

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 06CRS074131

STATE OF NORTH CAROLINA)
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)
)
VS.)
)
)
ANTONIO D. CHANCE)

**MOTION FOR RECONSIDERATION OF
DEFENDANT'S MOTION FOR
PRETRIAL HEARING TO DETERMINE
DEFENDANT'S INELIGIBILITY FOR
DEATH PENALTY DUE TO MENTAL
RETARDATION**

Now come the undersigned attorneys of record for Antonio Davon Chance and hereby move the court to reconsider its earlier denial of defendant's Motion for Pretrial Hearing to Determine Defendant's Ineligibility for Death Due to Mental Retardation, and in support thereof show unto the court as follows:

1) Defendant incorporates by reference his original Motion For a Pretrial Hearing on Mental Retardation, filed May 14, 2008, and its supporting affidavits as if fully set out herein.

2) Defendant incorporates by reference his brief in support of his Motion for Pretrial Hearing on Mental Retardation filed July 23, 2008 as if fully set out herein.

3) On July 30, 2008, the State provided counsel for defendant with a copy of the report of its expert on Mental Retardation, Mark Hazelrigg, Ph.D., which is dated July 24, 2008, the day before the court heard and denied Defendant's Motion for Pretrial Hearing. A copy of Dr. Hazelrigg's report is attached as "Attachment A" and incorporated

by reference.

4) Dr. Hazelrigg is a well qualified, highly experienced, board-certified Forensic Psychologist, who has, in addition to other professional activities, served for many years as the Director of the Forensic Treatment Program at the State of North Carolina's Dorothea Dix Hospital.

5) Dr. Hazelrigg's opinion regarding the defendant's mental retardation was based on his education, training, professional expertise, personal examination and testing of defendant and careful review of Defendant's school and other records as well as the testing of the defendant by other qualified experts.

6) Dr. Hazelrigg's opinion is that the Defendant does meet the statutory criteria for Mental Retardation based upon his evaluation, which has been ongoing since at least November 16, 2007.

7) The rendering of Dr. Hazelrigg's opinion that Mr. Chance is mentally retarded makes the issue uncontraverted and, taken together with the opinions of Defendant's experts, constitutes clear and convincing evidence of defendant's mental retardation and makes this case one clearly contemplated by the legislature to be appropriate for a pretrial judicial determination of the issue.

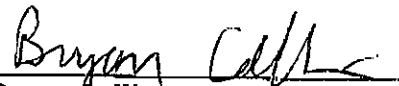
8) There is no reason to subject the system, the defendant, the families of Mrs. Moreland and the defendant to the enormous financial and emotional expense of a capital


trial in a case where, under the United States Constitution and the laws of the State of North Carolina, the defendant is ineligible for the death penalty.

9) The defendant contends that, had Dr. Hazelrigg's report been available to the court at the July 24, 2008 hearing, the ruling of the court would have been different as it would have been apparent to the Court that there was not a genuine dispute among the experts who have the skills and training to make a professional diagnosis of mental retardation:

WHEREFORE, defendant respectfully requests that the court conduct a new hearing to decide whether to conduct a pretrial determination of defendant's mental retardation and to allow such pretrial hearing to be held.

Respectfully requested this the 31 day of July 2008.


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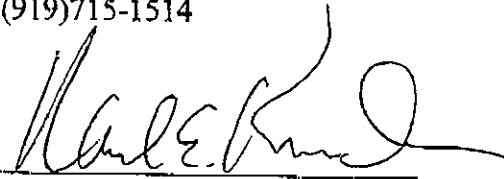
CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served a copy of the foregoing motion upon all parties of record by hand delivering said document to Assistant District Attorney, Susan Spurlin, and Howard Cummings at the Wake County Courthouse, District Attorney's office.

This the 31 day of July, 2008.



