APPENDIX

APPENDIX

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APPENDIX A

RENDERED: MARCH 26, 2020
TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000725-MR

LARRY LAMONT WHITE	)
	)
APPELLANT	)
	)
V.	)
	)
COMMONWEALTH OF KENTUCKY	)
	)
APPELLEE	)
	)

ON REMAND FROM THE UNITED STATES
SUPREME COURT
CASE NO. 17-9467
JEFFERSON CIRCUIT COURT CASE NO. 07-CR-004230

OPINION OF THE COURT
BY JUSTICE VANMETER

REVERSING AND REMANDING

In 2014, Larry Lamont White was convicted of rape in the first degree and murder for the 1983 killing of Pamela Armstrong. The jury recommended a sentence

of death for Armstrong's murder and twenty years' imprisonment for the rape. After our affirmance of his matter of right[1] appeal, the United States Supreme Court vacated the judgment, and remanded White's case back to this Court for further consideration in light of *Moore v. Texas*, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017), and its analysis regarding the execution of intellectually disabled defendants. Since the Supreme Court's remand, White has also *pro se* asked this Court to waive his intellectual disability claim, so he can move forward with post-conviction proceedings. After additional review of the record, and recent Kentucky and federal case law, we hold that—due to his death sentence—White may not *pro se* waive his pending intellectual disability claim. Further, based on the holdings of *Moore* and *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018), White has produced enough evidence to form a reasonable doubt as to his intellectual capabilities so as to warrant a hearing on the issue. Thus, we remand this case to the Jefferson Circuit Court with instructions to conduct an evidentiary hearing on White's intellectual disability claim.

I. Factual and Procedural Background.

The facts of this case are set out by this Court in its original opinion as follows:

> Armstrong was murdered on June 4, 1983. Her body was discovered that same day in a public alley, with her pants and underwear pulled down around her legs and shirt pulled up to her

[1] Ky. Const. § 110(2)(b).

bra line. She suffered from two gunshot wounds. One wound was observed on the left side of the back of her head, while the other wound was in virtually the same spot on the right side. The medical examiner was unable to determine which shot was fired first, but did opine that neither shot alone would have caused immediate death.

Although Appellant was originally a suspect, Armstrong's murder remained unsolved for more than twenty years. Yet, in 2004, the Louisville Metro Police Department ("LMPD") Cold Case Unit reopened Armstrong's case. Through the use of DNA profiling, Detectives sought to eliminate suspects. LMPD officers were able to obtain Appellant's DNA from a cigar he discarded during a traffic stop. Appellant's DNA profile matched the DNA profile found in Armstrong's panties.

On December 27, 2007, a Jefferson County Grand Jury returned an indictment charging Appellant with rape in the first degree and murder. During the trial, DNA evidence and evidence of Appellant's other murder convictions were introduced to the jury. On July 28, 2014, Appellant was found guilty of both charges.

Appellant refused to participate during the sentencing stage of his trial. The jury ultimately found the existence of aggravating circumstances and recommended a sentence of death for Armstrong's murder plus twenty years for her rape. The trial court sentenced Appellant

> in conformity with the jury's recommendation. Appellant now appeals his conviction and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution and Kentucky Revised Statute ("KRS") 532.075.

White v. Commonwealth, 544 S.W.3d 125, 133 (Ky. 2017), as modified (Mar. 22, 2018), *cert. granted*, *judgment vacated sub nom. White v. Kentucky*, 139 S. Ct. 532, 202 L. Ed. 2d 643 (2019), and *abrogated by Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018).

One year after our decision in *White*, we held that KRS[2] 532.130(2)—the statute requiring a showing of an IQ of 70 or less to determine intellectual disability—was unconstitutional. *Woodall*, 563 S.W.3d at 2. When the United States Supreme Court remanded White's case to this Court for reconsideration in light of *Moore v. Texas*, 137 S. Ct. 1039, this Court ordered supplemental briefing on the issue. White then *pro se* sent a letter to the Attorney General, stating his disagreement with his attorneys' decision to pursue an intellectual disability defense. Thereafter, White *pro se* filed a "motion" with this Court objecting to the intellectual disability defense "asking this Court to dismiss the issue[,]" as he was not "retarded" nor "guilty of this crime." White subsequently filed additional "motions" that both assert similar arguments attempting to waive the intellectual disability claim before this Court. We directed both White's appellate counsel and the Commonwealth to file supplemental briefs regarding White's ability to

[2] Kentucky Revised Statutes.

waive this claim. Both briefs were filed, and both issues are now ripe for determination.

II. A Defendant Cannot Waive a Pending Claim of Intellectual Disability in a Death Penalty Case.

The Commonwealth argues that White has the ability to *pro se* waive his claim of intellectual disability currently pending before this Court. White's attorneys disagree. Both sides discuss, at length, the relationship between attorney and client, and White's Sixth and Eighth Amendments rights. However, we need not decide the broader attorney-client question of whether a defendant can *pro se* waive any pending or potential claim because we hold that *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), and its progeny—extending to *Moore*—have placed an absolute bar against imposing the death penalty on the intellectually disabled.

"The Eighth Amendment of the United State Constitution prohibits the execution of a person who has an intellectual disability." *Woodall*, 563 S.W.3d at 2–3 (citing *Hall v. Florida*, 572 U.S. 701, 704, 134 S. Ct. 1986, 1990, 188 L. Ed. 2d 1007 (2014); *Atkins*, 536 U.S. at 321). The United States Supreme Court in *Hall v. Florida* held that some punishments are prohibited by the Eighth Amendment "as a categorical matter." *Id.* at 708. These punishments include 1) the denaturalization of a natural-born citizen; 2) sentencing a juvenile to death; and 3) sentencing "persons with [an] intellectual disability" to death. *Id.* The Supreme Court expounded in *Moore* that "the Constitution 'restrict[s] . . . the State's power to take

the life of' *any* intellectually disabled individual." 137 S. Ct. at 1048 (quoting *Atkins*, 536 U.S. at 321). We take the *Moore* court's emphasis on "any" to include any individual who has not yet been determined to have an intellectual disability, but who is entitled to an evidentiary hearing by showing "some evidence creating a [reasonable] doubt as to whether he is [intellectually disabled]." *Wilson v. Commonwealth*, 381 S.W.3d 180, 186 (Ky. 2012) (citation omitted); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2281, 192 L. Ed. 2d 356 (2015) (favorably reviewing a Louisiana statute which required a defendant to show a "reasonable doubt as to his intellectual disability to be entitled to an evidentiary hearing[]") (citation omitted).

Moore further held that "[m]ild levels of intellectual disability, although they may fall outside Texas citizens' consensus, nevertheless remain intellectual disabilities, and States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders[.]'" 137 S. Ct. at 1051 (quoting *Roper v. Simmons*, 543 U.S. 551, 563–64, 125 S. Ct. 1183, 1192, 161 L. Ed. 2d 1 (2005) (citations omitted) (emphasis added)). Thus, when a punishment is prohibited by the Eighth Amendment blocking an entire category of individuals from a certain penalty, and evidence has been established creating a reasonable doubt as to whether a defendant is a member of that category, the issue cannot be waived. Accordingly, as discussed *infra*, because White has met his burden to receive an evidentiary hearing on his intellectual disability claim, this Court cannot allow him to *pro se* waive this issue, as that would impose the death penalty on a potentially

intellectually disabled defendant—something the Commonwealth is without power to do.

III. White has Met the Burden to Receive an Evidentiary Hearing Regarding his Intellectual Capacity.

This Court was specifically directed to review White's intellectual disability claim under the standard set forth in *Moore*, 137 S. Ct. 1039. We last reviewed *Moore* in *Woodall*, wherein we declared KRS 532.130(2) unconstitutional, holding that "a criminal defendant automatically cannot be ruled intellectually disabled and precluded from execution simply because he or she has an IQ of 71 or above, even after adjustment for statistical error[.]" 563 S.W.3d at 6. Thus, as a preliminary matter, the statute we reviewed White's initial appeal under is no longer good law.

This Court, based on *Moore*, created the *Woodall* test to provide guidance to all future courts of this Commonwealth analyzing a claim of intellectual disability. *See id.* at 6–7 (citing *Moore*, 137 S. Ct. at 1045). Under the *Woodall* test, a defendant must show "(1) intellectual-functioning deficits (indicated by an IQ score 'approximately two standard deviations below the mean'—*i.e.*, **a score of roughly 70**—adjusted for the 'standard error of measurement'; (2) adaptive deficits ('the inability to learn basic skills and adjust behavior to changing circumstances,'); and (3) the onset of these deficits while still a minor." *Id.* at 6–7 (quoting *Moore*, 137 S. Ct. at 1045) (emphasis added). Lastly, "in addition to ascertaining intellectual disability using this test, prevailing medical standards should always take precedence in a court's determination." *Id.* at 7.

Under the first prong of the *Woodall* test, White has produced two separate IQ scores obtained before he turned 18. In 1971, when White was 12-years old, he was administered the Wechsler Intelligence Scale for Children ("WISC") and achieved a full-scale IQ of 76. Adjusted for the standard error of measurement, White's IQ score range was 71-81. While the Commonwealth argues that White's IQ range based on his WISC score does not warrant an evidentiary hearing, a 71 is as close as possible to being "roughly" 70. *Id.* at 6. Even assuming, *arguendo*, that 71 is not "roughly" 70, White has also produced another score. White was administered the Otis Quick-Scoring Mental Ability Test ("Otis"), scoring a 73, soon after he was administered the WISC test. Adjusted for the standard error of measurement, White's IQ score range for the Otis test was 68-78, well within the requirements of the first *Woodall* prong and earned while he was a minor, thus meeting *Woodall's* third prong. *Id.* at 7.

The Commonwealth contends that experts consider the Otis exam to be both unreliable and unacceptable for purposes of determining intellectual disability. *See* John H. Blume et al., *Protecting People with Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 Hofstra L. Rev. 1107, 1118–20 (2018) (discussing certain pitfalls of the Otis examination). However, this is the opposite argument the Commonwealth took regarding Otis IQ scores in *Bowling v. Commonwealth*, 163 S.W.3d 361, 384 (Ky. 2005) ("*Bowling IV*"),[3] wherein the

[3] These Otis scores were also cited more recently in a different opinion on Bowling's case before this Court. *Bowling v. Commonwealth*, 377 S.W.3d 529, 537 (Ky. 2012).

Commonwealth advocated and this Court accepted that two Otis IQ scores of 84 and 79 (the only two test scores taken while the defendant was a juvenile) were enough evidence to defeat the defendant's intellectual disability claim. *See also Smith v. Ryan*, 813 F.3d 1175, 1184–86 (9th Cir. 2016) (In *Smith*, previously cited favorably by this Court in *Woodall*, the Ninth Circuit reduced a sentence of death to life imprisonment based partially on the defendant's Otis test scores). While the Otis test may have its critics, a deeper analysis of White's IQ scores is best reserved for an evidentiary hearing at which time both sides can fully develop a record regarding White's two scores, his adaptive deficits or lack thereof, and consideration of the prevailing medical standards regarding intellectual disabilities.

Woodall's second prong, adaptive deficits, is less developed in this case than previous cases in front of our Court. Most of the evidence concerning this prong stems from the same time period as White's IQ scores. This is most likely because White has spent all but four of forty-three years of his adult life behind bars and has not had an evidentiary hearing which could have established these deficits or had a medical professional observe his behavior to the extent necessary to document adaptive deficits or lack thereof. White did have issues adapting to school and never succeeded there. He was graded as reading at a 2.4 grade level and doing arithmetic at a 3.4 level while he was in sixth grade. He was frequently truant. He was also observed to show "a fairly primitive level of socialization," and distanced himself from family and friends. While the lack of facts regarding any recent

evidence of adaptive deficits is troublesome, this is exactly what evidentiary hearings are designed for: to gather more facts and expert assistance to explore whether further evidence of adaptive deficits is revealed. At the very least—combined with his low-end IQ scores achieved while still a minor—White's potential adaptive deficits and lack of any substantial contact with the outside world during adulthood warrant further consideration in the form of an evidentiary hearing at the trial court level.[4] Finally, *Moore* requires courts to "consult current medical standards to determine intellectual disability," and we direct trial courts to review the *Woodall* test in light of the prevailing medical standards at the time of the evidentiary hearing. 137 S. Ct. at 1048; 563 S.W.3d at 7. Thus, adherence to previous judicial authority analyzing medical standards in this realm is only mandatory if it still comports with **current** medical standards.

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[4] *See Moore*, 137 S. Ct. at 1050 (discussing that current medical professionals "caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is. [Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition 38 (2013)] ('Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.'); *see* [American Association on Intellectual and Developmental Disabilities Clinical Manual, Eleventh Edition 20 (2010)] (counseling against reliance on 'behavior in jail or prison')").

IV. White's Concerns Regarding His Counsel.

White has shown a tendency to not cooperate with counsel and has *pro se* asked this Court to replace his current counsel multiple times. While we are not a fact-finding court, we acknowledge White's displeasure with his current and former counsel, as well as his lack of participation in the proceedings below. If, on remand, White persists in expressing disagreement with his counsel's representation concerning his appeal, he may request an evidentiary hearing regarding his competency to self-represent. *See Commonwealth v. Mason*, 130 A.3d 601, 671 (Pa. 2015) (discussing options for intellectual disability claimant who disagrees with counsel's choice to pursue *Atkins* defense).

V. Conclusion.

Since *Woodall* declared our statutory scheme in this area unconstitutional under *Moore* and *Hall*, White's evidence suffices the reasonable doubt standard entitling him to an evidentiary hearing on the matter of his potential intellectual disability. His adjusted IQ scores of 71 and 68 from when he was 12, alone are enough to form a reasonable doubt as to his intellectual capacity. Whether he has met the preponderance of the evidence standard[5] is a separate question to be analyzed by the trial court as a fact finder through the evidentiary hearing process. As no hearing has

[5] "It is important to note that [even after receiving an evidentiary hearing] the defendant still bears the burden of proving intellectual disability by a preponderance of the evidence." *Woodall*, 563 S.W.3d at 6 n.29 (citation omitted).

occurred, this Court withholds judgment until a hearing has been conducted and a determination made.

All sitting. All concur.

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APPENDIX B

Supreme Court of Kentucky

2014-SC-000725-MR

[Filed: March 26, 2010]

LARRY LAMONT WHITE	)
	)
APPELLANT	)
	)
V.	)
	)
COMMONWEALTH OF KENTUCKY	)
	)
APPELLEE	)
	)

ON REMAND FROM THE UNITED STATES
SUPREME COURT
CASE NO. 17-9467
JEFFERSON CIRCUIT COURT CASE
NO. 07-CR-004230

ORDER DENYING APPELLANT'S MULTIPLE MOTIONS TO WAIVE CLAIM OF INTELLECTUAL DISABILITY

Based on our published opinion in this case dated March 26, 2020, Appellant's multiple motions to waive his claim of intellectual disability are DENIED.

All sitting. All concur.

ENTERED: March 26, 2020.

/s/_____
CHIEF JUSTICE

APPENDIX C

Cite as: 586 U. S. ____ (2019)

ALITO, J., dissenting

SUPREME COURT OF THE UNITED STATES

LARRY LAMONT WHITE *v.* KENTUCKY

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

No. 17-9467. Decided January 14, 2019

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Supreme Court of Kentucky for further consideration in light of *Moore v. Texas*, 581 U.S. ___ (2017).

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting.

