No. 17-9467

IN THE SUPREME COURT OF THE UNITED STATES

LARRY LAMONT WHITE **PETITIONER**

v.

COMMONWEALTH OF KENTUCKY **RESPONDENT**

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

****CAPITAL CASE****

Respectfully Submitted,

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QUESTIONS PRESENTED

1. Did the Supreme Court of Kentucky erroneously affirm the trial court's denial of White's motion to exclude the death penalty as a possible punishment based on intellectual disability?

2. Did the Supreme Court of Kentucky err when it denied White's motion to suppress evidence obtained during a traffic stop?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 5

I. The Supreme Court of Kentucky correctly upheld the trial court's findings regarding intellectual disability 5

- **A. White does not have a valid IQ score as a basis for a determination of intellectual disability** 5
- **B. *Hall v. Florida* did not invalidate the statutory score threshold** 11
- **C. Courts are not obligated to apply the Flynn Effect** 14
- **D. White has not made a prima facie showing of adaptive deficits** 17
- **E. White's DNA was legally seized** 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Adkins v. Commonwealth, 96 S.W.3d 779, 787 (Ky. 2003) 11

Arizona v. Johnson, 555 U.S. 323, 332 (2009) 23

Atkins v. Virginia, 536 U.S. 304 (2002), ... 11, 12, 16

Battenfield v. Gibson, 236 F.3d 1215, 1233 (10th Cir. 2001) 21

Black v. Carpenter, 866 F.3d 734 (6th Cir. 2017) 15

Brumfield v. Cain, 135 S.Ct. 2269 (2015) 13

Cain v. Chappell, 870 F.3d 1003 (9th Cir. 2017) 14

Chapman v. Commonwealth, 265 S.W.3d 156, 172 (Ky. 2007)..................................... 20

Cole v. Branker, No. 5:05-HC-461-D, 2007 WL 2782327 at *21
(E.D.N.C. Sept. 20, 2007)... 7

Hall v. Florida, 134 S.Ct. 1986 (2014) .... passim

Knowles v. Iowa, 525 U.S. 113, 117-18 (1998) 23

Larry P. by Lucille P. v. Riles, 793 F.2d 969 (9th Cir. 1984)... 7

Larry P. v. Riles, 495 F.Supp. 926 (N.D. Cal. 1979)... passim

Ledford v. Warden, Georgia Diagnostic and Classification Prison,
818 F.3d 600, 629 (11th Cir. 2016). 14

Maryland v. Wilson, 519 U.S. 408, 414 (1997) 22

Moore v. Texas, 137 S.Ct. 1039, 1045 (2017) 13, 14, 17

Morrow v. Crisler, 479 F.2d 960, 962 (5th Cir. 1973).. 6

Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) 22

Rodriguez v. U.S., 135 S.Ct. 1609 (2015)... 23

Smith v. Duckworth 824 F.3d. 1233 (10th Cir. 2016) 12, 13, 15

Smith v. Royal, 137 S.Ct. 1333 (2017). 13

St. Clair v. Commonwealth, 140 S.W.3d 510, 560 (Ky. 2004) 20

State v. Ashworth, 706 N.E.2d 1231, 1237-38 (Ohio 1999) 20

Terry v. Ohio, 392 U.S. 1 (1968) 22

U.S. v. Akram, 165 F.3d 452, 455 (6th Cir. 1999) 22

White v. Commonwealth, 544 at 153 14

White v. North Carolina State Bd. Of Examiners of Practicing Psychologists, 388 S.E.2d 148, 168 (N.C. Ct. App. 1990) 9

Whren v. U.S., 517 U.S. 806 (1996) 22

Wilson v. Commonwealth, 37 S.W.3d 745, 749 (Ky. 2001) 22

Woodall v. Commonwealth, 2018 WL 2979581, 2017-SC-000171-MR (Ky. June 14, 2018) 13

Statutes

28 U.S.C. § 1254(1) 1

Fla. Stat. § 921.137(1) 11

§ KRS 532.130 11

21 Okla.St.Ann. § 701.10b 13

Other

A. Kaufman, IQ Testing 101, pp. 138-139 (2009)… 12

American Association on Intellectual and Developmental Disabilities, R. Schalock et al, User's Guide to Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports 22 (2012) 12

State Department of Education, Programs for the Educable Mentally Retarded in California Public Schools (1974)..8

Marc J. Tasse, The Death Penalty and Intellectual Disability 14 (Edward A. Polloway, Ed., 2015).. 6

Turner v. State of Florida, 2010 WL 518978, Appellee's Brief 7

OPINIONS BELOW

Citations to the official and unofficial reports of the opinions below are adequately set forth in the certiorari petition, as well as in the appendix thereto. The Commonwealth has also cited to the trial court record.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are adequately set forth in the certiorari petition.

