasn't a disciplinary problem at this stage.  
8     It was noted that while in the DOC the records would  
9     indicate the defendant had an opportunity to get a GED  
10    but chose not to but this witness testified that he  
11    thought a mentally retarded person could not get their  
12    GED in any event.

13            Regarding the 1995 assessment by Dr. Hoover  
14    that the defendant had an antisocial personality  
15    disorder, the witness admitted that he thought that all  
16    the things that we've talked about could be placed into  
17    that category, too.

18            He further testified that his understanding of  
19    the WAIS-III was that it had more questions that would be  
20    geared toward the mildly retarded range so that one might  
21    expect a slightly higher score because of the nature of  
22    the questions.

23            The Court then heard from Dr. Mark Hazelrigg.  
24    Again, after his credentials were detailed, he was  
25    eventually accepted as an expert in general clinical

1 psychology and forensic psychology. He testified that he  
2 gave the tests listed in his report -- the WAIS-III test,  
3 the Rey 15 test, and the Street Survival Skills  
4 Questionnaire.

5 He identified the Rey 15 test is a test for  
6 malingering. The 15 part test has ABC, both upper and  
7 lower case; 1,2,3; 1,2,3 Roman numerals; and circle,  
8 square, triangle. He indicated the defendant got nine of  
9 them right indicating a low number and that the defendant  
10 was not putting forth great effort in this test.

11 The witness testified that the WAIS-III is a  
12 revised IQ test published in 1996. In his opinion the  
13 WAIS-R test is outdated and that its norms for IQ are  
14 outdated and old, dating back to the 1980's. He  
15 indicated that the IQ norms would tend to change over  
16 time. He indicated that some of the test items were  
17 found to be ambiguous and that new sub-tests were added  
18 to take care of these ambiguities.

19 He testified that you would not particularly  
20 get a higher score on the WAIS-III than the WAIS-R. He  
21 said that in his comparisons and review the WAIS-R would  
22 tend to be the higher score, the exact opposite of what  
23 the defendant's expert testified. In his test, the  
24 defendant got a full scale test on the WAIS-III of 74  
25 with the caveat and opinion that this was not his maximum

1 effort.

2 He further testified in his report that he  
3 considered other matters which were listed in State's  
4 Exhibit No. 1, including school records, DOC records, the  
5 transcript of Mr. Larry's testimony at trial, and the  
6 psychological report and testimony of Gary Hoover at  
7 trial. He noted that Dr. Hoover had diagnosed the  
8 defendant with an antisocial personality disorder and  
9 borderline personality disorder in the 1995 court  
10 session.

11 The witness indicated he gave the defendant the  
12 Street Survival Skills Questionnaire to test his adaptive  
13 skills and that this test would have a series of sub-  
14 tests that would measure his skills. The witness drew no  
15 distinction between a deficit behavior versus a  
16 maladaptive behavior. He indicated that the deficit would  
17 be defined as the capacity to do or not do something  
18 versus the maladaptive behavior which would be the choice  
19 or election to do something right or wrong. He indicated  
20 the defendant's record would in fact indicate a  
21 maladaptive behavior as identified by Dr. Hoover in that  
22 he had a lengthy criminal record and had numerous  
23 infractions in the Department of Corrections, some of  
24 which were drug related, one of which was sexually  
25 related, one of which related to the making of a weapon

1 in a custodial facility.

2 He further indicated that on his WAIS-III test  
3 the margin of error for a competence interval would be  
4 plus five or minus four, making his margin of error of  
5 the competence interval in the range between 70 and 79.

6 Regarding his adaptive skills, communication,  
7 the witness testified that he found no impairment in that  
8 area and that it was clear from the testimony at the  
9 sentencing hearing and his interviews with the defendant.  
10 Regarding self-care, he indicated it was difficult  
11 because the defendant has not lived in society for long  
12 periods of time; however, he relied on the SSSQ which  
13 indicates that the defendant could understand basic  
14 concepts and signs and even when incarcerated he was able  
15 to care for himself within the structured environments of  
16 the prison facility and found no deficit. He further  
17 noted that the defendant's sister had indicated that the  
18 defendant could do things if he would so choose to do.

19 Regarding home living, again he relied on the  
20 SSSQ which was very helpful regarding issues such as  
21 washing clothes, times, dates, making appointments,  
22 spending money, and that he did all of these things in  
23 the average range.