The Court grants, vacates, and remands this case in light of *Moore v. Texas*, 581 U. S. ___ (2017). But *Moore* was handed down on March 28, 2017—almost five months before the Supreme Court of Kentucky reached a decision in this case. I would accordingly deny the petition for the reasons previously stated in my dissent in *Kaushal v. Indiana* dissenting opinion in *Webster v. Cooper*, 558 U. S. 1039, 1040 (2009).

APPENDIX D

Supreme Court of Kentucky.

2014-SC-000725-MR

[Filed: August 24, 2017]

Larry Lamont WHITE,	)
	)
Appellant	)
	)
v.	)
	)
COMMONWEALTH of Kentucky,	)
	)
Appellee	)
	)

COUNSEL FOR APPELLANT; Susan Jackson Balliet, Assistant Public Advocate, Erin Hoffman Yang, Assistant Public Advocate. COUNSEL FOR APPELLEE: Andy Beshear, Attorney General of Kentucky, Jeffrey Allan Cross, Assistant Attorney General, Emily Lucas, Assistant Attorney General.

Larry Lamont White, appeals from a judgment of the Jefferson Circuit Court sentencing him to death for the rape and murder of Pamela Armstrong.

Armstrong was murdered on June 4, 1983. Her body was discovered that same day in a public alley, with her pants and underwear pulled down around her legs and shirt pulled up to her bra line. She suffered from

two gunshot wounds. One wound was observed on the left side of the back of her head, while the other wound was in virtually the same spot on the right side. The medical examiner was unable to determine which shot was fired first, but did opine that neither shot alone would have caused immediate death.

Although Appellant was originally; a suspect, Armstrong's murder remained unsolved for more than twenty years. Yet, in 2004, the Louisville Metro Police Department ("LMPD") Cold Case Unit reopened Armstrong's case. Through the use of DNA profiling, Detectives sought to eliminate suspects. LMPD officers were able to obtain Appellant's DNA from a cigar he discarded during a traffic stop. Appellant's DNA profile matched the DNA profile found in Armstrong's panties.

On December 27, 2007, a Jefferson County Grand Jury returned an indictment charging Appellant with rape in the first degree and murder. During the trial, DNA evidence and evidence of Appellant's other murder convictions were introduced to the jury. On July 28, 2014, Appellant was found guilty of both charges. Appellant refused to participate during the sentencing stage of his trial. The jury ultimately found the existence of aggravating circumstances and recommended a sentence of death for Armstrong's murder plus twenty years for her rape. The trial court sentenced Appellant in conformity with the jury's recommendation. Appellant now appeals his conviction and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution and Kentucky Revised Statute ("KRS") 532.075.

On appeal, Appellant has raised thirty-three claims of error. In reviewing these claims, the Court is statutorily required to "consider the punishment as well as any errors enumerated by way of appeal." KRS 532.075(2). Moreover, since we are dealing with the imposition of death, this appeal is "subject to [a] more expansive and searching review than ordinary criminal cases." *St. Clair v. Commonwealth*, 455 S.W.3d 869, 880 (Ky. 2015) (citing *Meece v. Commonwealth*, 348 S.W.3d 627, 645 (Ky. 2011)). For the sake of brevity, we will approach all claims as properly preserved unless otherwise specified herein. To the extent claims were not preserved for our examination, we will utilize the following standard of review:

> [W]e begin by inquiring: (1) whether there is a reasonable justification or explanation for defense counsel's failure to object, e.g., whether the failure might have been a legitimate trial tactic; [but] (2) if there is no [such] reasonable explanation, [we then address] whether the unpreserved error was prejudicial, i.e., whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed.

Sanders v. Commonwealth, 801 S.W.2d 665, 668 (Ky. 1990).

KRE 404(b) Evidence

Appellant's first and most compelling argument is that the trial court committed reversible error when it allowed the Commonwealth to admit other bad acts

evidence of the Appellant as addressed by Kentucky Rules of Evidence ("KRE") 404(b). Prior to trial, the Commonwealth filed notice that it intended to introduce evidence of Appellant's two 1987 murder convictions. These convictions revealed that Appellant pled guilty to murdering Deborah Miles and Yolanda Sweeney.[1] The Commonwealth suggested that the Miles and Sweeney murders were similar enough to Armstrong's murder to demonstrate that Appellant was her killer.

Miles was discovered dead in her bedroom a mere week after Armstrong's murder. She was naked and had been shot in the left, back side of the head. Appellant claimed that he had known Miles for several months and that she sold drugs on his behalf. Appellant also claimed the two had a sexual relationship. Appellant stated that he shot Miles while at her apartment because she failed to repay him for drugs. Appellant claimed that he did not sexually assault her before or after her murder.

In regards to Sweeney, she was found dead behind a backyard shed approximately four weeks after Armstrong's murder. Sweeney suffered from a fatal gunshot wound to the left side of the back of her head. Her pants were missing and her panties were pulled down around her legs. Appellant stated that he met

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[1] On March 12, 1985, Appellant was sentenced to death for the murders of Miles and Sweeney. The Court overturned his convictions and death sentences in *White v. Commonwealth*, 725 S.W.2d 597, 598 (Ky. 1987) due to the Commonwealth's use of Appellant's illegally obtained confessions. Upon remand, Appellant pled guilty to the two murders and was sentenced to twenty-eight years' imprisonment.

Sweeney shortly before her death at a nightclub. She agreed to engage in sexual activity with him for $25.00. Appellant claims the two walked to a secluded outside area at which point Appellant provided Sweeney with the money. Appellant admitted to shooting Sweeney after she tried to run away with his money before conducting the agreed upon sexual acts.

The Commonwealth argued that the facts of these two convictions were similar enough to prove Appellant's identity as Armstrong's murderer. Extensive pleadings were filed from both parties and the trial court conducted several hearings on the matter. Ultimately, the trial court was persuaded by the Commonwealth's arguments and allowed the two prior convictions to be introduced to the jury for the purpose of establishing Appellant's identity through his modus operandi.

Before evaluating the trial court's admission of Appellant's two murder convictions, we note that reversal is not required unless the trial court abused its discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). Thusly, reversal is unwarranted absent a finding that the trial court's decision "was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

KRE 404(b) prohibits the introduction of "[e]vidence of other crimes, wrongs, or acts" used "to prove the character of a person in order to show action in conformity therewith." This evidentiary rule seeks to prevent the admission of evidence of a defendant's previous bad actions which "show a propensity or predisposition to again commit the same or a similar

act." *Southworth v. Commonwealth*, 435 S.W.3d 32, 48 (Ky. 2014). However, such evidence may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b)(1). While "modus operandi" is not specifically mentioned within the list of exceptions, this Court has long held that evidence of prior bad acts which are extraordinarily similar to the crimes charged may be admitted to demonstrate a modus operandi for the purposes of proving, *inter alia*, identity. *Billings v. Commonwealth*, 843 S.W.2d 890, 893 (Ky. 1992).

In order for the modus operandi exception to render prior bad acts admissible, "the facts surrounding the prior misconduct must be so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same mens rea." *English*, 993 S.W.2d at 945. Therefore, we must compare the facts of Appellant's prior murders to the murder of Armstrong, keeping in mind that "clever attorneys on each side can invariably muster long lists of facts and inferences supporting both similarities and differences between the prior bad acts and the present allegations." *Commonwealth v. Buford*, 197 S.W.3d 66, 71 (Ky. 2006).

Whether Appellant's prior murder convictions qualify for the modus operandi exception presents a challenging task for the Court, requiring "a searching analysis of the similarities and dissimilarities." *Clark*, 223 S.W.3d at 97. Our review is even more difficult considering that our jurisprudence on this issue has evolved mostly through the lens of sexual abuse cases.

These cases hold that a specific act of sexual deviance may be unique enough to demonstrate that the assailant's crimes are "signature" in nature. *See, e.g., Dickerson v. Commonwealth*, 174 S.W.3d 451, 469 (Ky. 2005); *English*, 993 S.W.2d 941 (all victims were relatives of wife and molestation occurred in the same fashion); *see also Anastasi v. Commonwealth*, 754 S.W.2d 860 (Ky. 1988) (tickling and wrestling with young boys while dressed in only underwear).

Outside the realm of sexual abuse, we have but few cases. In *Bowling v. Commonwealth*, 942 S.W.2d 293, 301 (Ky. 1997), a capital murder case, this Court allowed testimony from the survivor of a previously attempted robbery, wherein Bowling was identified as the assailant. The witness claimed that Bowling came into his service station, attempted to rob the store, and shot at him countless times. *Id*. at 301. The Court upheld the admission of that testimony because there was sufficient similarity between the crimes to demonstrate that Bowling's pattern of conduct was to rob gas stations attended by one worker in the early morning hours. *Id*.

In *St. Clair*, 455 S.W.3d 869, also a death penalty case, this Court upheld the testimony of St. Clair's accomplice, during which he testified about the duo's prior kidnapping and robbery. *Id*. at 886. The accomplice testified that Appellant held the prior victim at gun point, handcuffed him, and stole his late model pick-up truck, taking the victim along for the ride. *Id*. These facts were similar to the crimes to which St. Clair was charged. The Court held that the facts were sufficient to pass muster under the modus

operandi exception since in both kidnappings he used the same gun and pair of handcuffs in order to steal a similar type of truck. *Id*. at 887.

What we garner from our case law is that a perpetrator's modus operandi can be established by any number of similarities between the previous criminal acts and the crimes charged, e.g., the type of victims, proximity of the time and location of the crimes, the weapon or ammunition used, the method employed to effectuate the crime, etc. However, we must analyze similarities with caution, as the likeness of the crimes may merely constitute a common characteristic or element of the offense. The Court made this clarification in *Clark v. Commonwealth*, wherein we underscored that "the fundamental principle that conduct that serves to satisfy the statutory elements of an offense will not suffice to meet the modus operandi exception." 223 S.W.3d at 98. For that reason, "it is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates a modus operandi." *Dickerson*, 174 S.W.3d at 469.

With these cases in mind, we begin with the factual commonalities of the Miles and Sweeney murders with that of Armstrong's. The most noticeable similarity is that all three victims were African-American women in their early twenties, ranging from twenty-one years to twenty-three years old. Another substantial likeness concerns the date and location of all three murders. Appellant murdered Sweeney and Miles within approximately four weeks of murdering Armstrong. The Sweeney and Miles murders also occurred within blocks from Appellant's residence and the location of

where Armstrong's body was found. We also place considerable weight on the resemblances between the victims' manners of death. For example, the mode of execution which Miles and Sweeney both suffered was similar to Armstrong's fatal wounds. Specifically, all three victims were shot in the head in the area behind the left ear. Also, and of high importance, the bullets used to kill all three victims were .38 caliber bullets. Moreover, all three victims were each discovered in various stages of undress, which *suggested* they were victims of a sexual assault. The three victims' vaginal areas were likewise all exposed upon the discovery of their bodies.

Turning to the factual differences of the crimes, Miles was killed inside her apartment, while Armstrong and Sweeney were killed outside. In addition, Appellant maintained different levels of association with the three victims. Appellant claims to have known Miles for a few months prior to her death, while both Sweeney and Armstrong appear to have been new acquaintances. The crimes also occurred at different times of the day. Armstrong was murdered in mid to late morning, while Miles and Sweeney were killed at night. Another difference is that the gun that killed Armstrong was not used to kill Miles or Sweeney, even though it was the same caliber weapon. Moreover, unlike the other two victims, Armstrong was shot twice, as the first shot did not cause immediate death. Appellant also points out that there was no forensic evidence that Appellant had sexual contact with either Miles or Sweeney, nor was he convicted of sexually assaulting either victim. We should note that

Sweeney's body was too badly decomposed for a rape kit to be performed.

Less persuasive differences are also present. Appellant emphasizes that the victims were discovered in different states of undress. Armstrong was fully dressed with her underwear pulled down around her legs, while Sweeney was found without pants, also with her underwear pulled down around her legs. Miles, however, was discovered completely nude. The Court is hesitant to place great weight on the differences in the victims' states of undress because it likely demonstrates convenience or opportuneness rather than a planned action. *See Anastasi*, 754 S.W.2d at 862 (allowing modus operandi evidence of prior acts of sexual abuse where all victims, except one, were clothed only in underwear).

While the above-mentioned differences are inversely proportional to the degree of similarity needed to meet the modus operandi threshold, our jurisprudence does not require that the circumstances be indistinguishable. *See, e.g., Dickerson*, 174 S.W.3d at 469 (*quoting Rearick v. Commonwealth*, 858 S.W.2d 185, 187 (Ky. 1993)) ("[I]t is not required that the facts be identical in all respects . . .") Nonetheless, this Court is faced with an arduous question: at what point do the dissimilarities become sufficient enough to render the crimes unalike?

We find the case of *Newcomb v. Commonwealth*, 410 S.W.3d 63 (Ky. 2013) most instructive. In that case, Newcomb raped two women within a ten-day span. *Id.* at 70. Newcomb raped the first woman, a coworker, in her car after she offered to drive him home. *Id.* The

second woman was raped in her home after Newcomb unexpectedly stopped by to visit. *Id*. at 71. Newcomb was tried for both crimes together. *Id*. at 72. This Court upheld the joinder of both offenses, stating that evidence of either rape would be admissible in both trials if severed. *Id*. The Court explained that both rapes were similar enough to establish Newcomb's modus operandi. *Id*. at 74. The similarities relied upon included the victims' ages and race, in addition to the temporal proximities of the crimes. *Id*. The nature of force used was also similar in both rapes, as Appellant's attacks began with forcible kissing followed by a statement like, "You know you like me," or, "You know you want me." *Id*. at 75.

Similar to the case before us, there were numerous differences in the two rapes. For example, the locations of the crimes were not consistent. Newcomb raped one victim in a car after asking for a ride home, while he raped the other victim inside her home when visiting. *Id*. at 76. The levels of acquaintanceships were also different. Newcomb knew one victim from work and had previously shared a kiss with her, while he had only minimal interaction with the other victim. *Id*. In addition, and again similar to the case before us, the crimes were not identically followed through. Newcomb held one victim by the hair, but used minimal force with the other victim. *Id*.; *see also English*, 993 S.W.2d at 942 (English utilized the covering of a blanket to hide the commission of sexual acts with some of his victims, but not with others).

It is apparent to this Court that the similarities that satisfied the modus operandi threshold in *Newcomb* are

no more significant, nor are the differences any less substantial, than those of the facts presently before us. *Newcomb* illustrates that despite factual differences, the crimes' similarities, even if minimal, may be distinctive enough to evidence the perpetrator's identity. We believe those distinguishing similarities exist in the case before us. Indeed, Appellant engaged in a pattern of attacking African-American women in their early twenties within a close proximity during early June through early July of 1983. The most persuasive facts being that these three women were of the same age, race, and suffered a gunshot wound from a .38 caliber bullet to the mid-back, left side of the head while their vaginas were uncovered from the removal of clothing. In our view, the commonality of the facts between the Miles and Sweeney murders and the Armstrong murder presents a substantial degree of similarity. Therefore, we find that the trial court did not abuse its discretion in finding that the crimes' similarities were sufficient enough to demonstrate Appellant's identity through his modus operandi.

Having determined that the Miles and Sweeney murders qualified as modus operandi evidence, we must still ensure that such evidence was more probative than prejudicial. KRE 403; *Lanham v. Commonwealth*, 171 S.W.3d 14, 31 (Ky. 2005). The trial court ruled that although the evidence was "extremely prejudicial," the prejudice was outweighed by its high probative worth. We agree.