STATEMENT OF THE CASE

On June 4, 1983, the body of Pamela Armstrong, a young mother of five, was found lying in an alley in Louisville, Kentucky. She had been shot in the head twice. It appeared that she had been sexually assaulted; her pants and panties were pulled down almost to her knees, and her shirt was pushed up to her bra line. No arrest was made, and the case remained cold for more than twenty years. *White v. Commonwealth*, 544 S.W.3d 125, 133 (Ky. 2017).

In 2004, the case was reopened. (Vid. R., 07/21/2014, 13:32:10). Kentucky State Police had preserved some of Armstrong's garments from which DNA was extracted. (Vid. R., 07/23/2014, 10:16:52). A sample found on Armstrong's underwear included sperm. It was first compared to a known rapist and was found to not be a match. (Vid. R., 07/22/2014, 09:55:20). Then police continued searching the file and discovered White had been a suspect during the initial investigation. He had been later convicted of two other murders of young women in the same area and within mere weeks of Armstrong's murder. It became paramount for police to obtain a sample of his DNA. (Vid. R., 07/23/2014, 10:16:52).

On February 21, 2006, Sergeant Aaron Crowell and Detective William Hibbs were tasked with procuring a sample of White's DNA. By happenstance, Sgt. Crowell was familiar with White because he had arrested White for being a felon in possession of a firearm, trafficking in marijuana, and being in possession of a stolen vehicle. (Vid. R., 10/07/2013, 11:34:50). The officers surveilled the home where White was and observed him leave the house and get into the passenger seat of a

car. (Vid. R., 10/07/2013, 11:51:45). The car took off at a high rate of speed. (Vid. R., 10/07/2013, 12:30:18). The officers followed the car and initiated a traffic stop. Knowing of White's pending gun charge and knowing that White was suspected of shooting someone to death, Sgt. Crowell asked White to step out of the car for a protective pat down. (Vid. R., 10/07/2013, 12:03:15). When White put his hands up on the car for the pat down, he took his cigar out of his mouth and placed it on the back of the car. (Vid. R., 10/07/2013, 12:06:43). No citation was issued to the driver, and White returned to the passenger seat. As the car drove off, the cigar fell on the ground, and the officers collected it. (Vid. R., 10/07/2013, 12:11:59).

The cigar was submitted for testing to compare the DNA on its tip to the DNA extracted from Armstrong's panties. The results were that the odds of the sperm on Armstrong's panties belonging to someone other than White were one in one-hundred-sixty trillion. (Vid. R., 07/22/2014, 16:05:25). On December 27, 2007, White was indicted for first-degree rape and murder. *White, supra.*

After a lengthy jury trial, White was convicted of both charges. *Id.* He refused to participate in the sentencing phase, instructing his counsel to not present mitigating evidence. (Vid. R., 07/28/2014, 11:20:46). At that point, White's counsel made a motion – for the first time – to exclude death as a possible punishment due to White's possible intellectual disability. (Vid. R., 07/28/2014, 11:42:44; Pet's. App. p. 102-04). The trial court denied the motion. White's counsel and the court had a extended discussion regarding White's decision. After speaking to White personally and considering counsel's statements, the court ruled White had "freely, knowingly,

and voluntarily waived his right to consider mitigating evidence." (Vid. R., 07/28/2014, 11:37:45). The sentencing phase proceeded, and the jury recommended a sentence of death for the murder conviction and a sentence of twenty years' incarceration as punishment for the rape. (R. Vol. IV, pp. 580-87). The court's judgment order was entered October 14, 2014. (R. Vol. VI, pp. 836-38).

The Kentucky Supreme Court affirmed White's conviction and sentence on August 24, 2018. (Pet's. App. 53-101). White filed a petition for modification which was granted March 22, 2018. (Pet's. App. 1). White filed this petition for writ of certiorari on June 18, 2018.