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ATTACHMENT A

MARK HAZELRIGG, Ph.D.
Licensed Psychologist
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American Board of Professional Psychology

Clinical Psychology
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July 24, 2008

FORENSIC PSYCHOLOGICAL EVALUATION**Identifying Information**

Name: **Antonio Chance**
Court #: 06 CRS 74131
Date of Birth: 05-23-77

Referral Question

Howard Cummings, First Assistant District Attorney for Wake County, North Carolina requested an evaluation of Mr. Chance's intellectual functioning, specifically to assess whether Mr. Chance satisfies the statutory definition of mental retardation as provided for in N.C.G.S. 15A-2005.

Antonio Chance is a 30-year-old male, charged with First Degree Murder in Wake County. He was interviewed and tested in Wake County Jail. The purpose of the evaluation was explained to him, along with the limits to confidentiality. He indicated he understood and was willing to participate. He identified his attorneys as "Bryan Collins and Karl Knudsen."

Sources of Information

- Referral data and Court Orders from Howard Cummings, First Assistant District Attorney for Wake Co.
- Clinical interview 11-16-07
- Wechsler Abbreviated Scale of Intelligence (WASI)
- Repeatable Battery for the Assessment of Neuropsychological Status (RBANS)
- Trailmaking Test
- Investigation reports from the Raleigh Police Department
- Crime scene photographs and video
- School records from Wake and Harnett County Public Schools
- Psychological testing data from Ashley King, Ph.D.
- Psychological testing data from Ginger Calloway, Ph.D.

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- Interview with Lenzie Leach
- Medical records of Joyce Chance
- Employment records
- Probation records
- Records from NC DOC
- Records from Wake Co. Detention Center
- Interview reports of Mr. Chance's employers and family members by Annette Sheppard

Background Information

Much of the personal history information about Mr. Chance detailed below is from his own self-report. The consistency of his reports was compared to that from other sources whenever possible.

Childhood and Family History. Mr. Chance was born and raised in Raleigh, NC. He stated he has 3 sisters and he is the second oldest. His biological father was never involved in his life. His mother started a relationship with Lenzie Leach when he was about six months old and Mr. Leach raised him as his father. He reported his parents separated when he was about 12 years old and he was then raised by his stepfather. He stated his mother "liked to party a lot" and that she was not active in his upbringing. He described his father in very positive terms and indicated his father was a stable influence in his life. He said he has positive relationships with his sisters and his father, but only his father has visited him regularly in jail. He denied any abuse in the family, however, there are other reports that his stepfather was abusive toward his mother, other female companions, and Mr. Chance. He stated his mother had apparent substance abuse problems and had one admission to Dorothea Dix Hospital when he was in his 20s, but he did not know the reason for the admission. He did not report any other mental health issues or substance abuse problems in his family members.

Mr. Chance's family described a number of problems, observed since a young age. These included developmental delays, lack of age appropriate social skills, and dependence on others.

Relationships. Mr. Chance stated that has never married, but has two sons. By his report, he values his children very highly and willingly paid child support when he was employed. He said he was extremely distressed when his children's mother did not allow him to visit them. He related an incident in which he bought Christmas presents for his children, but could not see them in person to give them the gifts. Of note, he could not figure out any other way to get them the presents, despite knowing other family members who were in contact with them. Mr. Chance described a very close relationship with a woman, which dissolved largely because of his substance abuse. He said he did not cope well with this and said he was depressed and hopeless after the breakup.

School. Mr. Chance reported that he did "all right" in school, until age 16. He reported being in special classes from the 1st through the 3rd grades, but attended regular classes the rest of the time he was in school. He did not report behavior problems in school. He said he left school in the 10th grade because of getting in trouble and being incarcerated. He indicated he can read and write without difficulty.

School records indicate Mr. Chance was assessed when he was age 5 in Kindergarten. He had shown delays in academic readiness, such as not recognizing letters and numbers. He repeated Kindergarten and was placed in EMH classes from 1st to 3rd grades, based on IQ testing (discussed in detail below). He was retested at age 9 and was removed from EMH classes, being identified as Learning Disabled instead. At age 13, he was tested again, with similar results and with continued LD support in school.