In conducting a KRE 403 balancing test with respect to modus operandi evidence, "a variety of matters must be considered, including the strength of the evidence as to

the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility." *Newcomb*, 410 S.W.3d at 77 (quoting McCormick on Evidence, Ch. 17 § 190).

Accordingly, we begin our analysis by acknowledging that the strength of the Commonwealth's modus operandi evidence is unquestionably strong. The following observation is of great importance to this Court. Unlike other cases in which we have found the existence of modus operandi, the comparative offenses in the case before us were not merely alleged, rather Appellant pled guilty to murdering both Miles and Sweeney. *See Newcomb*, 410 S.W.3d at 70-72 (Newcomb was indicted for the rapes, but had not yet been convicted); *English*, 993 S.W.2d at 942-43 (other prior acts of sexual abuse were only alleged by the witnesses). In addition, and as we have already discussed, the similarities of the murders are substantial. The close proximity in time and location between each murder further heightens the evidence's probativeness.

In regards to the need for evidence and the efficacy of alternative proof, we find these considerations also weigh in favor of admission. The Commonwealth's only method of proving Appellant's identity as the perpetrator was through the use of DNA evidence. While the DNA evidence certainly proved that Appellant had ejaculated on Armstrong, he argued that he had consensual sex with her perhaps days before

her death. Since Appellant provided the jury with a plausible explanation for the presence of his semen, evidence of his modus operandi was highly probative in proving his identity. *See Bowling*, 942 S.W.2d at 301 (evidence of other crimes passed KRE 403 balancing test wherein the evidence rebutted a claimed defense and identification of the defendant as the assailant was at issue).

In concluding our analysis on this issue, we acknowledge that Appellant undoubtedly suffered prejudice from the introduction of his two prior murder convictions. However, we believe the trial court actively managed the jury's understanding of the evidence so as to prevent them from developing "overmastering hostility." In an effort to dissuade prejudice, the trial court admonished the jury about the proper use of the 404(b) evidence after the parties' opening statements. *See Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003) (juries are presumed to follow admonitions). The trial court explicitly explained to the jury that the evidence was only to be considered as evidence of modus operandi and identity. Furthermore, the trial court instructed the jury that the Commonwealth still had to prove each element of the crimes charged beyond a reasonable doubt and that Appellant's prior murder convictions could not be used to establish action in conformity therewith. The trial court provided the jury with a similar instruction just prior to the guilt-phase deliberations. In light of the trial court's actions, in conjunction with the high probative worth of the evidence, we find that the trial court did not abuse its discretion in allowing evidence of Appellant's prior murder convictions.

Jury Instructions

Appellant's next assignment of error is that the trial court's failure to define the terms "modus operandi" and "identity evidence" violated his due process rights. Appellant concedes that this issue is unpreserved.

Appellant contends that "modus operandi" and "identity evidence" are both terms that a juror is unlikely to understand. Consequently, it cannot be assumed that the jury followed the trial court's admonitions to only consider the prior murder convictions for the purposes of demonstrating Appellant's identity through his modus operandi.

In *Lawson v. Commonwealth*, 218 S.W.2d 41, 42 (Ky. 1949), our predecessor Court stated that trial courts must "instruct on the whole law of the case and to include, when necessary or proper, definitions of technical terms used." In support of his argument, Appellant cites *Wright v. Commonwealth*, 391 S.W.3d 743 (Ky. 2013), wherein this Court found that the trial court's failure to define "unmarried couple" within its instructions constituted error. *Id*. at 748. However, *Wright*, a domestic violence case, is distinguishable from the case before us. In *Wright*, the statutory definition of "unmarried couple" is distinctive from what an average juror would understand as a couple who is unmarried. See KRS 403.720 (an "unmarried couple" constitutes two individuals who have a child together and either live together or previously lived together). That is not the case here. We can find no evidence that the two terms go beyond the average juror's understanding. *See Caretenders, Inc. v. Commonwealth*, 821 S.W.2d 83, 87 (Ky. 1991)

("knowingly" and "willfully" are not technical terms requiring instructions). Furthermore, to the extent that these terms needed clarification, we believe they were sufficiently "fleshed out" during closing arguments. *Lumpkins ex rel. Lumpkins v. City of Louisville*, 157 S.W.3d 601, 605 (Ky. 2005) ("The Kentucky practice of 'bare bones' instructions permits the instructions to be 'fleshed out' in closing argument.").

DNA Suppression

Appellant next urges the Court to find reversible error in the trial court's refusal to suppress his DNA sample, which he claims was improperly obtained during an illegal traffic stop. In February of 2006, LMPD Sergeant Aaron Crowell was tasked with covertly obtaining Appellant's DNA. Accordingly, Sergeant Crowell and Detective Hibbs began surveilling Appellant's residence. While watching Appellant's residence, the two officers observed Appellant enter a vehicle as a passenger. The vehicle subsequently left the residence at an unlawful high rate of speed. The officers then stopped the vehicle due to the speeding violation. During the stop, Sergeant Crowell removed Appellant from the vehicle and performed a pat down to check for weaponry. Appellant placed his lit cigar onto the back of the vehicle. After checking the subjects' driver's licenses and running warrant checks, officers permitted the driver and Appellant to leave. No citation was issued. As the vehicle left the scene, Appellant's cigar fell to the ground and was collected.

Appellant filed a motion to suppress DNA evidence recovered from the cigar based on the illegality of the

traffic stop. The trial court denied Appellant's motion following evidentiary hearings.

In reviewing a trial court's denial of a motion to suppress, we ensure that the trial court's factual findings are not clearly erroneous, after which we conduct de novo review of the trial court's applicability of the law to the facts. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) (citing *Ornelas v. United States*, 517 U.S. 690, 697 (1996)). Appellant does not allege that any factual findings are unsupported. As a result, we turn to the trial court's application of the law to the facts.

The trial court relied entirely on *Lloyd v. Commonwealth*, 324 S.W.3d 384 (Ky. 2010) in ruling that the traffic stop was lawful. We can find no error in the trial court's reasoning. In *Lloyd*, this Court explained that an officer may conduct a traffic stop as long as he or she has probable cause to believe a traffic violation has occurred, regardless of the officer's subjective motivation. Id. at 392 (citing *Wilson v. Commonwealth*, 37 S.W.3d 745 (Ky. 2001)). The Commonwealth provided sufficient proof that Sergeant Crowell and Detective Hibbs observed the vehicle speeding. Thusly, it is immaterial that Sergeant Crowell desired to obtain Appellant's DNA since adequate probable cause existed.

On appeal, Appellant takes his argument further and suggests that his removal from the car and subsequent pat down was unlawful. The trial court did not address these arguments. Nevertheless, we can quickly dispose of Appellant's contentions. Pursuant to *Owens v. Commonwealth*, 291 S.W.3d 704 (Ky. 2009) an "officer

has the authority to order a passenger to exit a vehicle pending completion of a minor traffic stop." *Id*. at 708 (citing *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997)). Furthermore, Sergeant Crowell was permitted to conduct a pat down of Appellant. As his suppression hearing testimony illustrated, Sergeant Crowell maintained a reasonable and articulable suspicion that Appellant was armed and dangerous. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968). Specifically, Sergeant Crowell testified that he was not only aware of Appellant's proclivity to carry a weapon, but that he previously arrested Appellant for unlawful possession of a handgun. *See also Adkins v. Commonwealth*, 96 S.W.3d 779, 787 (Ky. 2003) ("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."). We have seen no evidence that Sergeant Crowell's quick pat down of Appellant exceeded the scope of *Terry*, nor has Appellant demonstrated that the traffic stop was prolonged to effectuate the pat down.

Recusal

Appellant urges the Court to find error in Judge James Shake's refusal to disqualify himself as the presiding trial judge. Appellant claims that Judge Shake, during his tenure as an Assistant Jefferson County Public Defender, represented him in four felony cases in 1981. Appellant only provides the Court with information concerning one of the four cases, criminal case 81-CR-669. In that case, which proceeded to a jury trial, Appellant was charged with sodomy and rape. The Court's records indicate that Appellant was

acquitted on the sodomy charge, but found guilty of the lesser charge of sexual abuse.

On July 18, 2014, five days into the jury trial, Appellant moved Judge Shake to recuse himself based on his past representation of Appellant. Appellant argued that prejudice would result if Judge Shake continued presiding over the trial "due to the uncertainty surrounding his knowledge of the [prior] case and/or relevant information obtained during his previous representation of [Appellant]."

Judge Shake conducted a hearing on the motion shortly thereafter. On July 21, 2014, Judge Shake denied Appellant's motion on the grounds of timeliness. Judge Shake, citing *Alred v. Commonwealth, Judicial Conduct Commission*, 395 S.W.3d 417, 443 (Ky. 2012), stated that it is incumbent upon which the party moving for recusal to do so "immediately after discovering the facts upon the disqualification rests. . . ." Judge Shake made clear that on a number of occasions throughout the proceedings, he had informed the parties of his prior representation of Appellant. Accordingly, Appellant should have filed his recusal motion long before the trial began.

In *Bussell v. Commonwealth*, 882 S.W.2d 111 (Ky. 1994), this Court was faced with similar Circumstances as that of the case before us. In *Bussell*, also a death penalty case, the defendant filed a recusal motion based on the trial judge's representation of him on murder charges some seventeen years prior. *Id*. at 112. In affirming the trial court's actions, this Court reiterated that Bussell knew or should have known about the prior representation. *Id*. at 113. Bussell's

failure to timely assert the issue waived his claim for recusal. *Id*.

Appellant was made aware of Judge Shake's prior representation prior to trial. While we cannot pinpoint the exact date such information was made known, we do know that Judge Shake had presided over the case for over six years as of the time of trial. During this time, Appellant should have been made aware of the prior representation, either through his own recollection or through Judge Shake's acknowledgments. Consequently, we deem Appellant's claim for recusal waived due to the untimeliness of his motion.

Notwithstanding Appellant's waiver, we must still address whether Judge Shake was mandated by statute to disqualify himself. *See Alred*, 395 S.W.3d at 443 (citing *Johnson v. Commonwealth*, 231 S.W.3d 800, 809 (Ky. App. 2007)). There are three separate statutory grounds for recusal which Appellant advances. KRS 26A.015 requires, in pertinent part, that Judge Shake recuse himself if he has (1) "personal knowledge of disputed evidentiary facts concerning the proceeding"; (2) "served as a lawyer or rendered a legal opinion in the matter in controversy"; or (3) "has knowledge of any other circumstances in which his impartiality might reasonably be questioned."

This Court does not believe any grounds for mandatory recusal existed. In regards to the first basis for disqualification, we disagree with Appellant's argument that his 1981 conviction had some type of evidentiary value to the existence of his modus operandi. Not only was his 1981 conviction not

introduced during the guilt phase, but Appellant fails to explain how Judge Shake's purported knowledge of that case renders the murders of Sweeney and Miles more similar to the murder of Armstrong. In regards to the second statutory ground for recusal, we find Appellant's argument unpersuasive. While it is true that Judge Shake previously served as Appellant's attorney, he did so in an unrelated case over thirty-three years prior. That particular conviction plainly does not constitute the same "matter in controversy." *See Bussell*, 882 S.W.2d at 112. Lastly, we find difficulty in reasonably questioning Judge Shake's impartiality. Judge Shake was candid about his recollections and explained that he had no memory of Appellant's cases or having any conversations concerning those cases. We will not assume bias based solely on the fact that Judge Shake represented Appellant more than thirty-three years prior to his trial. *Id*. (holding that judge's prior representation of defendant in a murder case did not render him biased). For these reasons, we find no error in Judge Shake's refusal to disqualify himself from presiding over Appellant's trial.

Chain of Custody

Appellant also requests that we grant him a new trial on the grounds that the trial court improperly admitted unreliable evidence. The evidence Appellant complains of is Armstrong's rape kit, underwear cuttings, and his cigar and buccal swab. Appellant contends that the Commonwealth failed to provide a sufficient foundation for the aforementioned articles due to numerous breaks in the respective items' chains of custody.

The admission of physical evidence requires "a finding that the matter in question is what its proponent claims." KRE 901(a). Said differently, a proper foundation demonstrates that the proffered evidence is the same evidence initially recovered and has not been materially changed. *See Beason v. Commonwealth*, 548 S.W.2d 835, 837 (Ky. 1977). In regards to fungible evidence, such as DNA, the item's chain of custody provides the necessary foundation for admission. *See Thomas v. Commonwealth*, 153 S.W.3d 772, 779 (Ky. 2004). However, the Court has repeatedly approached admission of such evidence in a liberal fashion, concluding that an unbroken chain of custody is not needed. *E.g., Thomas*, 153 S.W.3d at 781. As such, breaks in the chain of custody go to the weight of the evidence, rather than its admissibility. *McKinney v. Commonwealth*, 60 S.W.3d 499, 511 (Ky. 2001).

In reviewing the trial court's ruling, we look for an abuse of discretion. *Thomas*, 153 S.W.3d at 781 (citing *United States v. Jackson*, 649 F.2d 967, 973 (3d Cir. 1981)). Our focus is on whether a foundation was sufficiently laid so that there is a reasonable probability that the proffered evidence was not altered in any material respect. *Id.* In making this determination, we look to "the circumstances surrounding the preservation of the evidence and the likelihood of tampering by intermeddlers." *Thomas*, 153 S.W.3d 782 (citing *Pendland v. Commonwealth*, 463 S.W.2d 130, 133 (1971)).

Cuttings from Armstrong's Panties

Appellant focuses the majority of his argument on the DNA retrieved from the cuttings of Armstrong's

panties. Confusion abounds due to several cuttings being taken at two different times and the Commonwealth's inability to specify which path a particular cutting took. To simplify our analysis, we can place the cuttings into two groups originating from LMPD Detective Charles Griffin's collection of the panties from Armstrong's autopsy on June 4, 1983. Nine days later, he delivered the panties to a Kentucky State Police ("KSP") laboratory analyst Morris Durbin, who took cuttings from the areas testing positive for seminal fluids. This is the first group of cuttings. The cuttings were then stored in a KSP freezer where they remained until July of 2006. At that time, some of the cuttings were sent to a different KSP lab. The laboratory technician personally returned the cuttings to LMPD on April 25, 2007, after which they were stored in the LMPD property room. A sufficient chain of custody is patently clear for this first group of cuttings.

The second group of cuttings occurred in 2004, when LMPD was investigating another suspect in Armstrong's murder. At that time, the remnants of the intact panties were transported to the KSP laboratory. This is where the second group of cuttings occurred. These cuttings were returned to LMPD and stored in the property room that same year. The chain of custody for the second group of cuttings has one missing link. After Durbin made the initial selection of cuttings in 1983, there is no direct testimony demonstrating how the remnants of the intact panties made it back to the LMPD property room before being stored until 2004. Nevertheless, discovery indicates that the KSP lab released the panties to LMPD Officer "J. Trusty" on

August 10, 1983, the same day they were returned to the LMPD property room. This minimal gap in the chain of custody for the second group of panty cuttings does not render it unreliable. *See Thomas*, 153 S.W.3d at 782. ("All possibility of tampering does not have to be negated. It is sufficient that the actions taken to preserve the integrity of the evidence are reasonable under the circumstances.").

Since there is only one of two paths the panty cuttings could have taken, and both paths demonstrated intact chains of custody, we believe the Commonwealth provided a sufficient foundation demonstrating the reliability of the DNA evidence. It is inconsequential for the purposes of admission which path a particular cutting took. Regardless of whether a particular sample was part of the 1983 or 2004 cuttings, there is little doubt that the "proffered evidence was the same evidence actually involved in the event in question and that it remain[ed] materially unchanged." *Thomas*, S.W.3d at 779. Thusly, the Commonwealth adequately authenticated the evidence. The fact that the Commonwealth was unable to differentiate whether the cuttings were from the first or second batch of cuttings goes to the weight of the evidence.