24 He did indicate regarding the use of tools that  
25 the defendant had some difficulty making these

1 identifications but he attributed that to the defendant's  
2 lack of experience, not his deficiency or lack of  
3 ability. He further indicated that with all the other  
4 tasks the defendant had no problems such as what dry  
5 cleaning was, calling the electric company, making money,  
6 counting money, measurements such as cups, weights,  
7 measuring temperature and he found no impairment.

8 Social skills, he testified that he found from  
9 a review of the records and his interviews with the  
10 defendant that he had appropriate responses. That even  
11 though he had a quiet demeanor that the defendant had no  
12 impairment in this area.

13 Regarding community use, again he relied on the  
14 SSSQ which would indicate that regarding public services,  
15 such as utilities and transportation, the defendant had  
16 the basic knowledge where you get phone numbers or buy  
17 things. He had average skills in this area. He further  
18 noted the defendant got married twice in the Department  
19 of Corrections and worked within the parameters of that  
20 system to orchestrate a marriage while in the system and  
21 found no impairment.

22 Regarding self-direction, the witness testified  
23 that the defendant could establish routines, again within  
24 the parameters of prison life. He found no impairment in  
25 that.



1           Health and safety, he indicated that he did not  
2 do well on the SSSQ. He found a mild impairment but not a  
3 significant impairment on health and safety.

4           Regarding functional academics, he noted that  
5 the defendant did poorly in a few grades. However, in the  
6 sixth grade he got C's and a few B's. That he had made  
7 progress and that even though he was two years older than  
8 the other kids, he could read and write and this witness  
9 found mild impairment but not significant in this area.

10          Regarding leisure skills, the witness noted  
11 that the defendant had simply decided to do illegal  
12 things. That he's not been impaired. That he has chosen  
13 to engage in criminal activity and drug use and he  
14 attributes these to choices, not to any impairment or  
15 deficiency.

16          Regarding his work skills, he had difficulty  
17 assessing that because the defendant has not been out of  
18 prison for more than seven months at a time at any one  
19 time in his life. However, he noted that there are DOC  
20 records indicating his work within the prison department  
21 and work release programs. He further noted that he  
22 would concur that the defendant would in fact meet the  
23 criteria for antisocial personality disorder. That the  
24 maladaptive behavior would indicate these types of things  
25 and that these were things that had gotten him mostly in

1 trouble. That he could have led a more normal lifestyle  
2 had he chosen to do so.

3 The witness admitted on cross examination  
4 that there were other tests for malingering such as the  
5 TOM and the VIP. That he chose to give the Rey 15 test  
6 because it is generally accepted. It is not the only test  
7 but it is generally accepted.

8 The witness further testified that in his  
9 opinion the defendant could have done the Rey test fully  
10 had he given his full effort and that in his opinion the  
11 defendant was malingering to some extent. He admitted  
12 that the beta IQ test that the defendant had been given  
13 in the DOC, and as evidenced by the records, doesn't have  
14 an isolated verbal score and performance score. It is  
15 simply a screening test because it's brief and not  
16 completely comprehensive. He said he didn't give great  
17 weight to these beta scores but that he gave  
18 consideration to them and some weight in forming his  
19 clinical opinion.

20 Again, he reiterated in cross examination that  
21 the WAIS-R test validity was questionable due to its age  
22 but he admitted he found no scoring errors or  
23 administration errors in the way the WAIS-R test was  
24 given to the defendant by Dr. Fisher.

25 Regarding the contentions of what are called

1 the "practice effect" for repeatedly taking the test,  
2 this witness testified that one probably would not expect  
3 this in the circumstance because of the difference in the  
4 two tests. That they are in some ways completely  
5 different. He said that changes in the WAIS-R and the  
6 WAIS-III did add some easier questions and some  
7 additional time to help that mildly retarded group and to  
8 help form a better continuum in that area.

9 He stated emphatically, however, that the  
10 construction of the test to include some easier questions  
11 and some additional time would not affect or make a  
12 person's grades higher or in this case make the  
13 defendant's grades higher.

14 He said it was obvious that the defendant in  
15 some respects tried harder when taking the WAIS-III,  
16 quoting as an example an arrangement of pictures test. On  
17 the WAIS-R he got the first items correct in arranging  
18 three panels of pictures in orders and none of the  
19 others. However, in the second evaluation for the WAIS-  
20 III, he got that first three correct again. Then he  
21 moved on to make the next one correct, missed the third,  
22 but in item four he got them completely arranged  
23 correctly and item five correctly. These are new items.  
24 In item six he got partial credit on this test. Item  
25 seven full credit and item eight partial credit.

