ATTACHMENT 4

FILED

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF FORSYTH FORSYTH COUNTY C.S.C. 94-CRS-1451
BY: Linda E. Dill

STATE OF NORTH CAROLINA)
)
vs.)
THOMAS MICHAEL LARRY,)
Defendant.)

ORDER

THE COURT WILL FIND it sits in this matter pursuant to a Motion for Appropriate Relief alleging pursuant to 15A-2005 that the defendant is mentally retarded and that his penalty of death should be set aside in lieu of a life sentence.

The Court will find in this hearing that it heard from Darlena Mixon, a Forsyth County resident since 1964, and a retired school teacher. The evidence would tend to show that she has done numerous evaluations and she had done one on this defendant for purposes of special education placement and referral.

The Court will further find that during the course of her testimony the State and the defendant stipulated that the results of the test that she performed and two other tests that were administered at a younger age by unknown persons will be excluded from consideration for purposes of this hearing. So for all practical purposes nothing further from her testimony was of quality.

The Court will further find that it heard from Carolyn Larry of Charlotte, sister of the defendant. She being an LPN at North Central Family Medical Center in Rock Hill, SC for the past year and a half and previously worked at Carolinas Medical Center in Charlotte for six or seven years. She attended the Winston-Salem/Forsyth County school system until she moved to Charlotte in 1989.

She is the sister of the defendant. They had two other brothers, both of whom are deceased. She indicated that their mother raised them in Happy Hill

Gardens here in Winston-Salem. That their mother worked in the laundry at Baptist Hospital during this time. She indicated that the children all attended Diggs Elementary School, which was still segregated at that time. She indicated that she actually, though younger than the defendant, passed him in the first grade and stayed ahead of him through the remainder of her school career. She indicated her belief that he had failed the first and fifth grade. The testimony later indicated it was actually the first and fourth.

She indicated that their mother was stern and that their mother assigned them chores and that she kept a neat home and that her recollection was the defendant would not do his chores and they would have to assist him. Further, that at times he did not bathe on time or he did not lay his clothes out appropriately as requested.

She indicated her recollection that the defendant would have to sometimes stay inside while the other children were out playing because their mother would make him stay in and help him with his homework. She testified that the defendant wet his bed and that he was a bed wetter. That the mother would have to make sure that he got his wet clothes off in the morning. The Court will note that during the testimony of the hearing no age was given; however, it was later indicated during the testimony that this at least went through the period of the sixth or seventh grade.

She indicated that often her mother would have to tell him the same things every day. For instance, that he should not swim in Salem Creek though he chose to do so voluntarily. She also indicated from her recollection that their mother would have to tell him to take his bath. Again, I will note that no age parameters were given for this elicited conduct.

Regarding chores, she indicated her mother would put a list of chores on the refrigerator and that most of the time the defendant didn't do his appropriately. His chores would tend to be washing the dishes, emptying the trash can, or sweeping and that they would often have to chip in and do some of his chores or all of them.

She further testified that she recalled playing board games with the defendant and that when losing he would get mad and even though he understood the rules, he would accuse them of cheating or simply knock the board over ending the game. Consequently, the other children sometimes did not like playing with him. She also stated her recollection regarding outside games if you were winning that the defendant would often get mad and throw a rock at you and run off.

She also recalled an incident where they were building a model car and the defendant was trying to put a piece of the car on that was the wrong piece and he eventually got mad and just tore up the car. Again, no time parameters were specified.

She also testified that at a young age, as born out by the Department of Corrections records, he was sent to training school for a period of time. She did recall an incident where he and others vandalized their own elementary school, Diggs Elementary, by throwing eggs, paint, syrup, and other items on the floors. Part of their punishment was to clean it up and she recalled that she and her siblings had to go and assist. She indicated that she never knew him to have a North Carolina driver's license and that she had never seen him drive. However, the Court will note that among his many convictions are convictions of no operator's license and unauthorized use which would tend to indicate he has operated a motor vehicle.

She indicates that she recalls that he had a job for two weeks at one time, again, this being in his young life. The Court would further note that prison records would indicate that he had a job allegedly held for three months at one point.