REASONS FOR DENYING THE WRIT

I.

The Supreme Court of Kentucky correctly upheld the trial court's findings regarding intellectual disability

White did not raise an intellectual disability claim with the trial court until after the jury found him guilty of murder and first-degree rape. (Vid. R., 07/28/2014, 11:42:44; Pet's. App. p. 102-04). At that point, he pointed the court's attention to an old IQ score of 76 and to a then-recent decision, *Hall v. Florida*, 134 S.Ct. 1986 (2014). The court correctly denied his motion, which the Supreme Court of Kentucky appropriately affirmed.

A. White does not have a valid IQ score as a basis for a determination of intellectual disability

White does not have a valid IQ score upon which to base a claim of intellectual disability. He refused to participate in a psychological evaluation in preparation of his defense in 2009 and, therefore, relies on scores from obsolete testing in 1971. (Pet.'s App. 156-57).

White relies on the results of psychological testing administered to him in 1971. It consisted of a battery of tests. The examiner concluded, "[t]hese tests indicate borderline intellectual functioning IQ 76" and "his full scale IQ is 76[.]" (Pet.'s App. 107).

The tests included a score of 73 on an Otis Quick-Scoring Mental Ability Test. White complains that the trial court did not consider the Otis score. But, he did not present that score in his motion to exclude the death as a potential sentence. He only recited the full scale score of 76. (Pet's App. 102-04). The Otis section score was not considered by the Supreme Court of Kentucky and, therefore, should not be considered by this Court.

Regardless, White's Otis score is invalid for the purposes of determining intellectual disability. The AAIDD and DSM-V agree that a properly obtained IQ score must be from "a valid and reliable individually administered comprehensive standardized test of intelligence. The results obtained from group-administered tests of intelligence or abbreviated measures (i.e., short form) of intellectual functioning lack sufficient reliability and psychometric robustness to be used for the purpose of making a diagnosis of ID." Marc J. Tasse, The Death Penalty and Intellectual Disability 14 (Edward A. Polloway, Ed., 2015).

The Commonwealth has been unable to find much information regarding the Otis test, but it appears to not have met the criteria set forth by the AAIDD and DSM-V. One indication is the term "Quick-Scoring" in its name. This suggests the "abbreviated measures" cautioned against. Additionally, two years after White was tested, the Fifth Circuit referred to a plaintiff's taking, "a standardized intelligence test ***or*** the Otis Quick Mental Scoring Test." *Morrow v. Crisler*, 479 F.2d 960, 962 (5th Cir. 1973) (emphasis added). In an unpublished decision, the United States District Court for the Eastern District of North Carolina referred to the Otis Quick

Score Mental Test as an intelligence test ***other than*** a standardized intelligence test. *Cole v. Branker*, No. 5:05-HC-461-D, 2007 WL 2782327 at *21 (E.D.N.C. Sept. 20, 2007). An appellate brief in a Florida capital case sets forth that an Otis Form EM test (which is the type White took) is a group test and a multiplier must be applied in order to extract an actual IQ score. *Turner v. State of Florida*, 2010 WL 518978, Appellee's Brief. As stated above, according to the AAIDD and the DSM-V, group tests do not yield accurate, reliable scores. White cannot rely on the 73 score on the invalid Otis Quick-Scoring Mental Test.

Likewise, White's score of 76 on the result of the Wechsler Intelligence Scale for Children (WISC) (Pet.'s App. 128) is grossly out-of-date and unreliable. In 1984, the Ninth Circuit affirmed a district court's permanent injunction against California's use of the practice of placing children in special classes for the mentally retarded based on IQ scores, specifically pointing out the WISC. *Larry P. by Lucille P. v. Riles*, 793 F.2d 969 (9th Cir. 1984). It adopted the lengthy and thorough analysis by the District Court. *Larry P. v. Riles*, 495 F.Supp. 926 (N.D. Cal. 1979).

California public schools had enacted a program to educate mentally retarded students in special "Educable Mentally Retarded" (EMR) classes. *Id*. at 937-38. They removed students from the regular instructional program, instead teaching them "social adjustment" and "economic usefulness" with focus on "physical health and development, personal hygiene and grooming, language and communication skills, social and emotional adjustment, basic home and community living skills, occupational and vocational information and skills, and citizenship." *Id*. at 941.