1           So on the WAIS-III he got eight out of eleven,  
2     at least partial credit on the WAIS-R and he only got  
3     credit in one which in his opinion indicated that the  
4     defendant was not using his maximum effort on the first  
5     test and pursuant to his inquiry here was not using his  
6     maximum effort on this subsequent test.

7           The Court would further find that it heard in  
8     rebuttal briefly from Dr. Fisher again that in his  
9     opinion the defendant gave his best effort. That it was  
10    good and consistent and that regarding the SSSQ and its  
11    administration, that Dr. Fisher's interpretation was that  
12    the test was not used appropriately here because of the  
13    way the manual was worded.

14           Based on all these findings of fact, the Court  
15    will note in its conclusions of law and its conclusions  
16    in this case that it was guided by the definitions  
17    contained in NCGS 15A-2005 for purposes of this post-  
18    conviction Motion for Appropriate Relief by the death row  
19    inmate Thomas Larry alleging that his mental retardation  
20    as it's defined in that statute should require the Court  
21    to set aside this sentence of death and impose a sentence  
22    of life in prison.

23           The Court will note the defendant must  
24    establish the necessary prongs in 15A-2005 by a  
25    preponderance of the evidence. Again the first prong is

1 that the defendant has significantly sub-average, general  
2 intellectual functioning which is defined as an IQ of 70  
3 or below. The Court will find in this case that the  
4 defendant scored a 69 on the WAIS-R administered by Dr.  
5 Fisher and 74 on the WAIS-III administered by Dr.  
6 Hazelrigg. The Court will note that each test result had  
7 a range of competence within which both of the tests  
8 could either be above 70 or both could be 70 or below.

9 The Court could just simply take an average, I  
10 suppose, of the test scores of 60 and 74 with an average  
11 of 71.5. However, merely taking the average I don't  
12 think would be a sufficient inquiry.

13 The Court will note further and find that the  
14 WAIS-III was accompanied by the Rey 15 malingering test  
15 and that each test administrator used their own clinical  
16 judgment in making some determination regarding whether  
17 or not the defendant was malingering taking their  
18 respective tests. The Court will further find that each  
19 doctor reached a different conclusion. Again, Dr.  
20 Hazelrigg felt that the defendant was not putting forth  
21 his best effort or maximum effort. Dr. Fisher thought  
22 that the defendant was using his best effort.

23 The Court will also find that Dr. Hazelrigg has  
24 indicated that the WAIS-R test is outdated. That its  
25 norms are outdated from the 1980's and it is currently

1 not the preferable IQ test under these circumstances.

2 The Court will further find and note that the  
3 defendant had taken a revised beta screening test for IQ  
4 at least three times in the Department of Corrections  
5 with scores in 1976 of 84; 1987 of 88; in 1992 of 87.  
6 Interestingly, again, the findings of Dr. Hoover for  
7 purposes of sentencing at trial were absolutely devoid of  
8 any mention of the retardation issue.

9 The Court will find after consideration of all  
10 the test results, the ranges of competence of each test,  
11 the administration of the test, the clinical judgments of  
12 the experts, the test that was administered for  
13 malingering and all the other facts and circumstances  
14 that it has not been established by a preponderance of  
15 the evidence that the defendant in this case has  
16 significant or sub-average general intelligence  
17 functioning as this term is defined by North Carolina  
18 General Statute 15A-2005. Therefore, the motion to set  
19 aside the sentence of death is denied.

20 In my opinion, the Court's inquiry could end  
21 here but this Court will proceed to review for purposes  
22 of the record and this order the second prong of the test  
23 which is significant limitations in adaptive functioning.  
24 The Court notes that the statute 15A-2005(b) defines  
25 significant limitations in adaptive functioning as

1 significant limitations in two or more of the following  
2 areas: communication, self-care, home living, social  
3 skills, community use, self-direction, health and safety,  
4 functional academics, leisure skills and work skills.

5 The Court will address each adaptive skill area  
6 which the defense contends and their witness opined that  
7 the defendant has significant limitations in adaptive  
8 functioning.

9 Regarding the area of communication, the Court  
10 finds the defense expert withdrew this area in testimony  
11 stating that the defendant clearly can talk and that he  
12 has communication skills. That he didn't delve into this  
13 area too deeply and further all the evidence would tend  
14 to indicate the defendant does not have significant  
15 limitations in the area of communication.