She does recall the defendant being gone for long periods of time to training school. She does indicate further that he would often become missing from school. However, he would always return at night and would sit up and his mother would have to tell him to go to bed. She also recalled that her mother would always send him back to the bathroom to wash his hands after using the bathroom and that she often had to tell him that.

She indicated that from her recollection regarding school attendance that they would always go to school together. At recess or at lunch she often would not see him there and she wouldn't see him after school. She made the assumption that he left school and that he sometimes stayed away from home until about dark when he would always return. She testified that he was never gone overnight. That he would always come back.

She further testified and these are portions of her affidavit where she admitted that he was good at track, softball, art, painting and drawing. She testified in her affidavit and in her testimony that if he liked an activity, he could excel. If he didn't, you could forget it. Further, that he understood the rules. That he just didn't choose to follow the rules. Her exact testimony in her affidavit was "he was mean". However, she explained that to mean that he just wanted to do things his way and if he didn't get his way, he would do things to them. She also indicated that he would sometimes steal from them and then lie about where he got the item, saying that he found it.

She also agreed in her affidavit that he didn't have trouble taking care of himself, he just didn't want to do it. That he wanted things done his way.

The Court will further note from reviewing her affidavit, which is part of the court file, there were some passages that were of use to the Court. First of all, (quote) "he can read and write. He has a beautiful handwriting". "Mike didn't have any trouble taking care of himself although he left the bathroom dirty no matter how many times you told him to clean it up". "He wet the bed until he left the house in the seventh grade when he went to training school". "He could get around the neighborhood. He taught me how to ride my bike". "He was very protective of me and made sure I didn't cross the street or talk the strangers without him around". "I don't remember him being in school. He used to cut even in elementary school. I think he had bad grades because he never went to school". "He was really good at track, softball, and swimming. He was really good at art, painting, and drawing. If he wanted to do something, he excelled but if he wasn't interested, you could forget

it". "I don't know anything about him at work or at home because he was always incarcerated". "Mike understands the rules but he didn't follow them". "He is very manipulative of our mother. He asked her to put the house up to get him out of jail" (end quote). Again, those passages come from her affidavit signed on January the 16th, 2002. They are in the court file.

The Court further heard from Dr. Brad Fisher. The Court will note there was an extensive review of his CV which was introduced into evidence and he was eventually admitted several pages later as an expert in psychology and in the field of mental retardation.

The witness testified that he reviewed the definition of mental retardation in 15A-2005, the DSM-IV, and the American Association of Mental Retardation. He indicated that the definition in each was similar. That in the adaptive skills limitation categories the words were the same or similar and the DSM-IV has twelve areas or domains.

He indicated that he evaluated the defendant for a determination and evaluation of intelligence and he attempted to administer an IQ test in at least two sessions so that he could make some opine as to the defendant's malingering. He further requested that the attorneys for the defendant send him any data that might be relevant to his evaluation. He thought that this information might be particularly important as it goes to some determination as to the "before 18" prong of the test because this data would be needed for those purposes.

In his report, he indicates that he reviewed the following information: the affidavit of the defendant's mother, Daisy Larry. A summary of data by Katrina Kuzyszyn; correspondence and materials' summary to Dr. Tim Hancock; school records, the psychological evaluation by Darlena Mixon. He also looked at the classification from 1970 which were, I believe, part of the stipulation that would be excluded and the 1987 and 1989 classification evaluations in the DOC.

Interestingly, the witness did not look at the affidavit of his sister or evaluate any of the information that was provided or testified to by Dr.

Hoover in the sentencing phase of his original trial. In fact, he indicated he was not even aware that Dr. Hoover had evaluated the defendant in any way, shape, or form and was not aware of his testimony.

He indicated that he administered the IQ test on December of 2001 and January of 2002, taking a total of two to three hours time. He indicated he gave him the Wechsler Adult Intelligence Scale-R which I will refer to as the WAIS-R. He indicated that this has eleven sub-tests that result in a total test score. That he read the directions to each sub-test and wrote down the answers. He indicated in his practice he had used the WAIS-R for a long period of time.