(*quoting* State Department of Education, Programs for the Educable Mentally Retarded in California Public Schools (1974)). By not learning academic skills, these students were effectively disadvantaged for life.

The classes had developed a disproportionate population of African-American students.[1] *Id.* at 942-44. While IQ scores were not the only criterion for admission to the classes, they were the primary determining factor. *Id.* at 949. In 1971, the underlying action of *Larry P.* was filed. The plaintiffs were African-American students who had been deemed mentally retarded and placed in special education classes. The class was later expanded to include "'all Black California school children who have been or may in the future be classified as mentally retarded on the basis of IQ tests.'" *Id.* at 934. The plaintiffs alleged the IQ tests were racially biased and California schools unconstitutionally relied upon them, resulting in placement of children who were not mentally retarded in the EMR classes. *Id.*

The Northern District of California and the Ninth Circuit agreed with the plaintiffs. The District Court's opinion began with consideration of the ugly origin of intelligence testing. It pointed out the early intent of IQ testing arose from racial prejudice and social Darwinism. *Id.* at 935. It was an aid for eugenics; the developer of the widely-used Stanford-Binet test touted intelligence testing was a way to identify the feeble-minded and prevent them from reproducing. *Id.* The early developers believed feeblemindedness to be genetically associated with non-white minorities, specifically naming "negroes." *Id.* at 936.

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[1] It is essential to this argument to note White is African-American.

As early as the 1920's, it was recognized that African-American children did not perform as well as white children on IQ tests – on average one deviation. *Id*. at 954. Although tests were modified for gender neutralization, no modifications were made to correct the racial inequality. *Id*. "The experts [were] willing to tolerate or even encourage tests that portray minorities, especially blacks, as intellectually inferior." *Id*. Indeed, in the introduction to the WISC, its developer, Dr. Wechsler, explicitly qualified:

> We have eliminated the colored vs. white factor by admitting at the outset that ***our norms cannot be used for the colored population of the United States***. Though we have tested a large number of colored persons, our standardization is based upon white subjects only. We omitted the colored population from our first standardization because we did not feel that norms derived by mixing the population could be interpreted without special provisos and reservations.

Id. at 957 (emphasis added).

As already pointed out, White's score of 76 is based on the version of the WISC which was the subject of the *Larry P.* litigation. (Pet.'s App. 128). It is, therefore, highly likely that White's score is as much as one deviation lower than what it would have been on a properly normed test, meaning he likely has a higher intelligence quotient than his score reflects. *See Id*. at 954. The WISC was revised in 1974, three years after White was administered the test. *White v. North Carolina State Bd. Of Examiners of Practicing Psychologists*, 388 S.E.2d 148, 168 (N.C. Ct. App. 1990).

The test White took has been obsolete for more than forty years. It is unreliable to the point of having been found unconstitutional when used to classify children. If it was unconstitutional to use it for placement of schoolchildren, it is infirm evidence as a determining factor in capital litigation.

B. Hall v. Florida did not invalidate the statutory score threshold

Even if the Court considers White's 1971 IQ score of 76 to be valid, White still has not satisfied the threshold for an intellectual disability claim. Kentucky's statute prohibiting the execution of intellectually disabled persons, § KRS 532.130, is substantively the same as the statute addressed in *Hall v. Florida*. The issue in *Hall* arose because the Florida Supreme Court had affirmed Hall's death sentence solely on the basis of his IQ score of 71. Florida's statute which prohibits execution of a disabled person defines[2] intellectual disability as:

> Significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test[.]"

Fla. Stat. § 921.137(1). The mean score is 100, and the standard deviation is approximately 15 points, making two deviations roughly a score of 70. *Hall v. Florida*, 134 S.Ct. at 1994. Therefore, the practice of Florida courts was to summarily deny claims of intellectual disability if the petitioner's IQ score was above 70.

The *Hall* court stated "on its face this statute could be interpreted consistently with *Atkins*[3] and with the conclusions this Court reaches in the instant case." *Id*. However, it held that Florida courts were unconstitutionally applying the

[2] Because the statute was declared unconstitutional only as applied, it has not been revised.

[3] *Atkins v. Virginia*, 536 U.S. 304 (2002), which ruled it is unconstitutional to execute an intellectually disabled person.

law by not considering the effect of the Standard Error of Measurement (SEM) on IQ scores.