Behavior in school was initially (K) described as very active and easily distracted, needing constant help. He had little self-control, did not show respect for others, and used abusive language. In later years, he was described as friendly, delightful, and always willing to work.

Mr. Chance has attended three classes in Wake Technical Community College. He enrolled in Basic Skills Programs twice during incarcerations. He completed the classes with S grades. In 2003, he completed a Job Vocational Readiness course, also with a satisfactory grade.

Employment. Mr. Chance reported having had several jobs. He said the longest was for about 18 months for a moving company. He said he left jobs to seek better pay, but implied he also lost jobs due to lack of interest, being incarcerated, or because substance abuse interfered. He said his last job was at McDonalds and that he was "laid off" about 2 months prior to his arrest. He denied ever being fired. He said he supported himself when not employed by staying with family members.

Criminal History. Mr. Chance has a criminal history that dates to age 16 when he was charged with Second Degree Sex Offense and Common Law Robbery. At that time, he and a codefendant assaulted a man, including the codefendant sexually assaulting the man while Mr. Chance helped restrain him. Mr. Chance denied this level of involvement and said he was just in the wrong place at the wrong time. He served 4 1/2 years. In 2000 he was charged with failure to register as a sex offender and served 2 years. He stated that he did not know about the reporting requirements and said that his probation officer never told him about it. In 2004, he served 5 months for a marijuana charge.

Substance Abuse. Mr. Chance reported extensive abuse of cocaine, beginning in 2000 at age 22. He said he used powder cocaine and not crack, but that he used it every day and could not estimate the highest amount. He stated, "I was just gone for snorting." He said at first it was about 1 or 2 grams a day and later was much more than that. Mr. Chance also reported using marijuana on a nearly daily basis, but stated that this did not interfere with his functioning in the same way cocaine use did. He reported he drank alcohol only occasionally and this also was not a problem. He stated that using cocaine consumed his attention and that all of his free time was spent using or acquiring cocaine. He said to support his habit he "hustled" and sometimes sold drugs.

Mr. Chance stated he tried to seek help for his addiction. About 2 months before his arrest, his mother and sister took him to Wake County Mental Health, but he was offered only outpatient services. He said he had gone seeking inpatient treatment, but was told there were no inpatient beds at that time. "Those people shut the door in my face." He said if he had been given the help he was seeking "I wouldn't be in this situation." He said he went to an intake

session only and did not go to the outpatient classes that were recommended. He said after failing to get inpatient services he "started using heavier and heavier," and said the stress from his relationship problems and frustration over not being able to see his children contributed to the increase in his cocaine use.

Mental Health History. Mr. Chance denied ever having symptoms of psychosis, even when using drugs. He did report having had symptoms of depression. He did not clearly identify when this started, but said it has continued for several years. He stated that in 2005 he contemplated suicide, including writing notes to his family and going to visit them. He said he went to a park with the intention of shooting himself, but "I didn't have the guts." He stated that he was on cocaine at the time. He did not seek or receive treatment for depression. He also stated that afterwards, his cocaine use worsened, "I guess I was trying to kill myself with cocaine." In addition, about two months after his arrest on the current charges Mr. Chance wrote a note to his family expressing frustration and implied suicidal ideation. He was admitted to the DOC Mental Health Unit. He denied suicidal ideation, but did show signs of depression and was treated with Effexor (an antidepressant). This was later discontinued, as the symptoms of depression had lifted and were attributed to situational stressors. Discharge diagnosis was Adjustment Disorder with Depressed Mood, resolved, and Personality Disorder, NOS.

In 1995 while incarcerated, Mr. Chance took the MMPI-A. Results were essentially unremarkable. He produced a valid profile with no marked elevations on any clinical scales. His highest scale elevations were on scale 0 (relating to disinterest and/or discomfort with social interactions) and scale 2 (relating to symptoms associated with depression). He also showed mild elevations on content scales relating to social discomfort, and negative treatment indicators.