That he made an effort to determine if the defendant was malingering. He did not give him the Adaptive Behavior Area System Test because he did not feel that it was applicable to the defendant because he had been in prison for so much of his life and that test focused on areas such as use of checkbooks and the like. He simply had no experience in these areas and therefore he was not given this ABA System Test. However, the witness did determine that in his opinion the defendant was not malingering when he put his answers together with all the data to form his opinion.

He indicated that he used the WAIS-R test instead of the more current WAIS-III because he could better determine the issue of malingering by comparing it with previous WAIS-R's. Interestingly, the witness did not try to attempt to see if there had been any WAIS-R's given previously. He just made the assumption that there might have been and as it turned out there were no prior WAIS-R's for any comparison for purposes of malingering or otherwise. He testified that there is no authority that the definitively states whether or not the WAIS-R or the WAIS-III would be the better IQ test under these circumstances.

Again, regarding malingering, this witness concluded that the defendant was not malingering. That he was giving his best effort.

He further testified that on the WAIS-R he received a full scale score of 69 with a standard error of plus or minus five. The witness testified that there

is no absolute IQ number. That there is always a plus or minus standard of error or range of competence. He indicates that this range of competence is established by the American Association of Mental Retardation. He testified then that with a score of 69, the range of competence on this test would be 64 to 74.

The witness admitted that his determination of IQ includes some clinical judgments in some areas and this goes to the second prong of the test under 15A-2005. He testified that regarding functional academics the defendant had repeated the first and fourth grade. That he had stopped in the sixth grade and that his grades were consistently low. That the defendant had not held a job for more than three weeks. That when he worked, it was menial labor. That it required no complex thought process. The witness testified that he was not familiar with any job the defendant had held for three months as indicated by the DOC records.

Regarding self-care, he testified that from his review of the evidence that the defendant would only change or wash if pushed to do so. Regarding use of community resources, he indicated that when offered vocational training in training school, that the defendant refused to take it.

Regarding social skills, he indicated that as an expert witness he was shy of that area because the defendant was a self-described loner. Further, regarding home living, he indicated that the defendant had never lived in his own household due to his again frequent and consistent incarceration.

Regarding leisure skills, the witness indicated he had no opinion and that he never really used this particular domain very much.

In communications, he indicated that the defendant could in fact talk and that he didn't delve into this area very deeply.

He further indicated that since the defendant has fallen near the line, he looked closely at the testimony of family and friends. Again, his report indicates that would have been the affidavit of his mother, Daisy Larry.

The witness admitted that he did not review Dr.

Hoover's reports that were made for purposes of the defendant's trial or his testimony at that trial. He further admitted he did not review the defendant's testimony at the sentencing hearing of that trial because he didn't think it would be helpful. He did indicate that he looked at the DOC records but he did not have specific recollection of the beta IQ score. He did admit that in 1987 the defendant had a screening test beta test IQ score of approximately 88.

He further admitted on cross examination that nowhere in the DOC records was there any indication that the defendant had scored in the mentally retarded range on any IQ test, screening or otherwise, although in his experience he said the DOC does not tend to give individualized IQ tests.

He admitted that he did not give the defendant any substantive test for malingering but he gave his opinion based on his clinical analysis. He chose not to use the Rey 15 or any other test. In fact, he indicated he was not aware of other tests. He based his opinion on the following inquiry. "Was the data reliable from the two sessions he was with the defendant? Was the evidence consistent with other information I saw in the reports and otherwise? On the reports data was there other information reporting paradoxical symptoms?" And he also considered clinical judgments.

The witness testified that he felt in considering all these things that it gave him a clear clinical assessment of the defendant. He said that he intentionally did not give the defendant a malingering test because he thought his clinical evaluation based on these criteria would be more conclusive.

He testified that the WAIS-III, the more current test, has more questions that are designed and directed to those who fall in the 70 and below line to give a better continuum in this area and also has a built in component to attempt to compensate for the general increase in IQ over time. He indicated in his testimony that for prisoners he thought he was doing a better job by using the WAIS-R because again he could compare it to previous tests but again in this incidence he didn't check to see if there were previous tests and it turned

out there were none.

The witness did also admit on cross examination that he had to make clinical judgments regarding his opinions on adaptive behavior shortcomings although he did not interview the defendant's sister or teachers.