An IQ score should be interpreted as a range, not a fixed number. *Id*. at 1995 (*citing* D. Wechsler, The Measurement of Adult Intelligence 133 (3d ed. 1944)). The range takes into account the SEM because "[a]n individual's IQ test score on any given exam may fluctuate for a variety of reasons, [including] the test-taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions . . . and simple lucky guessing." *Id*. (*citing* American Association on Intellectual and Developmental Disabilities, R. Schalock et. al., User's Guide to Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports 22 (2012) (herein AAIDD Manual); A. Kaufman, IQ Testing 101, pp. 138-139 (2009)).

The AAIDD sets forth that the "generally accepted SEM adjustment for assessing intellectual disability is plus or minus five points of IQ." *Smith v. Duckworth*, 824 F.3d 1233, 1243-44 (10th Cir. 2016). Therefore, a score in the range of 65-75 is the threshold for further examination of a defendant's intellectual ability. This Court has explicitly recognized that a person with a score "75 or lower may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." *Hall v. Florida*, 135 S.Ct. at 2000. (*quoting Atkins v. Virginia*, 536 U.S. at 309, n. 5).

The standard of a score of 75 being the threshold for an intellectual disability claim was reinforced in *Brumfield v. Cain*, 135 S.Ct. 2269 (2015). Brumfield's IQ was 75, and this Court held it was error for the trial court to not conduct further examination of the other prongs of the intellectual disability analysis. It once again pointed out that in *Hall*, it had held, "once the SEM applies and the individual's score is 75 or below, the inquiry would consider factors indicating whether the person had deficits in adaptive functioning." *Brumfield v. Cain*, 135 S.Ct. at 2278 (*quoting Hall v. Florida*, 134 S.Ct. 1986 at 1996). More recently, this Court again noted the score of 70, adjusted for the SEM (a range of 65-75) is the first component of "the ***generally accepted, uncontroversial*** intellectual disability diagnostic definition[.]" *Moore v. Texas*, 137 S.Ct. 1039, 1045 (2017) (emphasis added).[4]

White presented an IQ score of 76 to both the trial court and the Supreme Court of Kentucky. After the SEM is applied, the range of White's IQ is 71-81. The cutoff line of 71 has been affirmed by the courts.[5] Therefore, he does not satisfy the threshold criterion of an intellectually disabled person.

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[4] Additionally, Oklahoma's statute which prohibits execution of an intellectually disabled person states, "in no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on any individually administered, scientifically recognized, standardized intelligence quotient test administered by a licensed psychiatrist or psychologist, be considered mentally retarded and, thus, shall not be subject to any proceedings under this section." 21 Okla.St.Ann. § 701.10b. The statute has not been controverted. *See Smith v. Duckworth* 824 F.3d. 1233 (10th Cir. 2016) *cert. denied Smith v. Royal*, 137 S.Ct. 1333 (2017).

[5] White has pointed out that recently the Supreme Court of Kentucky rendered *Woodall v. Commonwealth*, 2018 WL 2979581, 2017-SC-000171-MR (Ky. June 14, 2018), in which it declared Kentucky's threshold of 70 is unconstitutional. That opinion is not final as of the filing of this brief. It is unknown whether the Commonwealth will seek a writ of certiorari from this Court.

C. Courts are not obligated to apply the Flynn Effect

It was not error for the Supreme Court of Kentucky to reject White's contention that the Flynn Effect should be applied in order to lower his IQ score. It held that the Flynn Effect was not necessary because neither statutory nor precedential authority compelled its application. *White v. Commonwealth*, 544 at 153. White has not presented authority to the contrary.

White contends *Hall* and *Moore v. Texas*, *supra* mandate application of the Flynn Effect. Actually, neither case mentions the Flynn Effect – no case from this Court has addressed it. *Moore* mandates courts base their findings regarding intellectual disability on prevailing medical norms. The courts, therefore, are afforded discretion in deciding which expert opinions regarding prevailing medical norms are most compelling.

In spite of White's claims, the Flynn Effect is controverted amongst medical professionals. The Eleventh Circuit has recently upheld the District Court's rejection of the Flynn Effect because both experts had agreed "that the Flynn effect was not used in clinical practice to reduce IQ scores, and neither had seen the Flynn effect applied to IQ scores outside the context of capital litigation." *Ledford v. Warden, Georgia Diagnostic and Classification Prison*, 818 F.3d 600, 629 (11th Cir. 2016).