While incarcerated on the sex offense charge, Mr. Chance was enrolled in sex offender treatment groups. Note from the group leader indicated that he participated adequately, although was not always an active group member.

Summary Description of the Alleged Offense

Mr. Chance is alleged to have abducted and murdered Cynthia Moreland on 08/22/06. She did not arrive to work at Progress Energy in downtown Raleigh. It was determined that her parking pass had been used that morning in the parking deck she used for her work. Later, her vehicle was located some distance away, there was a transaction on her ATM card, surveillance photographs were obtained from several locations, and several outgoing telephone calls from her cell phone were recorded. Using this information, police located Mr. Chance. Mr. Chance did not give any information about how Ms. Moreland could be found. On 09/01/06, her body was found behind an abandoned house in a rural area. In the course of the investigation, it was determined that Mr. Chance had attempted to use the ATM card to make a purchase at a store and had sold the victim's cell phone after someone else showed him how to operate it.

Previous IQ Testing

Mr. Chance's intellectual functioning has been assessed multiple times. In 1983, at age 5, he was tested with the Wechsler Preschool and Primary Scale of Intelligence (WPPSI), with scores of Full Scale IQ=69, Verbal IQ=75, and Performance IQ=69. Based on these scores, he was placed in special classes for students with mild mental retardation (EMH) from grades 1 through

3. Four years later he was retested, this time with the Wechsler Intelligence Scales for Children-Revised (WISC-R). Scores were Full Scale IQ=75, Verbal IQ=75, and Performance IQ=78. Based on these scores he was transferred from the EMH classes to classification as Learning Disabled, and received services for that condition. He was retested again in 1990, again with the WISC-R. Results were Full Scale IQ=74, Verbal IQ=74, and Performance IQ=78. These scores confirmed the earlier results and he remained with the classification of LD the rest of the time he was in school.

When he was first incarcerated in the DOC, he was screened with the BETA IQ test. His score was IQ=104. This test is group administered and can be considered to be only a rough screening measure of IQ.

Finally, in 2006, Mr. Chance was tested with the Wechsler Adult Intelligence Scale-III (WAIS-III) by Ashley King, Ph.D. Scores were Full Scale IQ=67, Verbal IQ=71, and Performance IQ=68.

Interview and Mental Status Exam

Mr. Chance was interviewed in an office in the Wake County Jail. He was cooperative and polite. He presented with an adequately clean and neat appearance. There were no abnormalities in his motor movements or speech articulation. His mood was somewhat subdued and he reported mild symptoms of depression. He described these as ongoing and not significantly worse since his arrest than before. He did not exhibit significant signs of depression and showed a range of affect that included seriousness, humor, and anger. He reported past suicidal ideation and behavior, but denied current intent. He did state that the death penalty would be a way for him to stop living that did not involve directly committing suicide. Current symptoms of depression included sleep disrupted by bad dreams, depressed mood, and feelings of hopelessness.

Mr. Chance did not show any signs of disordered thought processes. His speech patterns were not tangential or circumstantial. Mr. Chance answered questions in a logical and coherent fashion and provided direct answers to questions. During the interview he was frequently distracted by loud noise and activity in the vicinity. He was always able to refocus on the interview with no difficulty after things became quiet again. During the administration of psychological tests, the area was relatively quiet and free from distraction.

Mr. Chance was oriented and was conversant on a concrete level. Even though there was noise and distractions, he was able to maintain his focus on the interview. His memory was generally intact for both recent and remote events. He was aware of and could discuss current events on a basic level.

Psychological Test Results

Because of the recent administration of the WAIS-III, IQ testing was limited to the WASI for confirmatory purposes. In addition, the RBANS and Trailmaking Test were administered to screen for neuropsychological dysfunction.