Regarding functional academics, he did concede that not attending school may be a reason for poor grades. He admits that a teacher, Eleanor Morris, in the first grade had indicated that the defendant doesn't listen well but that he works and plays well with others. He further admitted that the records would seem to indicate that when the defendant repeated the fourth grade, he had started his drug abuse which I believe was reported to be heroin at age twelve. He conceded that the defendant had not held down a lengthy job because he had in fact been in prison for most of his life.

Regarding the area of self-direction, again his opinion was that he was incapable of independent living. That was his interpretation of the record. However, he did not confer with either of the defendant's wives and conceded that the defendant did in fact elect to continue committing crimes instead of working or attempting to do something of a positive nature. The witness testified that he did not think that things in prison were particularly self directed but he could not recall any dramatic passages of classification even though the defendant did make honor grade at one point.

Regarding social skills, it was admitted that the defendant apparently got along well with the other inmates and wasn't a disciplinary problem at this stage. It was noted that while in the DOC the records would indicate the defendant had an opportunity to get a GED but chose not to but this witness testified that he thought a mentally retarded person could not get their GED in any event.

Regarding the 1995 assessment by Dr. Hoover that the defendant had an antisocial personality disorder, the witness admitted that he thought that all the things that we've talked about could be placed into that category, too.

He further testified that his understanding of the WAIS-III was that it had more questions that would be

geared toward the mildly retarded range so that one might expect a slightly higher score because of the nature of the questions.

The Court then heard from Dr. Mark Hazelrigg. Again, after his credentials were detailed, he was eventually accepted as an expert in general clinical psychology and forensic psychology. He testified that he gave the tests listed in his report -- the WAIS-III test, the Rey 15 test, and the Street Survival Skills Questionnaire.

He identified the Rey 15 test is a test for malingering. The 15 part test has ABC, both upper and lower case; 1,2,3; 1,2,3 Roman numerals; and circle, square, triangle. He indicated the defendant got nine of them right indicating a low number and that the defendant was not putting forth great effort in this test.

The witness testified that the WAIS-III is a revised IQ test published in 1996. In his opinion the WAIS-R test is outdated and that its norms for IQ are outdated and old, dating back to the 1980's. He indicated that the IQ norms would tend to change over time. He indicated that some of the test items were found to be ambiguous and that new sub-tests were added to take care of these ambiguities.

He testified that you would not particularly get a higher score on the WAIS-III than the WAIS-R. He said that in his comparisons and review the WAIS-R would tend to be the higher score, the exact opposite of what the defendant's expert testified. In his test, the defendant got a full scale test on the WAIS-III of 74 with the caveat and opinion that this was not his maximum effort.

He further testified in his report that he considered other matters which were listed in State's Exhibit No. 1, including school records, DOC records, the transcript of Mr. Larry's testimony at trial, and the psychological report and testimony of Gary Hoover at trial. He noted that Dr. Hoover had diagnosed the defendant with an antisocial personality disorder and borderline personality disorder in the 1995 court session.

The witness indicated he gave the defendant the

Street Survival Skills Questionnaire to test his adaptive skills and that this test would have a series of sub-tests that would measure his skills. The witness drew no distinction between a deficit behavior versus a maladaptive behavior. He indicated that the deficit would be defined as the capacity to do or not do something versus the maladaptive behavior which would be the choice or election to do something right or wrong. He indicated the defendant's record would in fact indicate a maladaptive behavior as identified by Dr. Hoover in that he had a lengthy criminal record and had numerous infractions in the Department of Corrections, some of which were drug related, one of which was sexually related, one of which related to the making of a weapon in a custodial facility.

He further indicated that on his WAIS-III test the margin of error for a competence interval would be plus five or minus four, making his margin of error of the competence interval in the range between 70 and 79.

Regarding his adaptive skills, communication, the witness testified that he found no impairment in that area and that it was clear from the testimony at the sentencing hearing and his interviews with the defendant. Regarding self-care, he indicated it was difficult because the defendant has not lived in society for long periods of time; however, he relied on the SSSQ which indicates that the defendant could understand basic concepts and signs and even when incarcerated he was able to care for himself within the structured environments of the prison facility and found no deficit. He further noted that the defendant's sister had indicated that the defendant could do things if he would so choose to do.