One month after the Supreme Court of Kentucky rendered the underlying opinion in this case, the Ninth Circuit affirmed a District Court's decision which rejected application of the Flynn Effect. *Cain v. Chappell*, 870 F.3d 1003 (9th Cir.

2017). Two doctors had testified in District Court; one had applied the Flynn Effect and the other had not. The District Court had "observed that . . . application of the Flynn effect was unpersuasive because 'the observation that there is a trend in a population toward rising IQ scores, even if credible, . . . does not support the practice of applying a point correction to the IQ scores of individual persons.'" *Id.* at 1023.

Likewise, the Tenth Circuit has held, "Oklahoma's failure to apply the Flynn Effect was not contrary to or an unreasonable application of clearly established federal law . . . because Atkins does not mandate an adjustment for the Flynn Effect, federal and state courts are divided on the validity of applying the Flynn Effect," and the Supreme Court has not addressed it. *Smith v. Duckworth*, 824 F.3d at 1246 (10th Cir. 2016).

The Sixth Circuit has rejected application of the Flynn Effect based on logical skepticism and the lack of a mandate from this Court. *Black v. Carpenter*, 866 F.3d 734 (6th Cir. 2017). In that case, as in cases in other jurisdictions, the defendant and prosecutor both produced experts who testified opposite opinions regarding application of the Flynn Effect.[6] Additionally, the Sixth Circuit reasoned that if the IQ of an entire generation was declining at the same rate, then the scores were still relative in comparison; *e.g.*, a group of individuals took a test in 1917 and received an average score of 100 and then took the same test in 2017. They would all receive a score of 70, meaning they were all intellectually disabled by today's standards.

[6] A neuropsychologist "testified that it was not standard practice to correct scores due to the Flynn Effect nor was it routinely considered by practitioners as a basis for lowering an IQ score." *Id.* at 747.

Therefore, in order to maintain the same classifications of differences that inherently exist within a population, the score labeling would have to be adjusted. "If *Atkins* had been a 1917 case, the majority of the population now living – [if the Flynn Effect was applied] – would be too [intellectually disabled] to be executed; and until the Supreme Court tells us that it is committed to making such downward adjustments, we decline to do so." *Id*. at 750. The Sixth Circuit also noted that the point of Atkins is to not execute intellectually disabled people, and according to the current definition, the qualifying IQ score is 70. *Id*. at 749. The definition could change, but at this time, it has not.

The law is clear that application of the Flynn Effect is at the discretion of the court. It is unnecessary for this Court to review the decision of the Supreme Court of Kentucky.

D. White has not made a prima facie showing of adaptive deficits

Even if White's score of 76 was accepted as valid and then lowered by operation of the Flynn Effect to come within the range of 65-75, he has not demonstrated any adaptive deficits. Adaptive deficits are "the inability to learn basic skills and adjust behavior to changing circumstances." *Hall v. Florida*, 134 S.Ct. at 1994. There are three adaptive skills sets – conceptual, social, and practical. *Moore v. Texas*, 137 S.Ct. at 1046. Performance which falls two or more standard deviations below the mean in at least two of the categories is indicative of intellectual disability. *Id.*

White argues that the record reflects he showed deficits in conceptual, or academic, skills. He points to the psychological summary which indicated he read at a 2.4 grade level and did arithmetic at the 3.4 grade level. (Pet.'s App. 108). However, the summary went on to say that his reasoning ability was within a low normal range. The evaluator also believed White displayed potential for improvement. Indeed, the record reflects that he went on to earn a GED and worked as a plumber's helper and plumber. (Pet.'s App. 157).

The record does not include any more academic records of White's education. The only evidence is from a report generated by Dennis Wagner in 2009. White refused to participate in a psychological evaluation which his counsel had requested. Mr. Wagner, therefore, generated a report from White's 1971 records and records from the Kentucky Department of Corrections. Wagner reported that in 2006, White was found to be clear in speech and logical, and no impairments in

cognition were found. White's "intelligence was estimated to be normal," and "[i]n 2008 he was thought capable of functioning in the general correctional population without mental health services." (Pet.'s App. 157).