On the WASI, Mr. Chance's scores were Verbal IQ=74, Performance IQ=62, and Full Scale IQ=66. These scores are generally consistent with previously obtained scores. Mr. Chance's scores on Performance subtests have varied over time, which seems to be the main factor affecting any differences in his Full Scale IQ scores.

To further explore the inconsistencies in Mr. Chance's performance IQ scores, the RBANS and the Trailmaking Test were administered as screening measures for neuropsychological dysfunction. The RBANS is a global screening measure for a variety of cognitive abilities, with scores expressed in Index Scores (which are on the same scale of IQ scores, e.g., mean of 100 and SD of 15). Mr. Chance's scores were higher than expected for Language (85) and Delayed Memory (83). His lowest score was in Attention (72). These scores suggest that Mr. Chance's general language abilities are a strength for him, while his attention and concentration are relative weaknesses, however, these were not statistically significant. The relatively lower score on Attention is consistent with poor performance on some performance tasks on the WAIS-III, which require sustained attention while working under time pressure.

On the Trailmaking Test, Mr. Chance finished part A easily and with a time that is in the average range. Part B is more demanding, as it requires repeated shifts in mental set. Although most individuals are able to finish this task, Mr. Chance was unable to complete Part B. After finishing most of it, he began making errors and was unable to concentrate adequately to figure out the last few steps. Based on the time when he discontinued the test, his score was in the impaired range (1st percentile). He also made five errors prior to discontinuing, which is a high number. The slow performance, large number of errors, and inability to complete the task are suggestive of cognitive deficits, particularly in the areas of attention, concentration, and ability to shift mental sets.

Diagnostic Impression (DSM IV)

Axis I: Cocaine Dependence, in a controlled environment

History of Adjustment Disorder with Depressed Mood, currently resolved

Possible Dysthymic Disorder

Axis II: Mild Mental Retardation

Mr. Chance has history of cocaine use, beginning at age 22. His use increased and eventually involved very heavy daily use. Cocaine use consumed his attention and all of his free time was spent using or acquiring cocaine. His need for cocaine use led to him engaging in illegal behavior, including selling drugs. His employment and social relationships were significantly disrupted by his cocaine use. He sought out treatment one time, but did not follow through with the appointments given.

Mr. Chance reported a history of chronically depressed mood, with sleep disturbance and episodes of suicidal ideation. He reported feelings of hopelessness. This symptom pattern is consistent with Dysthymic Disorder. During his treatment in the Mental Health Unit, his depressed mood was attributed to an adjustment disorder and the symptoms were not noted to be ongoing. The presence of his severe cocaine dependence is an additional complicating factor, as that degree of substance dependence could cause the symptoms of a mood disorder.

Mental Retardation

Regarding the possibility of Mental Retardation, there is evidence of cognitive deficits beginning at a young age. His family noted delays in development. At his first assessment at age 5, he tested with a Full Scale IQ of 69, with placement in EMH classes by the school system (such classes were designated for individuals with Mental Retardation). Formal adaptive skills

assessment was recommended, but there is no documentation that it was ever done. Subsequent testing in the school system at age 9 showed an IQ score above the level of Mental Retardation, however, his school achievement remained significantly below his grade level and Mr. Chance was considered to have a learning disability. He was then placed primarily in regular classes, with support, and functioned adequately in school. Repeat testing at age 13 showed similar scores and patterns of subtest scores. As an adult, Mr. Chance was assessed in 2006 with the WAIS-III, with a Full Scale IQ of 67, and then in 2007 with the WASI, with a Full Scale score of 66. Overall, test results have had some variability, particularly in Performance IQ scores, but the stronger and more consistent findings are that Mr. Chance's scores fall in the range of Mild Mental Retardation.

In regard to adaptive skills, there is evidence of deficits due to cognitive impairment. In general, Mr. Chance's personal history was marked by developmental delays, and limited social and living skills. There are many examples of him being unable to solve simple problems in everyday life. In addition, his lifestyle was disrupted due to his cocaine dependence and associated irresponsible behavior.