Regarding home living, again he relied on the SSSQ which was very helpful regarding issues such as washing clothes, times, dates, making appointments, spending money, and that he did all of these things in the average range.

He did indicate regarding the use of tools that the defendant had some difficulty making these identifications but he attributed that to the defendant's lack of experience, not his deficiency or lack of ability. He further indicated that with all the other

tasks the defendant had no problems such as what dry cleaning was, calling the electric company, making money, counting money, measurements such as cups, weights, measuring temperature and he found no impairment.

Social skills, he testified that he found from a review of the records and his interviews with the defendant that he had appropriate responses. That even though he had a quiet demeanor that the defendant had no impairment in this area.

Regarding community use, again he relied on the SSSQ which would indicate that regarding public services, such as utilities and transportation, the defendant had the basic knowledge where you get phone numbers or buy things. He had average skills in this area. He further noted the defendant got married twice in the Department of Corrections and worked within the parameters of that system to orchestrate a marriage while in the system and found no impairment.

Regarding self-direction, the witness testified that the defendant could establish routines, again within the parameters of prison life. He found no impairment in that.

Health and safety, he indicated that he did not do well on the SSSQ. He found a mild impairment but not a significant impairment on health and safety.

Regarding functional academics, he noted that the defendant did poorly in a few grades. However, in the sixth grade he got C's and a few B's. That he had made progress and that even though he was two years older than the other kids, he could read and write and this witness found mild impairment but not significant in this area.

Regarding leisure skills, the witness noted that the defendant had simply decided to do illegal things. That he's not been impaired. That he has chosen to engage in criminal activity and drug use and he attributes these to choices, not to any impairment or deficiency.

Regarding his work skills, he had difficulty assessing that because the defendant has not been out of prison for more than seven months at a time at any one time in his life. However, he noted that there are DOC records indicating his work within the prison department

and work release programs. He further noted that he would concur that the defendant would in fact meet the criteria for antisocial personality disorder. That the maladaptive behavior would indicate these types of things and that these were things that had gotten him mostly in trouble. That he could have led a more normal lifestyle had he chosen to do so.

The witness admitted on cross examination that there were other tests for malingering such as the TOM and the VIP. That he chose to give the Rey 15 test because it is generally accepted. It is not the only test but it is generally accepted.

The witness further testified that in his opinion the defendant could have done the Rey test fully had he given his full effort and that in his opinion the defendant was malingering to some extent. He admitted that the beta IQ test that the defendant had been given in the DOC, and as evidenced by the records, doesn't have an isolated verbal score and performance score. It is simply a screening test because it's brief and not completely comprehensive. He said he didn't give great weight to these beta scores but that he gave consideration to them and some weight in forming his clinical opinion.

Again, he reiterated in cross examination that the WAIS-R test validity was questionable due to its age but he admitted he found no scoring errors or administration errors in the way the WAIS-R test was given to the defendant by Dr. Fisher.

Regarding the contentions of what are called the "practice effect" for repeatedly taking the test, this witness testified that one probably would not expect this in the circumstance because of the difference in the two tests. That they are in some ways completely different. He said that changes in the WAIS-R and the WAIS-III did add some easier questions and some additional time to help that mildly retarded group and to help form a better continuum in that area.

He stated emphatically, however, that the construction of the test to include some easier questions and some additional time would not affect or make a person's grades higher or in this case make the

defendant's grades higher.

He said it was obvious that the defendant in some respects tried harder when taking the WAIS-III, quoting as an example an arrangement of pictures test. On the WAIS-R he got the first items correct in arranging three panels of pictures in orders and none of the others. However, in the second evaluation for the WAIS-III, he got that first three correct again. Then he moved on to make the next one correct, missed the third, but in item four he got them completely arranged correctly and item five correctly. These are new items. In item six he got partial credit on this test. Item seven full credit and item eight partial credit.

So on the WAIS-III he got eight out of eleven, at least partial credit on the WAIS-R and he only got credit in one which in his opinion indicated that the defendant was not using his maximum effort on the first test and pursuant to his inquiry here was not using his maximum effort on this subsequent test.