Rape Kit

Dr. McCloud collected Armstrong's rape kit, after which it was transferred to Detective Griffin during her autopsy. It is unclear if it was Detective Griffin or another officer who placed the kit in the LMPD property room. Nine days later, Detective Griffin transported the kit to a KSP laboratory. The Commonwealth could not pinpoint who transported the

kit back to the LMPD property room where it remained until June of 2004. At that time, the kit was once again transported to the KSP laboratory by an evidence technician where it exchanged hands with several identified analysts and technicians and returned to the LMPD property room. A similar exchange took place in 2007, where the kit was transported to a KSP laboratory by an identified evidence technician and was later returned to the LMPD property room. There was no testimony regarding who handled the kit, if anyone, while at the KSP laboratory.

Although there are several breaks in the rape kit's custodial chain, we do not believe these disruptions render the evidence unreliable. The deficiencies in custody are apparently due to careless record keeping in the form of failure to specify who transported the item, rather than actions that would have altered or possibly contaminated the contents of the rape kit. In *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998), the Court stated that "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in any material respect." ' (quoting *United States v. Cardenas*, 864 F.2d 1528, 1532 (10th Cir. 1989)). As such, the trial court did not err in admitting the evidence, as there was minimal chance that the contents of the rape kit were altered. Once again, we underscore that breaks in the chain of custody go to the weight of the evidence, rather than its admissibility. *McKinney*, 60 S.W.3d at 511.

Appellant also claims that evidence of the rape kit's chain of custody was insufficient due to Detective Griffin and Dr. McCloud, who were both deceased at the time of trial, being unable to testify. Yet, we find that Medical Examiner Dr. Tracey Corey's and LMPD Detective Joel Maupin's testimonies adequately perfected the missing links in the evidence's chain of custody. Dr. Corey testified that Dr. McCloud collected the rape kit during Armstrong's autopsy. Dr. Corey was not present during the autopsy, but confirmed the collection based on the autopsy report. *See Kirk v. Commonwealth*, 6 S.W.3d 823, 828 (Ky. 1999) (coroner's testimony elicited from the autopsy report authored by deceased pathologist was authenticated and admissible). Likewise, Detective Maupin testified that he witnessed Detective Griffin order the rape kit and take custody of the collected kit during the autopsy. Detective Maupin was also able to identify the rape kit as the one collected by virtue of Detective Griffin's signature and date on the rape kit packaging. Thusly, we find no error.

Buccal Swab and Cigar

As mentioned, Appellant also submits that the Commonwealth failed to establish the chain of custody for his cigar butt and buccal swab. We will not plunge into a lengthy discussion concerning the custodial history of these items. Instead, we can surmise that Appellant's most persuasive argument is predicated on unidentified individuals who accepted and released the evidence from the LMPD property room. As our analysis has already stated, minor custodial breaches do not automatically render the evidence unreliable.

See Thomas, 153 S.W.3d at 781. Despite the negligible gaps in custody, the Commonwealth reasonably demonstrated the identity and the integrity of the buccal swab and cigar. Therefore, the trial court did not abuse its discretion by admitting them into evidence.

Prosecutorial Misconduct

Appellant alleges numerous instances of prosecutorial misconduct during both the guilt and penalty phase closing arguments. In considering Appellant's claims of prosecutorial misconduct, we will only reverse if the misconduct is "so serious as to render the entire trial fundamentally unfair." *Stopher v. Commonwealth*, 57 S.W.3d 787, 805 (2001). We must emphasize that the trial court was required to give the Commonwealth wide latitude during its closing arguments. *Bowling v. Commonwealth*, 873 S.W.2d 175, 178 (Ky. 1993). In addition, the Commonwealth was entitled to draw reasonable inferences from the evidence and explain why those inferences support a finding of guilt. *Commonwealth v. Mitchell*, 165 S.W.3d 129, 131-32 (Ky. 2005).

Guilt Phase

The first instance of misconduct Appellant complains of occurred when the Commonwealth stated the following during closing arguments: "Let's cut to the chase. You had to hear a day's worth of evidence to know what everybody already knew. It was Larry White's DNA on Ms. Armstrong's vagina, her anus, her panties and the back of her pants." Appellant immediately objected, claiming that the Commonwealth was mischaracterizing the evidence.

The trial court overruled Appellant's objection, stating that the jury can reconcile the statements with the evidence presented.

Appellant is correct that his DNA was not specifically found on Armstrong's vagina, anus, or pants. While semen was found in those areas, analysts were unable to obtain a DNA profile. Nevertheless, Appellant's DNA matched the DNA profile found on Armstrong's panties with certainty—one in 160 trillion people. From this evidence, the Commonwealth was entitled to draw reasonable inferences and explain why those inferences support a finding of guilt. *Mitchell*, 165 S.W.3d at 131-32. Since evidence indicated that Appellant had sexual intercourse with Armstrong prior to her death, in addition to his DNA being found in her panties, the Commonwealth was permitted to make the reasonable inference that such DNA was present in the semen found on Armstrong's vagina, anus, and pants. *See Tamme v. Commonwealth*, 973 S.W.2d 13, 39 (Ky. 1998) ("The [prosecutor's] alleged misstatements are more accurately characterized as interpretations of the evidence.").

Appellant's second allegation of prosecutorial misconduct occurred when the Commonwealth commented on Roger Ellington's testimony. Appellant believes the Commonwealth's statements had the effect of offering the prestige of the Commonwealth Attorney's Office to support the witness' credibility. Appellant's brief provides a lengthy quote from the Commonwealth which it argues amounted to improper bolstering. After reviewing the Commonwealth's closing argument, we find no need to provide the quote,

as there is no merit in Appellant's contention. The Commonwealth merely summarized Mr. Ellington's testimony in a way that was persuasive to their position. *Compare Armstrong v. Commonwealth*, 517 S.W.2d 233, 236 (Ky. 1974) (improper bolstering occurred when the prosecutor informed the jury that he had known and worked with the witness before and the witness was honest and conscientious).

Appellant's third claim of misconduct also concerns Mr. Ellington's testimony. Mr. Ellington is the father of one of Armstrong's children. The defense advanced a theory that Mr. Ellington was Armstrong's killer. In response, the Commonwealth provided the jury with the following closing argument statements: "[Ellington], being accused, having a Fifth Amendment right to remain silent, [ ] came and sat right here. [Ellington] chose to testify. He took an oath from the judge and he answered the questions. Are those the actions of a killer?" Appellant argues that this statement amounted to an improper comment on Appellant's failure to testify. We disagree.

In *Ragland v. Commonwealth*, 191 S.W.3d 569, 589 (Ky. 2006), the Court explained that "a defendant's constitutional privilege against compulsory self-incrimination [is violated] only when it was manifestly intended to be, or was of such character that the jury would necessarily take it to be, a comment upon the defendant's failure to testify." When placed in the context of the defense's theories, we believe the Commonwealth was appropriately responding to Appellant's allegation that Ellington was Armstrong's killer. Such a comment does not constitute a comment

on Appellant's failure to testify. *See Bowling*, 873 S.W.2d at 178 (finding that prosecutor's closing argument statement that "We can't tell you what it is because only the man who pulled the trigger knows" did not amount to a comment on defendant's refusal to testify). As we have explained, "[n]ot every comment that refers or alludes to a non-testifying defendant is an impermissible comment on his failure to testify " *Ragland*, 191 S.W.3d at 589 (quoting *Ex parte Loggins*, 771 So.2d 1093, 1101 (Ala. 2000)).

Appellant also alleges that the Commonwealth improperly shifted the burden of proof when it reminded the jury that Appellant failed to provide proof that he and Armstrong had a relationship prior to her, murder. This Court has long held that a prosecutor "may comment on evidence, and may comment as to the falsity of a defense position." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). The complained of statement was clearly made to challenge the defense's theory that Appellant's DNA was present in Armstrong's underwear because the two had consensual sex preceding her death. The Commonwealth's remarks that there was no evidence that such an encounter took place was well within the bounds of closing arguments. We find no error.

Sentencing Phase

Appellant urges the Court to find that the Commonwealth committed flagrant prosecutorial misconduct when it stated that Appellant's murders of Armstrong, Miles, and Sweeney amounted to "genocide."

The Commonwealth concedes that the prosecutor's use of the term "genocide" was improper. We agree and condemn the Commonwealth's use of such unnecessary and disparaging comments. However, this Court does not believe the remark was severe enough to render the trial fundamentally unfair. While the Commonwealth's remark was obviously deliberate and undoubtedly produced some prejudice, the remark was isolated, being used only once during the closing argument. *See Mayo v. Commonwealth*, 322 S.W.3d 41, 57 (2010). Moreover, the evidence against Appellant, as discussed *supra*, was relatively strong. When viewed in the context of the entire trial, the Commonwealth's brief and minor remark did not undermine the essential fairness of Appellant's trial. *See Murphy v. Commonwealth*, 509 S.W.3d 34, 53-54 (Ky. 2017) (prosecutor's reference to defendant as a "monster" did not constitute reversible error); *Dean v. Commonwealth*, 844 S.W.2d 417, 421 (Ky. 1992) (Commonwealth calling the defendants "crazed animals" did not require reversal).

Next Appellant argues that the Commonwealth improperly urged the jury to sentence him to death for his prior murders of Miles and Sweeney. We find no need to relay the complained of statements. Instead, we resolve Appellant's contentions, by finding that the Commonwealth properly commented on the proof presented to the jury, including the fact that he had murdered two other women. We do not believe the Commonwealth's references to the Miles and Sweeney murders exceeded the bounds of permissible closing statements.

Appellant's final claim of prosecutorial misconduct concerns the Commonwealth's statement to the jury that they "never heard one word or witnessed one action of any remorse from the defendant."

Again, this comment was made during the sentencing stage. This argument, while unacceptable during the guilt stage, is germane to sentencing. The United States Supreme Court weighed in on this issue when reviewing this Court's decision. *White v. Woodall*, 134 S.Ct. 1697, 1704 (2014). The nation's highest court ruled that the trial court was not required to give an instruction of no inference of guilt by the defendant's refusal to testify during the penalty stage. The Supreme Court agreed with the trial court's conclusion that "no case law [ ] precludes the jury from considering the defendant's lack of expression of remorse . . . in sentencing." *See also Hunt v. Commonwealth*, 304 S.W.3d 15, 37 (Ky. 2009) (prosecutor's statement "[h]as anybody seen any remorse from this defendant during the trial?" did not constitute an impermissible comment on defendant's Fifth Amendment rights). There was no error here.

Victim Impact Evidence

Appellant next contends that he was denied a fair trial due to the elicitation of what he believes was victim impact evidence during the guilt phase of trial. This argument is unpreserved and without merit. During redirect examination of one of Armstrong's children, the Commonwealth inquired into the status of Armstrong's other children. The witness merely said that one of his siblings was killed and the other had committed suicide. The witness did not expound on

their deaths, nor did he state that their deaths were attributable to their mother's murder. We find no error.

Directed Verdict

Appellant argues that the trial court erred in failing to grant him a directed verdict of acquittal on the rape and murder charges. We have sufficiently outlined the sufficiency of the evidence in this opinion already to refute this claim. We will not protract this opinion by unnecessarily repeating it here. When viewing the evidence in its entirety, it was not clearly unreasonable for a jury to find Appellant guilty of the crimes charged.

Statutory Aggravator

Appellant next urges the Court to vacate his sentence of death on the grounds that the jury failed to find a statutory aggravator. In order to impose the death sentence upon a defendant, a jury must find, beyond a reasonable doubt, the existence of at least one of the statutory aggravators as listed in KRS 532.025(2)(a). In the case before us, the jury was instructed on the following aggravating circumstance:

> In fixing a sentence for the defendant, Larry Lamont White, for the offense of the murder of Pamela Armstrong you shall consider the following aggravating circumstance which you may believe from the evidence beyond a reasonable doubt to be true: (1) The defendant committed the offense of murder while the defendant was engaged in the commission of rape in the first degree.

Appellant takes issue with the jury's response to this question. The jury's verdict form read as follows: "We the jury, find beyond a reasonable doubt that the following aggravating circumstances exists in the case as to the murder of Pamela Armstrong." Underneath this aggravator, the jury foreman wrote the word "Rape." Appellant claims that the jury's finding of "rape" does not constitute a finding that the Appellant's murder of Armstrong was committed while he was engaged in the commission of first-degree rape.

Appellant's argument has merit to the extent that the jury's one word answer of "rape" does not specify whether the jury believed Appellant committed first-degree rape during the commission of Armstrong's murder. Yet, we may assume that the jury made the proper finding of the statutory aggravator based on the jury's likely interpretation and understanding of the verdict forms and instructions. *See Wilson v. Commonwealth*, 836 S.W.2d 872, 892 (Ky. 1992), *overruled on other grounds by St Clair*, 10 S.W.3d 482. Indeed, our analysis centers on "what a 'reasonable juror' would understand the charge to mean," *Id.* at 892 (citing *Frances v. Franklin*, 471 U.S. 307 (1985)). Based on the instructions and verdict form, the jury was given the option of finding only one aggravator—murder accompanied by first-degree rape, and was instructed that it could not impose a death sentence unless the aggravating circumstance was found: These instructions are clear. In the Commonwealth, we assume that juries follow instructions. *Johnson v. Commonwealth*, 105 S.W.3d 430, 436 (Ky. 2003). Accordingly, since the jury wrote the word "rape" on the verdict form which found the existence of the

aggravator, in conjunction with the jury's subsequent imposition of death, we find no error.

Invalid Indictment

Appellant contends that his conviction and sentence is void as a matter of law because the trial court lacked jurisdiction. Appellant's claim relies entirely on the fact his indictment was not signed by a circuit court judge or circuit court clerk. RCr 6.06 requires only that indictments be signed by the Grand Jury foreperson and the Commonwealth's attorney. Appellant fails to direct the Court to any statutory or precedential authority indicating that the lack of a circuit court judge or clerk's signatures renders the indictment invalid. *See Smith v. Commonwealth*, 288 S.W. 1059 (Ky. 1926) (holding that an indictment was valid despite the absence of the clerk's signature). Furthermore, RCr 6.06 prohibits any challenge to the indictment on signatory grounds "made after a plea to the merits has been filed or entered." Appellant pled "not guilty" to the crimes charged in January 2008, but did not challenge the indictment until July of 2014. For these reasons, Appellant's argument is not only waived, but lacks merit.

Jury Inquiry

Appellant maintains that the trial court violated his constitutional rights by failing to conduct an adequate inquiry regarding whether any jurors viewed an inflammatory news article. The article at issue was released at the beginning of the trial and labeled Appellant as a "serial killer" who raped and murdered two other women. Appellant moved for a mistrial,

arguing that the jury had likely been exposed to the news article. In response, the trial court informed the jurors that a news article was released concerning the case and then asked the jurors if they had followed his previous admonition "not to read anything or watch anything, [or] research anything." The jurors indicated that they had followed the trial court's admonition. Appellant made no further objections about the matter and did not ask for additional admonitions. We believe this unpreserved alleged error is without merit. *See Tamme*, 973 S.W.2d at 26 ("[h]aving properly admonished the jury not to read any newspaper articles about the trial, the trial judge was not required to inquire of them whether they had violated his admonition.").