16 Regarding work, the Court will find the defense  
17 has not established by a preponderance of the evidence  
18 that the defendant has a significant limitation in this  
19 area. Even though the witness contends that the defendant  
20 never held a job for more than three weeks and that each  
21 position has been menial, DOC records indicate to the  
22 contrary, citing a job he held one time for three months  
23 at \$338 a week.

24 Further, for the vast majority of what would  
25 have been the defendant's work life, he has been

1 incarcerated. Further, that he has held several work  
2 positions in the prison setting and that he has held  
3 positions working both within the prison and working  
4 outside of the prison setting which the Court will note  
5 were later revoked not because of poor job performance  
6 but for failure to return on time and follow the rules.

7           Regarding self-care, the Court will find the  
8 defense has not established by a preponderance of the  
9 evidence that the defendant has significant limitations  
10 in this area. Again, the SSSQ test revealed that the  
11 defendant understands basic concepts and signs. Further,  
12 the defendant is caring for himself within the parameters  
13 of his current environment.

14           The Court will further note that as a child the  
15 defendant was apparently allowed to run free on many days  
16 and even though he would have to be reminded to wash or  
17 change dirty clothes, as many children have to be  
18 reminded at that age, he was able to care for himself  
19 while on these frolics as he engaged in whatever  
20 activities he elected to do outside of school or away  
21 from his home life.

22           Regarding the issue of home living, the Court  
23 will find that the defense has not established by a  
24 preponderance of the evidence that the defendant has  
25 significant impairment. Again, the SSSQ indicates that



1 the defendant has functioned in the average range  
2 regarding making appointments, making money, spending  
3 money, dry cleaning and washing, electric service,  
4 measurements, weights and amounts and temperatures. It  
5 is clear that he has difficulty with use of tools but  
6 this is directly attributable to his lack of experience,  
7 not a significant impairment.

8           Regarding the use of community resources, the  
9 Court will find that the defense has not established by a  
10 preponderance of the evidence that the defendant has  
11 significant limitations. Even though the defendant was  
12 offered vocational training and DART while incarcerated,  
13 he elected not to participate in these activities. The  
14 Court will note that when the end result was something  
15 the defendant wanted, he did use his community resources  
16 to his benefit and to his gain to gain this end.

17           Examples of this are his use of the system to  
18 get married twice while in custody; his use of the system  
19 to get transfers of housing within the Department of  
20 Corrections and his use of the system to obtain work  
21 positions within the prison system or on work release.

22           Further, the SSSQ reveals that he is able to  
23 comprehend and could use public resources such as  
24 utilities, transportation, and getting numbers out of the  
25 phone book and the like.

1           Regarding health and safety, the Court will  
2     find that the defense has not established by a  
3     preponderance of the evidence that the defendant has  
4     significant limitations. The Court will note that as a  
5     child the defendant again wandered freely and frolicked  
6     frequently and that there is no evidence that he was ever  
7     injured or harmed during these frolics.

8           Further, that during the numerous criminal  
9     offenses which he committed, some with weapons, he  
10    accomplished his goals without sustaining any injuries to  
11    himself other than those that might have been induced  
12    through self-induction of drugs.

13          The Court will further note that as an inmate  
14    at the youth prison he attempted to fashion a saw blade  
15    into a shank, thus indicating his awareness regarding  
16    safety issues. The State's witness conceded that there  
17    may be mild impairment in this issue but the Court will  
18    find when considering the totality of the evidence and a  
19    review of all considerations that these would fall short  
20    of significant limitation in this area.

21          Regarding leisure skills, the Court will find  
22    that the defendant has failed to establish by a  
23    preponderance of the evidence that the defendant has  
24    significant limitations. In fact, all the evidence would  
25    be to the contrary. The testimony and the affidavits

1 indicate that the defendant is a good athlete in track,  
2 swimming, softball, baseball, and is a good painter and  
3 drawer so the Court would find no deficits in this area.

4           Regarding self-direction, the Court will find  
5 that the defendant has failed to establish by a  
6 preponderance of the evidence a significant limitation in  
7 this area. In fact, all the evidence is to the contrary.  
8 As a child, he established what apparently was his  
9 routine of going to school, leaving to pursue other  
10 activities such as swimming in Salem Creek, and then  
11 returning home before dark.