The Court would further find that it heard in rebuttal briefly from Dr. Fisher again that in his opinion the defendant gave his best effort. That it was good and consistent and that regarding the SSSQ and its administration, that Dr. Fisher's interpretation was that the test was not used appropriately here because of the way the manual was worded.

Based on all these findings of fact, the Court will note in its conclusions of law and its conclusions in this case that it was guided by the definitions contained in NCGS 15A-2005 for purposes of this post-conviction Motion for Appropriate Relief by the death row inmate Thomas Larry alleging that his mental retardation as it's defined in that statute should require the Court to set aside this sentence of death and impose a sentence of life in prison.

The Court will note the defendant must establish the necessary prongs in 15A-2005 by a preponderance of the evidence. Again the first prong is that the defendant has significantly sub-average, general intellectual functioning which is defined as an IQ of 70 or below. The Court will find in this case that the defendant scored a 69 on the WAIS-R administered by Dr.

Fisher and 74 on the WAIS-III administered by Dr. Hazelrigg. The Court will note that each test result had a range of competence within which both of the tests could either be above 70 or both could be 70 or below.

The Court could just simply take an average, I suppose, of the test scores of 69 and 74 with an average of 71.5. However, merely taking the average I don't think would be a sufficient inquiry.

The Court will note further and find that the WAIS-III was accompanied by the Rey 15 malingering test and that each test administrator used their own clinical judgment in making some determination regarding whether or not the defendant was malingering taking their respective tests. The Court will further find that each doctor reached a different conclusion. Again, Dr. Hazelrigg felt that the defendant was not putting forth his best effort or maximum effort. Dr. Fisher thought that the defendant was using his best effort.

The Court will also find that Dr. Hazelrigg has indicated that the WAIS-R test is outdated. That its norms are outdated from the 1980's and it is currently not the preferable IQ test under these circumstances.

The Court will further find and note that the defendant had taken a revised beta screening test for IQ at least three times in the Department of Corrections with scores in 1976 of 84; 1987 of 88; in 1992 of 87. Interestingly, again, the findings of Dr. Hoover for purposes of sentencing at trial were absolutely devoid of any mention of the retardation issue.

The Court will find after consideration of all the test results, the ranges of competence of each test, the administration of the test, the clinical judgments of the experts, the test that was administered for malingering and all the other facts and circumstances that it has not been established by a preponderance of the evidence that the defendant in this case has significant or sub-average general intelligence functioning as this term is defined by North Carolina General Statute 15A-2005. Therefore, the motion to set aside the sentence of death is denied.

In my opinion, the Court's inquiry could end here but this Court will proceed to review for purposes

of the record and this order the second prong of the test which is significant limitations in adaptive functioning. The Court notes that the statute 15A-2005(b) defines significant limitations in adaptive functioning as significant limitations in two or more of the following areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills.

The Court will address each adaptive skill area which the defense contends and their witness opined that the defendant has significant limitations in adaptive functioning.

Regarding the area of communication, the Court finds the defense expert withdrew this area in testimony stating that the defendant clearly can talk and that he has communication skills. That he didn't delve into this area too deeply and further all the evidence would tend to indicate the defendant does not have significant limitations in the area of communication.

Regarding work, the Court will find the defense has not established by a preponderance of the evidence that the defendant has a significant limitation in this area. Even though the witness contends that the defendant never held a job for more than three weeks and that each position has been menial, DOC records indicate to the contrary, citing a job he held one time for three months at $338 a week.

Further, for the vast majority of what would have been the defendant's work life, he has been incarcerated. Further, that he has held several work positions in the prison setting and that he has held positions working both within the prison and working outside of the prison setting which the Court will note were later revoked not because of poor job performance but for failure to return on time and follow the rules.

Regarding self-care, the Court will find the defense has not established by a preponderance of the evidence that the defendant has significant limitations in this area. Again, the SSSQ test revealed that the defendant understands basic concepts and signs. Further, the defendant is caring for himself within the parameters of his current environment.

The Court will further note that as a child the defendant was apparently allowed to run free on many days and even though he would have to be reminded to wash or change dirty clothes, as many children have to be reminded at that age, he was able to care for himself while on these frolics as he engaged in whatever activities he elected to do outside of school or away from his home life.