Voir Dire Limitation

Appellant submits to the Court that his trial was fundamentally unfair due to the trial court's limitation of juror inquiries during jury selection. More specifically, Appellant sought to question the individual jurors about their capacities to consider Appellant's prior convictions for the limited purpose of identity and modus operandi. The trial court narrowed the potential questioning concerning the KRE 404(b) evidence to the commonly utilized inquiries regarding whether the jurors could follow the law and instructions.

Trial courts are granted broad discretion and wide latitude in their control of the voir dire examination. *Rogers v. Commonwealth*, 315 S.W.3d 303, 306 (Ky. 2010). Our review of the trial court's limitations is whether denial of a particular question implicates fundamental fairness. *Lawson v. Commonwealth*, 53

S.W.3d 534, 540 (Ky. 2001). In *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 1985), defense counsel attempted to inquire whether potential jurors, when assessing a witness' credibility, could consider the fact that the witness made a deal with the Commonwealth in exchange for his. testimony. *Id*. The Court upheld the trial court's limitations on such inquiries because such questions were "to have jurors indicate in advance or commit themselves to certain ideas and views upon final submission of the case " *Id*. at 407; *see Woodall v. Commonwealth*, 63 S.W.3d 104 (Ky. 2001) (affirming the trial court's limitation of defense counsel's questions concerning whether the jurors could consider a low I.Q. score as mitigating evidence). In light of *Ward*, we do not believe the trial court exceeded its broad discretion. Appellant's questioning would have likely exposed juror views concerning his past murders and possibly committed the jurors to those assessments. As mentioned, less harmful questioning was utilized and allowed Appellant to ascertain whether the jurors could follow the trial court's instruction to consider the evidence for the correct purposes.

Venirepersons Struck For Cause

Appellant next claims that the trial court abused its discretion in striking Juror 1159266 and Juror 1159422 for cause on the grounds that they could not give due consideration to the potential sentence of death. This Court abides by the principles set forth in *Uttecht v. Brown*, 551 U.S. 1, 9 (2007), which held that "a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law

framework can be excused for cause, but if the juror is not substantially impaired, removal for cause is impermissible." In *Brown v. Commonwealth*, 313 S.W. 3d 577, 599 (Ky. 2010), this Court discussed the great difficulty in determining whether a potential juror's reservations about the death penalty would "prevent or substantially impair the performance of [their] duties as juror[s] in accordance with [their] instructions and [their] oath." (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)). For this reason, we grant the trial court's wide-ranging discretion, as "this distinction will often be anything but clear and will hinge to a large extent on the trial court's estimate of the potential juror's demeanor." *Brown*, 313 S.W 3d at 599.

With regards to Juror 1159266, voir dire questioning revealed his opposition to the death penalty. Unfortunately for the trial court, his opposition was anything but consistent. When initially asked if he could consider the death penalty, Juror 1159266 responded in the negative. The potential juror subsequently explained that he did not believe in the death penalty, going so far as to say, "I just don't think that being put to death is the proper punishment ever." When Appellant began asking the potential juror questions, he seemed to let up on his previously stated convictions and expressed that he could consider all available penalties. However, further questioning by the Commonwealth once again uncovered his bias against the death penalty and that it was never the proper punishment.

Juror 1159422 also expressed contempt for the death penalty. When asked if she could consider the entire

range of penalties, the potential juror stated, "I'd prefer not to . . . [and] I wouldn't want to[,] several of them maybe, but not the death penalty." Juror 1159422 went on to explain that she was capable of considering "anything," but clarified that the death penalty is not something she wanted to entertain. She also explained that she was Catholic and didn't "particularly like the death penalty." Appellant provided the potential juror with similar questioning regarding her ability to consider the death penalty as a possible sentence. She replied as follows: "I wouldn't want to, no. I wouldn't want to, but could I? I guess anybody can do anything."

When faced with conflicting and somewhat unclear answers, such as those provided by Juror 1159266 and Juror 1159422, we must look to the jurors' responses as a whole and ask if a reasonable person would conclude that the juror was substantially impaired in the ability to consider the death penalty. *Brown*, 313 S.W.3d at 601. In light of both jurors' unequivocal objections to the death penalty, in addition to their uncertainty and hesitation in imposing a sentence of death, we cannot conclude that the trial court abused its discretion. *See id.* (upholding trial court's for-cause strike of juror who said "I don't know" virtually every time he was asked if he could impose the death penalty).

Jury Sequester

Appellant complains that he was denied a fair trial due to the trial court's failure to sequester the jury on the weekend between the guilt and sentencing phases. We find no error. RCr 9.66 states that "[w]hether the jurors in any case shall be sequestered shall be within the discretion of the court." Accordingly, in *St Clair v.*

Commonwealth, 140 S.W.3d 510, 558 (Ky. 2004), this Court made clear that it is not an abuse of discretion to refuse "to sequester a jury between the guilt and sentencing phases of a bifurcated trial " (citing *Wilson v. Commonwealth*, 836 S.W.2d 872, 888 (Ky. 1992), overturned in part by *St. Clair v. Roark*, 10 S.W.3d 482 (Ky. 1999)).

Mitigating Evidence

Appellant contends that the trial committed error when it denied him the opportunity to inform the jury that he had previously pled guilty to murdering Sweeney and Miles. However, a careful review of the record fails to demonstrate such a ruling. Moreover, we have been unable to locate Appellant's specific request for relief or request that the trial court make a ruling on the matter. *See, e.g., Brown v. Commonwealth*, 890 S.W.2d 286, 290 (Ky. 1994).

Missing Evidence Instruction

The next issue for our review concerns the trial court's denial of Appellant's request for a missing evidence instruction. The evidence at issue is a printout of food stamp recipients and a bus schedule. The bus schedule was found under Armstrong's body and collected by law enforcement. At the time of trial, the bus schedule was not introduced into evidence and was never located. In regards to the food stamp printout, Armstrong was stated to have left her apartment to obtain food stamps on the morning of her murder, but the food stamps were missing on her person when her body was discovered. In an attempt to confirm her whereabouts that morning, LMPD Detective Les Wilson testified

that he obtained a printout from the food stamp office showing Armstrong as a recipient. After Detective Wilson's testimony, the parties realized the printout was missing. Both parties stipulated this fact and the trial court advised the jury that the food stamp printout was not within the case file. Appellant requested an instruction on the missing evidence. The trial court denied the request on the grounds that Appellant failed to demonstrate that the evidence was intentionally destroyed by law enforcement.

A missing evidence instruction is required only when a "Due Process violation [is] attributable to the loss or destruction of exculpatory evidence." *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002). In order for Appellant to be entitled to a missing evidence instruction, he must establish that (1) the failure to preserve the missing evidence was intentional and (2) it was apparent to law enforcement that the evidence was potentially exculpatory in nature. *Id*. Appellant has failed to demonstrate either bad faith on the part of law enforcement or that the missing evidence would have had the potential to exonerate him as the assailant. *See Roark v. Commonwealth*, 90 S.W.3d 24 (Ky. 2002) (missing composite sketch of perpetrator and lineup photographs did not require missing evidence instruction because bad faith was not shown and the evidence was not exculpatory). Thusly, the trial court properly denied Appellant's request for a missing evidence instruction.

Alternative Perpetrator Evidence

Appellant also complains that the trial court erred in failing to permit the introduction of evidence that

Michael Board, the father of one of Armstrong's children, was her actual killer. More specifically, Appellant sought to question a testifying detective regarding a warrant taken out by Board against Armstrong five years prior to her death, After the Commonwealth objected, the trial court prohibited the questioning on the grounds that Board being the alternative perpetrator was unsupported and speculative. Appellant preserved the detective's testimony by avowal.

When evaluating alternative perpetrator evidence, the KRE 403 balancing test is the true threshold for admission, as such evidence is almost always relevant. *Gray v. Commonwealth*, 480 S.W.3d 253, 268 (Ky. 2016) ("The proponent of the theory must establish something more than simple relevance or the threat of confusion or deception can indeed substantially outweigh the evidentiary value of the theory."). Probative worth is diminished if the "proffered evidence [presents] speculative, farfetched theories that may potentially confuse the issues or mislead the jury." *Id*.

The only proffered evidence indicating that Board was the alternative perpetrator was the back and forth warrants between the parties during what was obviously a tumultuous relationship. However, the most recent warrant as of the time of Armstrong's death originated five years prior. Taking into account the five-year time lapse, we do not believe the evidence established that Board had a motive to murder Armstrong. Too much time had simply gone by for the warrant to have any true probative worth. The

proffered evidence also failed to demonstrate that Board had the opportunity to commit, or that he was in any way linked to, Armstrong's murder. *See Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003). Appellant's theory was weak and presented itself as speculative and farfetched. Consequently, we do not believe the trial court's ruling was an abuse of its discretion, nor did it prevent Appellant from presenting a full defense.

Penalty Phase Exhibit

Appellant next requests a new sentencing trial based on an unadmitted exhibit being placed with the jury during deliberations. The Commonwealth utilized an enlarged chart illustrating Appellant's criminal history during the sentencing phase of trial. Appellant did not object to the introduction of his criminal history via the testimony of the Commonwealth's witness, nor the use of the chart. The record reflects that the Commonwealth failed to request for the chart to be admitted into evidence. Yet, the jury was allowed to view the chart during its deliberation in violation of RCr 9.72. Nonetheless, the error was harmless as Appellant's criminal history, specifically the most prejudicial convictions—his previous murder convictions—had already been disclosed to the jury on several occasions.

Intellectual Disability

Appellant urges the Court to reverse his death sentence on the grounds that the trial court refused to hold a hearing to explore the existence of an intellectual disability. Once the jury returned a verdict of guilt, Appellant motioned the trial court to remove

the death penalty as a possible sentence based on Appellant's low IQ score and the case *Hall v. Florida*,— U.S.—, 134 S.Ct. 1986 (2014). The trial court denied Appellant's motion, and declined his request for a hearing on the matter.

The Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of persons with intellectual disability. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The Commonwealth recognizes this rule of law in KRS 532.140, which forbids the imposition of death upon an "offender with a serious intellectual disability." In order for a defendant to meet Kentucky's statutory definition of "serious intellectual disability," and thus evade the death penalty, he or she must meet the following criteria pursuant to KRS 532.135: (1) the defendant's intellectual functioning must be "significant[ly] subaverage"—defined by statute as having an intelligence quotient of 70 or less; and (2) the defendant must demonstrate substantial deficits in adaptive behavior, which manifested during the developmental period.

Procedurally, trial courts require a showing of an IQ value of 70 or below before conducting a hearing regarding the second criteria of diminished adaptive behavior. Moreover, pursuant to *Hall*, 134 S.Ct. 1986, trial courts must also adjust an individual's score to account for the standard error of measurement. *See also White v. Commonwealth*, 500 S.W.3d 208, 214 (Ky. 2016) (pursuant to Hall, trial courts in Kentucky must consider an IQ test's margin of error when considering the necessity of additional evidence of intellectual

disability). As stated in *Hall*, the standard error of measurement's plus or minus 5 points. *Id*. at 1999.

Appellant submitted to the trial court his 1971 IQ test score of 76. After applying the standard error of measurement, Appellant's IQ score has a range of 71 to 81. Such a score is above the statutory cutoff of 70, thereby failing to meet the "significant subaverage" requirement. Thusly, further investigation into his adaptive behavior was unnecessary. Nonetheless, Appellant submits that *Hall* forbids states from denying further exploration of intellectual disability simply based on an IQ score above 70. However, this Court can find no such prohibition. The holding of *Hall* renders a strict 70-point cutoff as unconstitutional if the standard error of measurement is not taken into account. Id. at 2000. In other words, *Hall* stands for the proposition that prior to the application of the plus or minus 5-point standard error of measurement, "an individual with an IQ test score 'between 70 and 75 or lower' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." *Id*. (quoting *Atkins v. Virginia*, 536 U.S. 304, 309, n. 5, (2002)). That is not the case before us, as Appellant's IQ, even after subtracting the 5-point standard error of measurement, is higher than the 70-point minimum threshold.

We also reject Appellant's request that we apply the "Flynn Effect" to his IQ score. The Flynn Effect is a term used to describe the hypothesis that "as time passes and IQ test norms grow older, the mean IQ score tested by the same norm will increase by approximately three points per decade." *Bowling v.*

Commonwealth, 163 S.W.3d 361, 374 (Ky. 2005) (citing James R. Flynn, *Massive IQ Gains in 14 Nations: What IQ Tests Really Measure*, 101 Psych. Bull. 171-91(1987 No. 2)). Therefore, as applied, Appellant's 1971 IQ score of 76, would actually be 59 by today's standards—71 minus 12 points for the Flynn Effect and 5 points for the standard error of measurement—well below the 70-point threshold. Appellant, however, fails to cite any precedential or statutory authority indicating that trial courts must take into account the Flynn Effect. Indeed, KRS 532.140 is unambiguous and makes no allowance for the Flynn Effect, nor is such an adjustment mandated by this Court or the U.S. Supreme Court. *See Bowling*, 163 S.W.3d at 375-76. Furthermore, even if the Court was obliged to ignore the confines of KRS 532.135 and place less weight on Appellant's IQ score, there is ample evidence of Appellant's mental acumen. For example, Appellant often advocated for himself through numerous pro se motions. One such motion was written so persuasively that defense counsel specifically asked the trial court to rule on its merits. Consequently, we find no error in the trial court's denial of Appellant's motion for an evidentiary hearing or exclusion of the death penalty.

Competency Hearing

Appellant also requests that the Court find reversible error in the trial court's failure to conduct a competency hearing. Pursuant to defense counsel's motion, the trial court ordered Appellant to undergo a competency evaluation. However, at the scheduled May 10, 2010 competency hearing, the trial court discovered

that the Kentucky Correctional Psychiatric Center ("KCPC") was unable to perform an evaluation of Appellant due to his refusal to cooperate. At the scheduled hearing, Appellant informed the trial court that he had several complaints regarding his counsel. As it relates to the issue before us, Appellant explained to the trial court that he was competent and did not want to go to KCPC for an evaluation. Appellant further urged the Court to consider his 1984 evaluation which declared him competent. Several days later, the trial court ordered Appellant's counsel be removed due to irreconcilable differences. The issue of competency was not brought up again until Appellant's motion for a new trial in September of 2014, which was subsequently denied.

Competency hearings are implicated on statutory and constitutional grounds, both having separate standards governing those rights. Per KRS 504.100(1) a trial court must order a competency examination upon "reasonable grounds to believe the defendant is incompetent to stand trial." Subsection (3) of the statute then states that "[a]fter the filing of a report (or reports), the court shall hold a hearing to determine whether or not the defendant is competent to stand trial." Thusly, the state statutory right to a competency hearing only arises after report of a competency examination is filed.

The due process constitutional right to a competency evaluation attaches when there is *substantial evidence* that a defendant is incompetent. *Id*. When reviewing a trial court's failure to conduct a competency hearing we ask "[w]hether a reasonable judge, situated as was the

trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." *Padgett v. Commonwealth*, 312 S.W.3d 336, 345-46 (Ky. 2010) (quoting *Thompson v. Commonwealth*, 56 S.W.3d 406, 408 (Ky. 2001)). It is within the trial court's sound discretion to determine whether "reasonable grounds" exist to question competency. *Woolfolk v. Commonwealth*, 339 S.W.3d 411, 423 (Ky. 2011).

With respect to Appellant's statutory right to a competency hearing, we believe that issue has been waived. See *Padgett*, 312 S.W.3d at 344 (defendant waived hearing after stating that competency was not an issue). Appellant pleaded with the trial court not to question his competency and his new counsel failed to pursue the matter further.