White's performance during pre-trial proceedings also provide an indication of his academic abilities. White submitted several *pro se* pleadings. Particularly, one motion asked the trial court to reconsider its previous ruling regarding evidence of prior bad acts. (Resp.'s App. 1). His counsel had also filed a motion requesting the court to reconsider its ruling. At a hearing on counsel's motion, White's counsel asked the court to incorporate White's *pro se* motion:

> After I had read it, and thank you Your Honor for giving it to me, I read it and I absolutely like what he wrote in there. I mean, he stated some things in there that, quite frankly, we missed in our motion to reconsider.
>
> So what I would like to do is take and incorporate by reference this particular motion, and if you need to so it's all in the same place, I'll go make a copy of it and attach it to and refile our motion to reconsider so that you have it appropriately in the file.
>
> But I do think there were very good, salient points brought up in there that are right on point. This is not the ramblings of some disgruntled defendant who has no idea [and] who's writing about the color of the chairs and the fact that his lawyers are beating him and all that stuff. Well-written, well on-point. I'd like the court to consider it.

(Vid. R., 07/02/2014, 11:28:40). This description does not comport with White's current claim that he is intellectually disabled.

The record also does not support White's claim of having social deficits. Many children are immature and enjoy spending time with their grandmothers at age

twelve; it does not mean they have crippling social deficits. It is not unusual for adolescents to have bad attitudes. Young boys commonly follow the lead of older boys. Actually, the examiner also reported positive characteristics. She noted that White sought her approval. He responded to favorable results and would become frustrated when he thought he was answering inadequately. The evaluator also believed White showed some "sensitivity to feelings beyond the primitive, self-centered level[.]" (Pet.'s App. 108)

Furthermore, the evidence which White would have offered as mitigation refutes his claim of being deficient in social skills. First, trial counsel had located White's brother who would have testified that White had a large family, including a child of his own. Trial counsel did not indicate that White's brother would be testifying regarding anything which would cast aspersions on White's ability to maintain normal relationships.

Notably, White's counsel proposed to offer the testimony of someone who had been White's friend since childhood. That friend's testimony would be that when they were in school, White had hopes and dreams "like any young man"; that White was "even-tempered and tried as hard as he could"; and that when White was released from prison in 2001, he was going to church and seemed to be trying to get his life back together. (Vid. R., 07/28/2014, 11:35:20). White's former sister-in-law was prepared to offer testimony consistent with the friend's testimony. (Vid. R., 07/28/2014, 11:36:00).

Likewise, White's conduct with respect to the penalty proceedings did not demonstrate adaptive deficits. Refusal to present mitigation evidence is a right and is not characterized as an adaptive deficiency. *St. Clair v. Commonwealth*, 140 S.W.3d 510, 560 (Ky. 2004). Indeed, a defendant's refusal to present any penalty argument will not render a death sentence unsound. *Chapman v. Commonwealth*, 265 S.W.3d 156, 172 (Ky. 2007) (*citing State v. Ashworth*, 706 N.E.2d 1231, 1237-38 (Ohio 1999)).[7] However, a court must make a determination that the defendant's decision is knowing and voluntary. It must:

> Inform the defendant of the right to present mitigating evidence, and what mitigating evidence is; (2) inquire both of the defendant and his attorney (if not *pro se*) whether he or she understand those rights; (3) inquire of the attorney if he or she has attempted to determine from the defendant whether any mitigating evidence exists; (4) inquire what that mitigating evidence is (if the defendant has refused to cooperate, the attorney must relate that to the court); (5) inquire of a defendant and make a determination on the record whether the defendant understands the importance of mitigating evidence in a capital sentencing scheme, understands such evidence could be used to offset the aggravating circumstances proven by the prosecution in support of the death penalty, and the effect of failing to present that evidence; (6) after being assured the defendant understands these concepts, inquire of the defendant whether he or she desires to waive the right to present such mitigating evidence; and (7) make findings of fact regarding the defendant's understanding and waiver of rights.

[7] Chapman entered a guilty plea in which he requested the death penalty. He then waived his appeals. After multiple competency evaluations, the trial court allowed Chapman to voluntarily accept execution. Its ruling was upheld by the Supreme Court of Kentucky, and Chapman was executed. If that was not determined to be adaptive deficits indicative of intellectual disability, White's refusal to participate in one stage of his proceedings falls short of demonstrating adaptive deficits.