Regarding the issue of home living, the Court will find that the defense has not established by a preponderance of the evidence that the defendant has significant impairment. Again, the SSSQ indicates that the defendant has functioned in the average range regarding making appointments, making money, spending money, dry cleaning and washing, electric service, measurements, weights and amounts and temperatures. It is clear that he has difficulty with use of tools but this is directly attributable to his lack of experience, not a significant impairment.

Regarding the use of community resources, the Court will find that the defense has not established by a preponderance of the evidence that the defendant has significant limitations. Even though the defendant was offered vocational training and DART while incarcerated, he elected not to participate in these activities. The Court will note that when the end result was something the defendant wanted, he did use his community resources to his benefit and to his gain to gain this end.

Examples of this are his use of the system to get married twice while in custody; his use of the system to get transfers of housing within the Department of Corrections and his use of the system to obtain work positions within the prison system or on work release.

Further, the SSSQ reveals that he is able to comprehend and could use public resources such as utilities, transportation, and getting numbers out of the phone book and the like.

Regarding health and safety, the Court will find that the defense has not established by a preponderance of the evidence that the defendant has significant limitations. The Court will note that as a child the defendant again wandered freely and frolicked

frequently and that there is no evidence that he was ever injured or harmed during these frolics.

Further, that during the numerous criminal offenses which he committed, some with weapons, he accomplished his goals without sustaining any injuries to himself other than those that might have been induced through self-induction of drugs.

The Court will further note that as an inmate at the youth prison he attempted to fashion a saw blade into a shank, thus indicating his awareness regarding safety issues. The State's witness conceded that there may be mild impairment in this issue but the Court will find when considering the totality of the evidence and a review of all considerations that these would fall short of significant limitation in this area.

Regarding leisure skills, the Court will find that the defendant has failed to establish by a preponderance of the evidence that the defendant has significant limitations. In fact, all the evidence would be to the contrary. The testimony and the affidavits indicate that the defendant is a good athlete in track, swimming, softball, baseball, and is a good painter and drawer so the Court would find no deficits in this area.

Regarding self-direction, the Court will find that the defendant has failed to establish by a preponderance of the evidence a significant limitation in this area. In fact, all the evidence is to the contrary. As a child, he established what apparently was his routine of going to school, leaving to pursue other activities such as swimming in Salem Creek, and then returning home before dark.

The Court will further note that his criminal activities, which are lengthy and numerous in nature, took some degree of self-direction and planning to accomplish and carry out such as selection of victims, prime sites, and weapons. Further, he has established a routine for himself within the parameters of his current structured environment, that being both at the youth detention, DOC, and now on death row.

Regarding the area of social skills, the Court will find that the defense has failed to establish by a preponderance of the evidence significant limitations.

The defense expert, Dr. Fisher, indicated that he was (quote) "shy of this area". All the evidence would tend to indicate that the defendant has no significant limitations in social skills. Even though he has a quiet demeanor, he can participate in normal conversation. His responses in interviews and in examination during his court hearing were appropriate and according to the testimony in this hearing all of his interviews and prior testimony indicated a clear ability to communicate and possess appropriate social skills.

Finally, regarding functional academics, the Court will find that the defendant has established by a preponderance of the evidence a significant limitation in this area. The Court would further find that the evidence would reveal that the defendant failed the first and fourth grades so that a significant limitation was in fact manifested prior to the age of 18. The State's expert conceded a mild impairment in this area but the Court, after reviewing all the circumstances in their totality, the school records, and the testimony of family members that was presented in affidavits, would find a significant limitation in his functional academic area.

So, in conclusion, the Court will find that the defendant has not established by a preponderance of the evidence a significantly sub-average general intellectual functioning ability. So on that basis alone the Court could deny the motion. However, the Court went on to visit all other areas cited in 15A-2005 and would find that the defendant has established only one of the significant limitation areas of adaptive functioning, that being the functional academic area by a preponderance of the evidence and, further, that this limitation was manifested before the age of 18.

Therefore, after consideration of all areas, again, the Court would deny the Motion for Appropriate Relief.

This the 3 day ~~of June~~ July, 2003.

Ronald E. Spivey
Superior Court Judge Presiding