Upon review of Appellant's constitutional right to a competency hearing, we cannot say that there were reasonable grounds to suspect incompetency. As already stated, Appellant assisted in his defense, often advocating on his own behalf through numerous pro se filings. Appellant was steadfast in the defense he wished to present, even notifying the court of his dissatisfaction with his defense team. Moreover, Appellant was able to comport himself well in the courtroom, conveyed his thoughts without difficulty, and demonstrated a thorough understanding of the charges he faced. In fact, the only indication that Appellant was not competent to stand trial was defense counsel's movement for a competency evaluation. As this Court has previously stated, "defense counsel's

statements alone could not have been *substantial* evidence." *Padgett*, 312 S.W.3d at 349. For these reasons, we do not believe a reasonable judge would have expressed doubt about Appellant's competency to stand trial.

Death Penalty

For his final claims of error, Appellant asserts numerous arguments concerning the constitutionality of Kentucky's death penalty statutory scheme and the trial court's imposition of death. Appellant's arguments have already been settled by this Court. *See Meece*, 348 S.W.3d 627 (Kentucky's death penalty is constitutional); *St Clair v. Com*, 451 S.W.3d at 655 (proportionality review was sufficient, failure to define reasonable doubt does not violate due process rights, jury does not need to be instructed that it may choose a non-death sentence even upon a finding of aggravating circumstance, and no error in trial judge's report erroneously stating that a "passion and prejudice" instruction was provided to the jury); *Dunlap v. Commonwealth*, 435 S.W.3d 537 (Ky. 2013) (Kentucky's death penalty scheme is not discriminatory, prosecutorial discretion does not render death penalty inherently arbitrary, and jury was not required to be informed of means of execution or parole eligibility); *Mills v. Commonwealth*, 996 S.W.2d 473, 492 (Ky. 1999), *overruled on other grounds by Padgett*, 312 S.W.3d 336 (holding that there "is no requirement that a jury be instructed that their findings on mitigation need not be unanimous").

Moreover, Appellant's contention that our death penalty statute violates the Sixth Amendment

pursuant to *Hurst v. Florida*, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016) is unpersuasive. In *Hurst*, the U.S. Supreme Court found Florida's capital sentencing scheme unconstitutional because the jury only issued a sentencing recommendation, after which the judge made the ultimate factual findings needed for the imposition of death. *Id.* at 622-24. However, under the Commonwealth's statutory scheme, the trial court does not usurp the jury's role in finding the existence of statutory aggravators needed for the imposition of the death penalty.

Proportionality

Lastly, Appellant maintains that his death sentence was excessive and disproportionate compared to similar cases.

> The Commonwealth, through its death penalty statutes, has established a proportionality review process. KRS 532.075(3)(c), Under KRS 532.075(1), "[w]henever the death penalty is imposed for a capital offense . . . the sentence shall be reviewed on the record by the Supreme Court." Further, Subsection (3)(c) provides that "with regard to the sentence, the court shall determine . . . [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Hunt v. Commonwealth, 304 S.W.3d 15, 52 (Ky. 2009).

"The Eighth Amendment to the United States Constitution mandates that a death sentence be proportionate to the crime the defendant committed."

Commonwealth v. Guernsey, 501 S.W.3d 884, 888 (Ky. 2016) (citing *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (A death sentence is unconstitutional if it "is grossly out of proportion to the severity of the crime.")) "In addition to this constitutional requirement for an inherently proportional sentence, KRS 532.075 mandates comparative proportionality review in all Kentucky cases in which the death penalty is imposed." *Guernsey*, 501 S.W.3d at 888. "Comparative proportionality review is not mandated by the Eighth Amendment, rather it is a requirement imposed solely by statute." *Id*. (citing *Pulley v. Harris*, 465 U.S. 37, 43-44, 104 S.Ct. 871, 875, 79 L.Ed.2d 29 (1984)); *see also, Bowling v. Parker*, 344 F.3d 487, 521 (6th Cir. 2003) ("The Supreme Court has held that the Constitution does require proportionality review, but that it only requires proportionality between the punishment and the crime, not between the punishment in this case and that exacted in other cases[ ]"); *Caudill v. Commonwealth*, 120 S.W.3d 635, 678 (Ky. 2003) ("There is no constitutional right to a [comparative] proportionality review[ ]").

Our independent review of the record, pursuant to KRS 532.075, reveals that Appellant's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. As in *Hunt*,

> the sentence is not disproportionate to the penalty imposed in similar cases since 1970 considering both the crime and the defendant. Rather than belaboring this opinion with a string cite containing the cases we examined

> during the course of our proportionality review, we incorporate by reference the list found in *Hodge v. Commonwealth*, 17 S.W.3d 824, 855 (Ky. 2000). We have incorporated that list in other cases, such as *Parrish v. Commonwealth*, 121 S.W.3d 198, 208 (Ky. 2003). We have also reviewed the applicable cases rendered after *Hodge*. *See, e.g., Fields v. Commonwealth*, 274 S.W.3d 375, 420 (Ky. 2008) (giving "particular attention" to other cases involving single murders in performing proportionality review of death sentence in case involving murder in the course of burglary).

304 S.W.3d at 52.

Under the circumstances of Appellant's case, and the heinous nature of the crimes he committed, we conclude that imposition of the death penalty was justified.

Conclusion

For the aforementioned reasons, we affirm the Jefferson Circuit Court's judgment and sentence of death.

Attachment

ORDER GRANTING PETITION FOR MODIFICATION

The Petition for Modification, filed by the Appellant, of the Opinion of the Court, rendered on August 24, 2017, is hereby GRANTED.

All sitting. All concur.

ENTERED: March 22, 2018.

/s/ John D. Minton, Jr.

CHIEF JUSTICE

OPINION OF THE COURT BY JUSTICE CUNNINGHAM

All sitting. All concur.

APPENDIX E

JEFFERSON CIRCUIT COURT

DIVISION TWO

NO: 07-CR-4230

COMMONWEALTH OF KENTUCKY)
)
PLAINTIFF)
)
V.)
)
LARRY LAMONT WHITE)
)
DEFENDANT)

OPINION AND ORDER

This matter comes before the Court on the Defendant's Motion by counsel for Judgment Notwithstanding the Verdict and *pro se* Motion for a New Trial/Motion to Dismiss. The Commonwealth has filed a response applicable to both motions. Oral arguments were heard on September 8, 2014 and the issues now stand submitted.

The Defendant was tried by jury commencing on July 14, 2014 through July 28, 2014. He was found guilty of Murder and First Degree Rape in the death of Pamela Denise Armstrong. The jury recommended a twenty year sentence for First Degree Rape and Death

on the charge of Murder. Sentencing is now scheduled for September 26, 2014.

R. Cr. 10.24 states that: Not later than five (5) days after the return of a verdict finding a defendant guilty of one or more offenses, or after the discharge of the jury following their having not returned a verdict, a defendant who has moved for a directed verdict of acquittal at the close of all the evidence may move to have the verdict set aside and a judgment of acquittal entered, or for a judgment of acquittal. Likewise, if a defendant has been found guilty under any instruction to which at the close of all the evidence was not sufficient to support a verdict of guilty under that instruction, that a defendant may move that to that extent the verdict be set aside and a judgment of acquittal entered. A motion for a new trial may be joined with this motion.

R.Cr. 10.02 states that: (1) Upon motion of a defendant, the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice. Of trial was by the court without a jury, the court may vacate the judgment, take additional testimony an direct the entry of a new judgment. (2) Not later than ten (10) days after return of the verdict, the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a defendant, and in the order shall specific the grounds therefor." R. Cr. 10.06 provides that such a motion must be served no later than five (5) days after the verdict.

In support of his post-trial motions, the Defendant, by counsel, has made twenty-eight assignments of error.

1. The Court erred by failing to hold a competency hearing. The Court ordered an evaluation, but it was never carried out. The Defendant argues that the Court's refusal to hold a hearing violated his rights. However, unlike the case at bar, in *Pate v. Robinson,* 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 815 (1966) counsel made diligent efforts throughout the trial process to advise the Court on the defendant's competency issues. Indeed, counsel argues that the Defendant's refusal to participate in the sentencing phase could have been the result of some mental condition. However, this Court did not *refuse* to hold a hearing. As argued by the Commonwealth in its response, it is *not* mandatory. In *Padgett v. Commonwealth,* 312 SW 3d 336 (Ky. 2010) the Court held that there must be substantial evidence of record that the defendant is incompetent in order to require a hearing. The Commonwealth asserts that the Defendant's active participation in this case, by way of filing his own well-considered *pro se* motions, demonstrate that he was competent to stand trial. As stated in *Windsor v. Commonwealth,* 413 SW 3d 568 (Ky. 2010), only where there are reasonable grounds to question a defendant's competency is a hearing required. This Court did not err.

2. The Court erred by failing to recuse itself based on prior representation of the Defendant, see *Small v. Commonwealth,* 617 SW 2d 61 (Ky. App. 1961). It is the Defendant's position that he was convicted in that case and that the fact of that conviction was introduced during the sentencing phase herein, see *Woods v. Commonwealth,* 793 SW 2d 809 (Ky. 1990). Nevertheless, as asserted by the Commonwealth in its response, the previous conviction was not in controversy in *this* case and therefore recusal was not required, see *Matthews v. Commonwealth,* 371 SW 3d 743 (Ky. App. 2011). The Court finds the *Small, supra,* case to be factually distinguishable in that it involved a judge and former prosecutor who was to preside over the revocation of the sentence that he offered to the defendant as prosecutor. Likewise, the *Woods supra,* case is distinguishable since that case involved the previous conviction and formed the basis for the trial court's recusal.

3. The Court erred by permitting the Court to introduce evidence pursuant to KRE 404 (b). It is the Defendant's position that he was unavoidably prejudiced by the introduction of his previous Murder convictions, see *Clay v. Comonwealth,* (a drug case) 818 SW 2d 264 (Ky. 1991); *Commonwealth v. Ramsey,* (DUI case) 920 SW 2d 526 (Ky. 1996). As the Commonwealth noted in its response, this issue was thoroughly litigated prior to trial.

This Court stands by the propriety of its previous ruling and incorporates those authorities relied upon in its previous Opinion. The cases cited by the Defendant are distinguishable. Clay involves a drug conviction and Ramsey involves a DUI 4th. While the evidence of prior convictions was not proper in the guilt phase of the trial, it was proper in the sentencing phase. However, this is not the situation in the case at bar, since prior conviction evidence in this case is admissible only for the purpose of showing modus operandi and the jury was so admonished.

4. The Court erred by failing to allow the defense to voir dire the prospective jurors regarding his prior convictions. The case of *Hayes v. Commonwealth,* 175 SW 3d 574 (Ky. 2005), cited by the Defendant involves two separate issues. The previous convictions used in *Hayes* were, similar to convictions herein, for the purpose of showing motive, intent or plan and not to show guilt by demonstrating that the Defendant acted in conformity with bad character. Moreover, in *Hayes,* the defense sought to voir dire the jury about the defendant's refusal to testify and not about the effect of the prior convictions. As submitted by the Commonwealth, the extent of voir dire is in the sound discretion of the trial court, see *Pollini v. Commonwealth,* 172 SW 3d 418

(Ky. 2005); *Woodall v. Commonwealth,* 63 SW 3d 104 (Ky. 2001).

5. The Court erred by excusing jurors who had reservations about the death penalty but retaining others who favored the death penalty over a term of years. However, the Defendant has failed to identify any such biased jurors and therefore the Court is without a basis to evaluate the Defendant's claim. The Court has discretion to order a new trial where it is shown that the Defendant did not have a fair trial and bias of a juror is shown, see *Combs v. Commonwealth,* 356 SW 2d 761 (Ky. 1962). There has been no such showing herein.

6. The Court erred by failing to grant the Defendant's motion for a mistrial based on publicity the morning of trial. The Court gave the prospective jurors an admonition on this issue and no jurors who had preconceived ideas based on the news story have been identified, see *Wood v. Commonwealth,* 178 SW 3d 500 (Ky. 2005).

7. The Court erred by denying the Defendant additional peremptory challenges. Relying on the authority set forth in *Woodall v. Commonwealth,* 63 SW 3d 104 (Ky. 2001), the Commonwealth argues that the Defendant was given just as many strikes to exercise as the Commonwealth. Indeed, the challenges were allocated as set forth in R. Cr. 9.40 (1) and (2).

8. The Court erred by failing to sequester the jury between the guilt and sentencing phases. The Commonwealth notes that this matter is in the sound discretion of the trial judge, see *Bowling v. Commonwealth,* 942 SW 2d 293 (Ky. 1997). This is an issue of judicial discretion and the Court found no basis which would warrant restricting the jurors' liberty.

9. The Court erred by failing to suppress the fruits of the traffic stop that yielded the cigar butt used to obtain the Defendant's DNA. This issue was litigated prior to trial and the Court found that no basis for suppression. This Court stands by the propriety of its previous ruling and incorporates those authorities relied upon in its previous Opinion.

10. The Court erred by failing to dismiss the Indictment on speedy trial grounds. The Commonwealth notes that the case of *Dunaway v. Commonwealth,* 60 SW 3d 563 (Ky.) sets forth the factors to be considered by a trial court in determining whether dismissal based on failure to grant a speedy trial. These are: 1) the length of the delay; 2) the reason for the delay; 3) whether the right has been asserted; and 4) prejudice caused by the delay. The Commonwealth submits that all the delays herein have been the result of the Defendant's conduct in repeatedly terminating assigned counsel. This Court

stands by the propriety of its previous ruling and incorporates those authorities relied upon in its previous Opinion.

11. The Court erred by permitting the Commonwealth to introduce the victim's autopsy results through Dr. Mary Corey, although she was not the medical examiner at the time the autopsy was performed. The Commonwealth notes that Dr. Corey's qualifications pursuant to KRE 701 and 703 were not questioned at trial. The Court finds that the evidence was properly introduced.

12. The Court erred by overruling the Defendant's motion for a mistrial based on the testimony of Robert Grevious about the neighborhood where the victim's body was discovered. As argued by the Commonwealth, the Defendant cites no authority for this allegation of error. As in any case, the Court analyzes evidence based on the standards set forth in KRE 403. Based on this standard, the Court did not err.

13. The Court erred by overruling the Defendant's objection to the introduction of 1983 photographs of Pamela Armstrong's children. The Defendant asserts that it was not proper to introduce this type of evidence in the guilt phase. Victim humanization has long been recognized as a permissible basis for the introduction of such photos, see *Adkins v. Commonwealth,* 96 SW 3d 779 (Ky. 2003); *Love v. Commonwealth,* 55 SW 3d 816

(Ky. 2001). Also, as argued by the Commonwealth, these photos illustrate in a graphic way the reason that Pamela Armstrong's children are unable to remember facts and circumstances surrounding the crime.

14. The Court erred by failing to exclude evidence for which the Commonwealth had not shown the chain of custody. Such items include, the victim's panties, cuttings from the panties, the DNA of the Defendant, the rape kit, keys and identification. The Commonwealth argues that it need not show a perfect chain of custody, as long as there is persuasive evidence that the reasonable probability is that the evidence has not been altered, see *Helphenstine v. Commonwealth,* 423 SW 3d 708 (Ky. 2014). As asserted by the Commonwealth, any gaps in the chain of custody go to the weight of such evidence and not its admissibility.