St. Clair v. Commonwealth, 140 S.W.3d at 560-61 (*quoting Battenfield v. Gibson*, 236 F.3d 1215, 1233 (10th Cir. 2001)).

When White's counsel informed the court that against counsel's advice, White refused to participate in the penalty phase or to offer mitigating evidence, the court went to speak[8] to White personally. The court and counsel then carefully went through the required factors listed in *St. Clair*, reading each one and discussing how it had been satisfied. White's counsel had informed White of all the ramifications of not presenting mitigating evidence and memorialized the conversation in a letter. White read the letter and signed it. Counsel did not indicate that White did not have the intellectual capacity to knowingly sign the letter. (Vid. R., 07/28/2014, 11:36:55). Based on the personal interaction with White and counsel's testimony, the trial court found White had "freely, knowingly, and voluntarily" waived his right to present mitigating evidence to the jury. (Vid. R., 07/28/2014, 11:37:45).

The Supreme Court of Kentucky concluded correctly that White has not presented proof which requires a hearing regarding intellectual disability. This Court should deny the petition for review.

[8] White had refused to enter the courtroom.

E. White's DNA was legally seized

White has misconstrued the facts underlying the seizure of the cigar from which his DNA was obtained. The traffic stop was legitimately initiated. As White acknowledges, "an officer who has probable cause to believe a civil traffic violation has occurred may stop a vehicle regardless of his or her subjective motivation in doing so." *Wilson v. Commonwealth*, 37 S.W.3d 745, 749 (Ky. 2001) (*citing U.S. v. Akram*, 165 F.3d 452, 455 (6th Cir. 1999); *Whren v. U.S.*, 517 U.S. 806 (1996)). The officers observed the vehicle speeding and pulled it over on that basis. (Vid. R., 10/07/2013, 11:36:13; 11:53:03).

The officers removed White from the car as a safety measure.[9] This Court has long recognized that traffic stops pose "inordinate risk" to police officers. *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977). The risk is increased by the presence of a passenger. *Maryland v. Wilson*, 519 U.S. 408, 414 (1997). Therefore, an officer may order a passenger to exit the vehicle. *Id*. at 415.

The pat down of White was a *Terry*[10] frisk. It allows for a limited search of one's person if "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate. *Id*. at 21-22. Specifically, "officers who conduct 'routine traffic stops' may 'perform a "patdown" of a driver and any passengers upon reasonable suspicion

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[9] The officers did nothing to induce White to leave his cigar on the car. They had no reason to suspect they would obtain his DNA as the result of a limited pat down.

[10] *Terry v. Ohio*, 392 U.S. 1 (1968)

that they may be armed and dangerous.;" *Arizona v. Johnson*, 555 U.S. 323, 332 (2009) (*quoting Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998)).

The officers had ample reasons to take safety precautions with respect to White. They were aware of his pending weapons charge. One of the officers had arrested him for the gun violation. Most importantly, he was suspected of murdering a woman by shooting her with a gun. As the Supreme Court of Kentucky noted, "when an officer believes that he is confronting a murder suspect, he has presumptive reason to believe that he is dealing with an armed and dangerous person." *Adkins v. Commonwealth*, 96 S.W.3d 779, 787 (Ky. 2003).

Accordingly, the pat down of White did not impermissibly extend the stop. The facts of the cases he cites in order to support his contention of illegal delay are distinguished from the facts here. In *Arizona v. Johnson*, the officer began questioning the passenger in order to "gain 'intelligence about the gang [the passenger] might be in.'" *Id*. at 328. The Court's holding was that the inquiries – not a lawful pat down for safety purposes – had unreasonably extended the stop. *Id*. at 333.

Likewise, *Rodriguez v. U.S.*, 135 S.Ct. 1609 (2015), is a narrow decision. "This case presents the question whether the Fourth Amendment tolerates a dog sniff conducted after the completion of a traffic stop." *Id*. at 1612. Justice Ginsburg acknowledged that "highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular." *Id*. at 1616. Hence, it is improper to apply the rulings of *Johnson* and

Rodriguez to this case. They were concerned with traffic stops which had been extended for investigative purposes, whereas here, the pat down of White was protective.

The Supreme Court of Kentucky reached the correct conclusion. This Court should deny review.

CONCLUSION

For all the reasons stated above, the Petition for a Writ of Certiorari should be **DENIED**.

Respectfully Submitted,

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