12           The Court will further note that his criminal  
13 activities, which are lengthy and numerous in nature,  
14 took some degree of self-direction and planning to  
15 accomplish and carry out such as selection of victims,  
16 prime sites, and weapons. Further, he has established a  
17 routine for himself within the parameters of his current  
18 structured environment, that being both at the youth  
19 detention, DOC, and now on death row.

20           Regarding the area of social skills, the Court  
21 will find that the defense has failed to establish by a  
22 preponderance of the evidence significant limitations.  
23 The defense expert, Dr. Fisher, indicated that he was  
24 (quote) "shy of this area". All the evidence would tend  
25 to indicate that the defendant has no significant

1 limitations in social skills. Even though he has a quiet  
2 demeanor, he can participate in normal conversation. His  
3 responses in interviews and in examination during his  
4 court hearing were appropriate and according to the  
5 testimony in this hearing all of his interviews and prior  
6 testimony indicated a clear ability to communicate and  
7 possess appropriate social skills.

8 Finally, regarding functional academics, the  
9 Court will find that the defendant has established by a  
10 preponderance of the evidence a significant limitation in  
11 this area. The Court would further find that the evidence  
12 would reveal that the defendant failed the first and  
13 fourth grades so that a significant limitation was in  
14 fact manifested prior to the age of 18. The State's  
15 expert conceded a mild impairment in this area but the  
16 Court, after reviewing all the circumstances in their  
17 totality, the school records, and the testimony of family  
18 members that was presented in affidavits, would find a  
19 significant limitation in his functional academic area.

20 So, in conclusion, the Court will find that the  
21 defendant has not established by a preponderance of the  
22 evidence a significantly sub-average general intellectual  
23 functioning ability. So on that basis alone the Court  
24 could deny the motion. However, the Court went on to  
25 visit all other areas cited in 15A-2005 and would find

1     that the defendant has established only one of the  
2     significant limitation areas of adaptive functioning,  
3     that being the functional academic area by a  
4     preponderance of the evidence and, further, that this  
5     limitation was manifested before the age of 18.

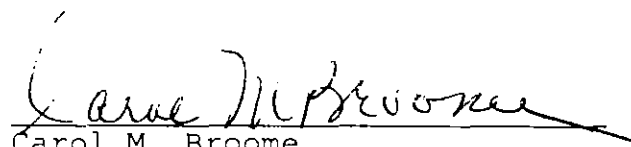
6             Therefore, after consideration of all areas,  
7     again, the Court would deny the Motion for Appropriate  
8     Relief. This the (blank) day of June, 2003. Ronald E.  
9     Spivey, Superior Court Judge Presiding.

10    WHEREUPON, this matter was adjourned.

STATE OF NORTH CAROLINA      IN THE GENERAL COURT OF JUSTICE  
    SUPERIOR COURT DIVISION  
 COUNTY OF FORSYTH                      94-CRS-1451

STATE OF NORTH CAROLINA      )  
    )  
 vs.                                   )      C E R T I F I C A T E  
 THOMAS MICHAEL LARRY,      )  
                                  Defendant.      )  
 -----) )

This is to certify that the Transcript in the  
 above captioned case was requested of the Court Reporter  
 named below on February 3, 2004 and was delivered and/or  
 mailed to the Attorneys(s) of record as indicated below  
 on April 2, 2004.

  
 Carol M. Broome  
 Official Court Reporter & Notary

ERIC A. SAUNDERS  
 Forsyth County DA's Office  
 Winston-Salem, NC 27120

WILLIAM G. CAUSEY, JR.  
 1422 South Main Street  
 High Point, NC 27260

STATE OF NORTH CAROLINA                    )  
  )  
vs.    )       C E R T I F I C A T E  
THOMAS MICHAEL LARRY,                        )  
                          Defendant.            )  
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I, Carol M. Broome, the officer before whom the foregoing proceeding was taken, do hereby certify that said hearing, pages one through 286 inclusive, is a true, correct and verbatim transcript of said proceeding.

I further certify that I am neither counsel for, related to, nor employed by any of the parties in the action in which this proceeding was had; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of this action.

Carol M. Broome  
Carol M. Broome  
Official Court Reporter

STATE OF NORTH CAROLINA      IN THE GENERAL COURT OF JUSTICE  
    SUPERIOR COURT DIVISION  
 COUNTY OF FORSYTH                      94-CRS-1451

STATE OF NORTH CAROLINA      )  
    )  
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 Carol M. Broome  
 Official Court Reporter