15. The Court erred by failing to give a missing evidence instruction as to the lost food stamp manifest and TARC schedule from the crime scene. The Defendant contends that these items could be exculpatory as described in *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 215 (1963). *Sweatt v. Commonwealth,* 550 SW 2d 520 (Ky. 1977) is distinguishable in that it involved the identification of another as the assailant. Clearly, the case at bar is a closer call.

Pursuant to *Couthard v. Comonwealth,* 230 SW 3d 572 (Ky. 2007), such an instruction is required only where the failure to preserve the evidence is intentional and the evidence was potentially exculpatory. Although the Defendant contends that the evidence could have been exculpatory, there is no allegation that either law enforcement or agents of the Commonwealth intentionally disposed of it or otherwise allowed it to disappear.

16. The Court erred by preventing the Defendant from putting forth an "alternative perpetrator" defense by limiting his cross-examination of Detective Wilson regarding potential suspects and their criminal history. A criminal defendant has the right to present exculpatory evidence. However, the Court may infringe upon that right where the alternative theory is "unsupported, speculative or far-fetched." *Dickerson v. Commonwealth,* 174 SW 3d 451 (Ky. 2005). It is the Commonwealth's position that the door to such cross-examination was open, see *Moore v. Commonwealth,* 983 SW 2d 479 (Ky. 1998). The Court concludes that its ruling was proper, since there was no significant proof on the issue of an alternative perpetrator and additional questioning would have been a mere fishing expedition.

17. The Court erred by failing to direct a verdict of acquittal on the grounds that there was no direct evidence that he was involved in

Pamela Armstrong's shooting. There was no way to determine when the semen (DNA) was deposited on her underwear. There was no evidence of forcible compulsion. There was no evidence presented regarding the murder weapon. This Court stands by the propriety of its previous ruling.

18. The Court erred by permitting prosecutorial misconduct with regard to statements made in the Commonwealth's argument regarding the previous murders. Although the Court allowed the introduction of those convictions to show *modus operandi,* the Defendant asserts that the Commonwealth went farther, see *Osborne v. Commonwealth,* 867 SW 2d 484 (Ky. App. 1983). The Commonwealth denies exceeding the scope of the allowed use of the previous murders. There have been no citations to the record with regard to any specific instances of prosecutorial misconduct and the Court has no independent recollection that the convictions were used for any other purpose than to show a unique criminal signature.

19. The Court erred by permitting prosecutorial misconduct with regard to Roger Ellington's testimony. It is the Defendant's position that the Commonwealth used Ellington's testimony as a way to draw attention to the Defendant's decision *not to* testify. The Commonwealth indicates that it was at all times aware of its obligation to respect the

Defendant's right to remain silent, see *Ordway v. Commonwealth,* 391 SW 3d 762 (Ky. 2013).

20. The Court erred by permitting prosecutorial misconduct in the Commonwealth's opening statement when Mr. Balcer referred to the Defendant's "deadly works of art." The Commonwealth states that it is entitled to wide latitude in regard to closings, see *Brewer v. Commonwealth,* 206 SW 3d 343 (Ky. 2006). The Court finds that the prosecution did not exceed proper boundaries.

21. The Court erred by permitting prosecutorial misconduct in the sentencing phase by referring to the Defendant's "genocide." The Defendant argues that a mistrial should have occurred. The Commonwealth states that it is entitled to wide latitude in regard to closings, see *Brewer, supra.* The Court finds that the prosecution did not exceed proper boundaries.

22. The Court erred by permitting the Commonwealth to urge the jurors to consider the previous murders beyond the limited scope (i.e. modus operandi) ordered by the Court, see *Brewer, supra.* The Court finds that the prosecution did not exceed proper boundaries.

23. The Court erred by permitting prosecutorial misconduct by referring to the DNA found on

the pants. The Defendant asserts that the DNA was unidentifiable and certainly not his. The Commonwealth states that it is entitled to wide latitude in regard to closings, see *Brewer, supra.* The Court finds that the prosecution did not exceed proper boundaries.

24. The Court erred by accepting the jury's verdict when the jury did not find an aggravator. The jurors found that the Defendant committed "Rape" but did not find that the Murder was perpetrated "in the commission of the Rape." It is the Commonwealth's position that the jury's finding was not unconstitutional. The Commonwealth asserts that the jurors were properly instructed, see *Dunlap v. Commonwealth,* 435 SW 3d 537 (Ky. 2013).

25. The Court erred by permitting the Commonwealth to refer to Cleola Moore as a "cook," see *Moore v. Commonwealth,* 634 SW 2d 426 (Ky. 1982). The Commonwealth reiterates that it is entitled to wide latitude in regard to closings, see *Brewer, supra.* The cases cited indicate that the prosecutor should not express a personal opinion of a witness' character. However, in this case, the word "cook" is merely descriptive without any reflection on her character. The Court finds that the prosecution did not exceed proper boundaries.

26. The Court erred by permitting the Commonwealth from referencing the Defendant's previous statements without the Court's admonition. The Commonwealth states, once again, that it is entitled to wide latitude in regard to closings, see *Brewer, supra.* The Court finds that the prosecution did not exceed proper boundaries.

27. The Court's errors accumulated such that a new trial is necessary, see *Funk v. Commonwealth,* 842 SW 2d 476 (Ky. 1992). The Commonwealth asserts that cumulative error can only serve as the basis for a new trial where individual errors are substantial or prejudicial, see *Epperson v. Commonwealth,* 197 SW 3d 46 (Ky. 2006). The case at bar is distinguishable from *Funk,* which involved the admission of grisly photos, the broad use of a prior conviction and the withholding of exculpatory evidence.

28. The Court erred by failing to hold a hearing pursuant to KRS 532.130 to determine whether his IQ, as established in 1971, was sufficiently low to preclude the death penalty as a possible sentence based on the authority set forth in *Hall v. Florida,* 572 U.S._(2014). The Commonwealth notes that there was no pretrial motion to exclude the death penalty based on the level of the Defendant's intelligence. However, the Commonwealth argues that, based on *Hall,* it takes more than merely a showing of borderline

> intelligence to eliminate the death penalty. The Defendant has cited no other evidence regarding any impairment.

In support of the post-trial motions, the Defendant, *pro se,* has made seven assignments of error:

1. The Defendant argues that the Commonwealth failed to prove Rape as an aggravator. In *Brown v. Commonwealth,* 313 SW 3d 577 (Ky. 2010), the Court held that acquittal of the death penalty only occurs where the Commonwealth fails to show the *"existence* of an aggravator [Emphasis added]." While the verdict form does not state that the jury found the Defendant guilty of Murder "in the commission" of a Rape, it did find him guilty of Murder and Rape in the same time and place and with the same victim.

2. The Defendant argues that the Commonwealth failed to introduce evidence of sexual intercourse. His DNA was found *in* and on the victim. This evidence is clearly probative. The Defendant did not assert that he had consensual sexual relations with the victim. Therefore, it was permissible for the jury to infer that the DNA was forcibly injected into her. This Court did not err.

3. The Defendant argues that the Commonwealth failed to prove Murder. The jury was properly instructed under Instruction No. 1, that the Defendant "killed Pamela Armstrong by shooting her with a handgun; AND B. That in so doing, he caused the death of Pamela Armstrong

intentionally." In *Potts v. Commonwealth,* 172 S.W.3d 345 (Ky. 2005) the Court cited *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), wherein the United States Supreme Court stated that, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." The Commonwealth set forth evidence on each of the elements set forth in the Court's instructions to the jury and therefore, there has been no error as to either the Rape or Murder verdicts.

4. The Defendant argues that the Court's ruling permitting the use of KRE 404 (b) evidence in the form of the previous Murder convictions was prejudicial in spite of the Court's admonition not to consider it as substantive evidence of guilt. This issue was thoroughly litigated before trial, not once but twice. The prejudicial effect of the prior convictions was clearly outweighed by their probative value, KRE 403.

5. The Defendant argues that the Commonwealth, in its closing argument, should not have been permitted to urge the jurors to use their "common sense." As previously noted, the Commonwealth has wide latitude in regard to closing arguments, see *Brewer, supra.*

6. The Defendant argues that the Court's instruction on Rape was deficient pursuant to KRS 510.040 (1) (a), see *Yates v. Commonwealth,*

430 SW 3d 883 (Ky. 2014). This Court's Instruction No. 2 in the guilt phase of the trial indicates that the jury "must believe from the evidence, beyond a reasonable doubt" that the Defendant "engaged in sexual intercourse with Pamela Armstrong; AND B. That he did so by forcible compulsion." It is the Defendant's position that "lack of consent" is an essential element of the crime, without which he may not stand convicted. However, those words only appear in the statute in the alternative and as applicable to those incapable of consent because of their status as helpless or younger than 12. Therefore, they would not apply to this fact situation.

7. The Defendant argues that the sum of the cumulative error in the proceedings warrant a new trial pursuant to R. Cr. 10.26, see *Potts, supra.* This Court finds that there has been no "manifest injustice."

The decision as to whether or not to grant a new trial rests in the sound discretion of the trial judge, see *Pennington v. Commonwealth,* 220 SW 2d 761 (Ky. 1949). The Court having reviewed the arguments of the Defendant and his counsel, as well as the response of the Commonwealth, and having reviewed all cited authority as set out herein;

IT IS HEREBY ORDERED AND ADJUDGED that the Defendant's motion, by counsel, for a new trial and/or for judgment notwithstanding the verdict is DENIED.

IT IS FURTHER ORDERED that the Defendant's motion, *prose,* for a new trial and/or to dismiss is DENIED.

/s/ James M. Shake

JAMES M. SHAKE, JUDGE

JEFFERSON CIRCUIT COURT

DIVISION TWO

DATE:_____

Cc: Mark S. Baker

Mark Hall

Darren Wolff

APPENDIX F

JEFFERSON CIRCUIT COURT

DIVISION TWO (2)

JUDGE JAMES M. SHAKE

NO. 07-CR-4230

[Filed: August 4, 2014]

COMMONWEALTH OF KENTUCKY	)
	)
PLAINTIFF	)
	)
vs.	)
	)
LARRY LAMONT WHITE	)
	)
DEFENDANT	)

****

NOTICE

Please take notice that the defendant, through counsel, will make the following motion and tender the attached Order during the Court's regularly scheduled motion hour, on Monday, or as soon thereafter as counsel may be heard.

MOTION FOR NEW TRIAL ANDJUDGMENT NOTWITHSTANDING THE VERDICT

Comes the Defendant, Larry Lamont White, by counsel, and pursuant to RCr 10.02, 10.06, and 10.24, moves the Court to grant him a new trial, or, in the alternative, to grant him a judgment of acquittal notwithstanding the verdict. The grounds for this motion are set forth below. Specifically, the defendant was denied a fair trial and should be granted a new trial because:

1. The court entered an order requiring the defendant to be transported to KCPC to have a competency evaluation early in the case; however, to the best of the knowledge and belief of the undersigned counsel, there is no evidence in the record that a hearing on that evaluation ever took place. Competency hearings are mandatory and the court's refusal to conduct that hearing violates the defendant's right to a fair trial. *Pate v. Robinson,* 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed 815 (1966). Mr. White refused to participate in the sentencing and mitigation portion of his capital murder trial. This could very well have been a factor in his competency and a hearing prior to the start of the trial should have been conducted. Failure to do so violated his federal and state constitutional rights.

2. The court denied the motion requesting that Judge James M. Shake recuse himself from the proceedings. This motion was properly preserved in writing at the beginning of jury selection. The court denied the defendant's request on the grounds that the request was made untimely; however, despite the

repeated requests made by the defendant for the court to rule on the substance of the defendant's motion requesting recusal, the court refused to make those findings. A judge should disqualify himself in any proceeding where he has participated in previous proceedings concerning the same defendant to the extent that this impartiality may reasonably be questioned. *Small v. Commonwealth,* 617 S.W.2d 61 (Ky.App. 1961). In this case, Judge Shake represented the defendant in a jury trial for sexual abuse that occurred in 1981. The defendant was convicted and sentenced to three years for this conviction. This conviction and sentence was admitted during the sentencing portion of this indictment and was considered by the jury in their deliberations sentencing the defendant to death. See *Woods v. Commonwealth,* 793 S.W.2d 809 (Ky. 1990).

3. The trial court erred in allowing the jury to hear evidence of Mr. White's previous criminal conduct, including two previous murder convictions in the guilt/innocence phase of the trial. The court allowed the jury to hear this evidence pursuant to KRE 404(b) as evidence of *modus operandi,* or identity evidence. The effect on the jury hearing this evidence was unduly prejudicial to Mr. White and prevented him from receiving a fair trial in violation of his federal and state constitutional rights. This information should have been reserved for the sentencing portion of the trial, rather than during the guilt/innocence portion. "No reference shall be made to the prior offense until the sentencing phase of the trial, and this specifically includes reading of the indictment prior to or during the guilt phase." *Clay v. Commonwealth,* 818 S.W.2d

264, 265 (Ky. 1991). Failure to do so results in "unavoidable prejudice" to the defendant. Commonwealth v. *Ramsey,* 920 S.W.2d 526, 528 (Ky. 1996).

4. The trial court erred by not allowing the defendant to voir dire the jury panel regarding their ability to be fair and impartial upon hearing evidence of prior criminal convictions of Mr. White during the guilt/innocence portion of the trial. Mr. White requested that he be allowed to voir dire the jury as to whether they would be able to provide the defendant with a fair trial, and view him to be innocent, until proven guilty by the evidence presented by the Commonwealth, despite hearing evidence of his past criminal conduct. The defendant argued that the court's admittance of the other bad act evidence shifted the burden of proof from the Commonwealth to Mr. White; consequently, he should have been allowed to question the jurors prior to them being seated as jurors to ensure they could be impartial and not prejudiced by the evidence. "Part of the guarantee of a defendant's Sixth Amendment right to an impartial jury is an adequate voir dire to identify unqualified jurors. A voir dire examination must be conducted in a manner that allows the parties to effectively and intelligently exercise their right to peremptory challenges and challenges for cause." *Hayes v. Commonwealth,* 175 S.W. 3d 574, 584 (Ky. 2005), quoting *Morgan v. Illinois,* 504 U.S. 719, 729-30, 112 S.Ct. 2222, 2230, 119 L.Ed. 492 (1992). Additionally, based upon the court allowing the Commonwealth to present evidence of other bad act evidence, including previous criminal convictions, the jury should have been allowed to be questioned on

whether that evidence caused the prospective jurors to form an opinion as to the defendant's guilt.

5. The trial court excused jurors who indicated that they had reservations about the imposition of the death penalty and retained jurors who said they would tend to vote for the death penalty rather than a term of years. This was indicative of the unfair nature of the trial that the defendant received. The defendant filed a written motion prior to jury selection requesting that the court not allow this to happen. It happened.

6. The court failed to grant the defendant's motion for a mistrial based on the false newspaper article that was printed the morning of the trial. The article was printed in The Courier Journal on the day of opening statements and contained false and misleading information; Attached hereto as Exhibit A.

7. The court denied the defendant's request for additional preemptory strikes which he requested.

8. The trial court failed to sequester the jurors between the guilt/innocence findings and the sentencing portion of the trial. This failure left open the possibility that jurors or members of their family were exposed to and could have read a newspaper article or viewed a television report of the case and, therefore, were able to consider facts that were not presented to them in the trial of the case. The failure of the court to sequester the jury in addition to the possibility that the jurors were exposed to information that they did not obtain from the evidence presented during the trial, denied the defendant a fair trial in violation of his constitutional rights.