Addressing the areas of adaptive skills listed in the statute:

a. communication. Mr. Chance has an adequate vocabulary to express simple and basic ideas. He engaged in relevant conversations about a variety of topics. He does not have significant limitations in this area.

b. self-care. Mr. Chance claimed a good understanding of how to care for his own basic needs, but in fact, his family reported that he needed assistance and he was unable to obtain mental health or substance abuse treatment, even when he recognized a need for it. He does show impairment in this area that has interfered with his ability to function independently.

c. home living. Mr. Chance described performing the ordinary tasks around the house. He stated that he performed many of these tasks while living in family members' homes, however, their consistent reports are that he did not perform these tasks adequately unless given assistance. He does show impairment in this area that has interfered with his ability to function independently.

d. social skills. In interview, Mr. Chance was personally engaging and friendly. He maintained eye contact and his conversational style used appropriate give-and-take. He listened attentively to questions and answered relevantly. In other contexts, Mr. Chance reported appropriate social behavior, such as buying gifts for his children. He does not have significant limitations in this area.

e. community use. Mr. Chance showed some knowledge of how to accomplish various tasks in the community. He could not give directions, even for relatively familiar areas and his family reported he got lost easily. He shows mild to moderate impairment in this area.

f. self-direction. Mr. Chance described examples of activities that involved independent decision-making on his part. While he often chose antisocial activities, such as drug use, these were choices he made independently. The poor judgment that is evident seems to be more closely associated to the lifestyle that he had chosen than cognitive limitations.

g. health and safety. Mr. Chance described how to manage basic activities safely and had an understanding of what to do in case of accidents or injuries. As noted, he was unable to obtain needed help for mental health or substance abuse problems. This included going to the mental health center, but not attending the appointment that was made. He shows mild to moderate impairment in this area.

h. functional academics. Mr. Chance's academic achievement has been assessed both in the school system and DOC. In 1994 his reading score was at a grade level of 7.8, with spelling at 4.3 and arithmetic at 4.4. These scores are low compared to his years of education. His reading ability may be adequate for day to day functioning. His arithmetic ability is low, but he can perform basic functions. Overall, he shows impairment in this area that has interfered with his ability to function independently.

i. leisure skills. Mr. Chance described having friends and engaging in social activities. These were largely focused on substance abuse, but they were the social activities of his choice. His choice to engage in substance abuse rather than more socially acceptable leisure activities is a result of addiction, not cognitive impairment.

j. work skills. Mr. Chance was employed many times throughout his adult years, generally in relatively unskilled positions. He denied ever being fired, but implied that drug use had interfered with some of his jobs, rather than having difficulties resulting from cognitive limitations. Thus, his work skills are impaired, but the relative contributions of cognitive limitations versus substance abuse cannot be separated.

In summary, in my opinion Mr. Chance does meet the criteria for Mental Retardation. He was tested to be in that range as a child, with placement in EMH classes. This meets the first prong of the diagnosis, that the impairment was evident prior to age 18. Subsequent testing did show IQ scores higher than 70, but there continued to be learning problems and adaptive skill deficits.

As an adult, his IQ was tested to be 67, which was then confirmed. There was no evidence of malingering or inadequate effort given during these test administrations. Neuropsychological testing further confirmed deficits in attention and concentration, as well as more general cognitive impairment. Thus, reliable test results show his current IQ falls below 70, with confirmation of cognitive deficits from other tests.

Finally, Mr. Chance does demonstrate significant adaptive skills deficits. Specifically, he showed clear impairment in the areas of Self Care, Home Living, and Functional Academics. Less severe deficits were also apparent in Community Use, Health and Safety. In addition, he has deficits in Self-Direction, Leisure Skills, and Work Skills, but these deficits are compounded by issues with substance abuse and may not be exclusively due to limited intellectual ability. Taken as a whole, he does meet the diagnostic criteria of having significant deficits in two or more areas.


Mark Hazelrigg, Ph.D.