9. The trial court's failure to suppress the collection of the cigar butt during the traffic stop that occurred on February 21, 2006, as well as any evidence collected as a result of that stop and seizure, denied the defendant a fair trial. The factual and legal grounds requiring suppression of the evidence collected during the stop was addressed and set forth in the defendant's motion to suppress that was filed and litigated prior to trial.

10. The trial court's failure to grant the defendant's motion to dismiss the indictment based upon the violation of his constitutional right to a speedy trial.

11. The Commonwealth was allowed to present the testimony of the autopsy findings of Pamela Armstrong through Dr. Mary Corey although Dr. Corey was not the medical examiner that performed the autopsy on Ms. Armstrong.

12. The Court overruled the Defendant's motion for a mistrial when Mr. Robert Grevious was allowed to testify to the jury that following the June/July 1983 time period the neighborhood where he lived, and where Ms. Armstrong's body was found, became a bad neighborhood and went "to hell."

13. The Court overruled the defendant's objection to the Commonwealth being allowed to present a photograph of Pamela Armstrong's children, during 1983. Commonwealth's Exhibit 18 and 19. These photographs were introduced to enflame the passions of the jury and were not relevant to any fact that was at issue in the trial of the matter, nor did the evidence tend to prove any element of the offense that the defendant was charged with and indicted for. The

evidence was basically sentencing evidence that was allowed to be introduced during the guilt/innocence phase of the trial and was improper.

14. The Commonwealth did not adequately prove the proper chain of custody for the scientific evidence that was presented to the jury and allowed to be entered into evidence, including the evidence of the victim's panties, the cuttings taken from the panties, the DNA sample collected from the defendant, including the cigar butt and the buccal swab, the rape kit exhibits collected from Pamela Armstrong, the keys that were collected under the body of Pamela Armstrong, the photo identification/driver license of Pamela Armstrong collected at the scene, and the other evidence that was admitted by the court, objected to by the defendant, and considered by the jury.

15. The Court failed to give to the jury a missing evidence instruction. The defendant requested a missing evidence instruction based upon the lost food stamp manifest that Detective Wilson acknowledged he received and that was no longer available. Detective Wilson acknowledged that the information contained in the manifest would have been important and relevant to determine if other suspects may have been at the food stamp store with Ms. Armstrong on the day of her death. Additionally, the TARC bus schedule that was photographed at the scene but was not available at the trial of this matter. The failure of the Commonwealth to preserve this evidence constitutes a violation of the defendant's rights to exculpatory material. *Brady v. Maryland,* 373 U.S. 83, 87; 83 S.Ct. 1194, 1197; 10

L.Ed. 215 (1963); see also *Sweatt v. Commonwealth,* 550 S.W.2d 520 (Ky. 1977).

16. The Court would not allow the defendant to question Detective Wilson on the criminal histories of other potential suspects, including fathers of Ms. Armstrong's children, i.e. Roger Ellington, Lawister Robinson, etc . . . The court's denial of this type of evidence prevented the defendant from fully developing his theory of defense in violation of his constitutional due process rights, both federal and state. The inability of the defendant to adequately develop his defense, basically an "alternative perpetrator" defense, denied him a fundamental right protected by the federal and state constitutions. *Dickerson v. Commonwealth,* 174 S.W.3d 451 (Ky. 2005), quoting *Beaty v. Commonwealth,* 125 S.W.3d 196, 206-207 (Ky. 2003). This is especially so in this case based upon the number of potential suspects that had a potential motive and opportunity to commit the crime that the defendant was convicted of.

17. The defendant's motion for directed verdict should have been sustained as the Commonwealth presented no direct evidence that Mr. White was directly involved in the shooting of Pamela Armstrong. Strong evidence was presented that indicated that there was no possible way to determine when the semen and DNA was deposited into the victim's underwear. Additionally, there was no evidence presented of forcible compulsion to prove a rape. There was no evidence presented to prove a murder weapon or of that murder weapon having any connection to the defendant. Consequently, the defendant's numerous

motions for a directed verdict and a mistrial should have been sustained.

18. The prosecutor's argument to the jury during the guilt/innocence was improper because the argument referenced the previous murders of Deborah Miles and Yolanda Sweeney. The prosecutor's references to the other two murders violated the court's previous admonition to the jury that the evidence could only be used for *modus operandi. Osborne v. Commonwealth,* 867 S.W. 484 (Ky.App. 1993)(held that the misuse of evidence of limited admissibility can constitute reversible error.)

19. The prosecutor's argument to the jury during the guilt/innocence was improper. During the closing argument, the Commonwealth argued that Roger Ellington was interviewed by the jury during his testimony at the trial. The prosecutor walked onto the "witness stand" during these comments and informed the jury that Mr. Ellington was interviewed in open court, under oath. This reference was improper because it essentially was an indirect comment on the defendant's decision not to testify in violation of his Fifth Amendment right to remain silent. Additionally, it was improper bolstering of the credibility of a witness.

20. The prosecutor's opening statement during the sentencing portion of the trial was improper because it referred to the murders of Deborah Miles and Yolanda Sweeney as "the defendant's other two deadly works of art." Again, these sort of references were inflammatory and improper and caused the jury to consider that

evidence for more than the court authorized it to be used pursuant to KRE 404(b).

21. The defendant was denied a fair trial and should be granted a new trial, including a new sentencing hearing, based upon the improper argument of the prosecutor during the Commonwealth's argument to the jury during the sentencing portion of the trial. The prosecutor referred to the acts that Mr. White was convicted of as "genocide." This argument was improper and the mistrial that was requested by counsel should have been granted.

22. The prosecutor's references to the jury during the sentencing argument was improper because the prosecutor asked the jury to consider the evidence that the court had previously instructed them to consider solely for evidence of *modus operandi,* or identity, to fix their sentence. In this case, Mr. White was sentenced to death, not solely for the commission of the Pamela Armstrong murder but he was also resentenced for the murders of Deborah Miles and Yolanda Sweeney. In fact, the prosecutor's references to "genocide" and the prosecutor telling the jury that the defendant "deserved a gold medal for what he did" suggesting that the jury consider giving him a gold medal, rather than a silver or a bronze medal, suggested to the jury that they should and could punish Mr. White, not solely for the murder of Pamela Armstrong, but also for the other two murders that he had previously been convicted of and that he had already served his time for. These arguments were tantamount to the prosecution asking the jury "to send a message." This type of argument

has been considered and frowned upon in *Brewer v. Commonwealth,* 206 S. W .3d 343, 351 (Ky. 2006).

23. The prosecution continually made reference to the jury that the semen found on the victim's pants was the defendants. However, the evidence that was presented to the jury clearly illustrated, without any differing interpretation, that the semen that was found on the victim's pants was unidentifiable and no match to anyone's DNA was made, or could be made. Consequently, the Commonwealth's continued references to the semen on the pants constituted facts that were not in evidence. This error was preserved and requires a new trial be granted. See *Duncan v. Commonwealth,* 322 S.W.3d 81 (Ky. 2010), where court found that the prosecutor's depiction, in cross-examination and closing argument, of the DNA evidence as conclusively identifying the defendant when in fact the DNA expert testified that there was only a partial match, was fundamentally unfair and required reversal.

24. The defendant should be granted a new trial, including a new sentencing hearing, because the jury did not properly find an aggravating circumstance sufficient to support a death sentence. The statutory authority for a death sentence requires the fact-finder to find beyond a reasonable doubt that the murder was committed while the defendant "was in the commission of a rape." In this case, the jury simply found "RAPE." This was improper and violates the defendant's right to a fair trial. The finding was unconstitutionally vague and, consequently, the defendant deserves a new trial, and a new sentencing hearing.

25. The court refused to properly admonish the jury during the sentencing phase argument given by the prosecution. Specifically, the prosecution's reference to the defense witness, Cleola Moore, as a "cook." See *Moore v. Commonwealth,* 634 S.W.2d 426 (Ky. 1982)(the personal opinion of the prosecutor as to the character of a witness is not relevant and is not proper.) Additionally, the Commonwealth's reference to the crimes committed by Mr. White as "genocide" and the references to Roger Ellington telling the truth on the witness stand. These comments were improper, the court should have declared a mistrial, or at least admonished the jury as to the improper nature of the comments and instructed them not to consider the comments.

26. The numerous improper statements made by the prosecutor during closing arguments, both during the guilt/innocence, as well as the sentencing portion of the trial, made the entire proceedings fundamentally unfair and violated the defendant's due process rights pursuant to Section 2 of the Kentucky Constitution and the Due Process Clause of the 14th Amendment to the United States Constitution. As a result, the defendant's motion for a mistrial should have been granted. At the very least an admonition should have been provided by the court and, despite the defendant's objections and request, that admonition was not given.

27. In the event this court were to determine that each of the individual grounds for a new trial and/or judgment of acquittal is not sufficient standing alone to warrant a new trial, the cumulative error that was created due to each of these specific grounds constitute

a reason, in and of itself, sufficient to require the defendant receive a new trial. See *Funk v. Commonwealth,* 842 S.W.2d 476 (Ky. 1992).

28. The death sentence should have been removed from the jury as a possible punishment in this matter based upon the recent opinion of the United States Supreme Court in the case of *Freddie Lee Hall v. Florida,* rendered May 27, 2014.

The Court in *Hall v. Florida, supra,* made it more difficult for states to execute prisoners that claim an intellectual disability. The Court ruled that the State of Florida must apply a margin of error to IQ tests since medical guidelines permit IQ scores to reach as high as 75 based upon the margin of error that exists in the testing. The Court had previously ruled in *Atkins v. Virginia,* 536 U.S. 304 (2002), that a state cannot execute people with intellectual disabilities because it violates their Eighth Amendment rights against cruel and unusual punishment. Florida's intellectual disability statute created a threshold IQ score of 70 to define "intellectual disability" or "mental retardation" for the purposes of death penalty eligibility.

The Court in *Hall* indicated that a "(i]ntellectual disability is a condition, not a number." *Hall, supra.* As such, the Florida court will be required to consider the standard error of measurement when determining whether a defendant satisfies the clinical definition of intellectual disability and, therefore, protected from execution.

Kentucky's law is almost identical to the Florida statute that was ruled unconstitutional by the *Hall* court. KRS 532.130 states

> (1) An adult, or a minor under eighteen (18) years of age who may be tried as an adult, convicted of a crime and subject to sentencing is referred to in KRS 532.135 and 532.140 as a defendant.
>
> (2) A defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period is referred to in KRS 532.135 and 532.140 as a seriously mentally retarded defendant. "Significantly subaverage general intellectual functioning" is defined as an intelligence quotient (I.Q.) of seventy (70) or below.

Consequently, the same analysis used in the *Hall* opinion could, and should, be used in the case at bar based on previous testing that the Defendant, Larry Lamont White, has a history of testing that tests him with a seventy-six (76) IQ, which the tester indicated was *borderline* intelligence.

Curiously, the test that was performed on Mr. White was conducted in 1971. That testing additionally indicates that Mr. White received a head injury in 1967 from being hit by a car. This evidence must be heard and the Court must make a ruling to determine whether Mr. White is even eligible to receive a death sentence based upon his borderline intelligence testing

and evidence that he may have sustained a head injury during his childhood.

As such, the Defendant requests that the Court enter the attached order setting a hearing to determine whether Mr. White's IQ is in fact within the standard set by the United States Supreme Court in *Hall v. Florida, supra.* Additionally the Defendant requests that the Court determine that KRS 532.130, and the sentencing scheme set forth therein, is unconstitutional. Finally, the Defendant requests that the Court preclude the death penalty as a possible sentence that could be imposed against him in this matter.

WHEREFORE, the defendant moves the Court to grant him a new trial or judgment notwithstanding the verdict and also moves the Court to grant him a hearing on this motion.

Respectfully Submitted,

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Louisville, Kentucky 40202

BY */s/ Mark G. Hall*

CERTIFICATE OF SERVICE

I hereby certify that a true copy of here of has been served via U.S. Mail, upon the following persons on this the 4th day of August 2014:

Hon. Mark Baker
Assistant Commonwealth Attorney
514 West Liberty Street
Louisville, Kentucky 40202

/s/ Mark G. Hall
MARK G. HALL

APPENDIX G

JEFFERSON CIRCUIT COURT
DIVISION TWO (2)

JUDGE JAMES M. SHAKE

NO. 07-CR-4230

[Filed July 28, 2014]

COMMONWEALTH OF KENTUCKY	)
	)
PLAINTIFF	)
	)
vs.	)
	)
LARRY LAMONT WHITE	)
	)
DEFENDANT	)

****

MOTION TO EXCLUDE DEATH AS POSSIBLE PUNISHMENT BASED UPON DEFENDANT'S PREVIOUS BORDERLINE IQ TESTING AND RECENT OPINION OF SUPREME COURT IN *HALL V. FLORIDA*

Comes the Defendant, Larry Lamont White, by counsel, and hereby moves the Court to enter an Order precluding the death sentence as a possible punishment in this matter based upon the recent

opinion of the United States Supreme Court in the case of *Freddie Lee Hall v. Florida,* rendered May 27, 2014. (Opinion Attached in its entirety as Exhibit A.)

The Court in *Hall v. Florida, supra,* made it more difficult for states to execute prisoners that claim an intellectual disability. The Court ruled that the State of Florida must apply a margin of error to IQ tests since medical guidelines permit IQ scores to reach as high as 75 based upon the margin of error that exists in the testing. The Court had previously ruled in *Atkins v. Virginia,* 536U.S. 304 (2002), that a state cannot execute people with intellectual disabilities because it violates their Eighth Amendment rights against cruel and unusual punishment. Florida's intellectual disability statute created a threshold IQ score of 70 to define "intellectual disability" or "mental retardation" for the purposes of death penalty eligibility.

The Court in *Hall* indicated that a "[i]ntellectual disability is a condition, not a number." *Hall, supra.* As such, the Florida court will be required to consider the standard error of measurement when determining whether a defendant satisfies the clinical definition of intellectual disability and, therefore, protected from execution.

Kentucky's law is almost identical to the Florida statute that was ruled unconstitutional by the *Hall* court. KRS 532.130 states

> (1) An adult, or a minor under eighteen (18) years of age who may be tried as an adult, convicted of a crime and subject to sentencing

is referred to in KRS 532.135 and 532.140 as a defendant.

(2) A defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period is referred to in KRS 532.135 and 532.140 as a seriously mentally retarded defendant. "Significantly subaverage general intellectual functioning" is defined as an intelligence quotient (I.Q.) of seventy (70) or below.

Consequently, the same analysis used in the *Hall* opinion could, and should, be used in the case at bar based on previous testing that the Defendant, Larry Lamont White, has a history of testing that tests him with a seventy-six (76) IQ, which the tester indicated was *borderline* intelligence.

Curiously, the test that was performed on Mr. White was conducted in 1971. (Attached as Exhibit B.) That testing additionally indicates that Mr. White received a head injury in 1967 from being hit by a car. This evidence must be heard and the Court must make a ruling to determine whether Mr. White is even eligible to receive a death sentence based upon his borderline intelligence testing and evidence that he may have sustained a head injury during his childhood.

As such, the Defendant requests that the Court enter the attached order setting a hearing to determine whether Mr. White's IQ is in fact within the standard set by the United States Supreme Court in *Hall v.*

Florida, supra. Additionally the Defendant requests that the Court determine that KRS 532.130, and the sentencing scheme set forth therein, is unconstitutional. Finally, the Defendant requests that the Court preclude the death penalty as a possible sentence that could be imposed against him in this matter.

Respectfully Submitted,
Mark G. Hall
119 S. 7th Street 4th Floor
Louisville, Kentucky 40202
(502) 589-0761
(502) 584-0656 Fax

Darren Wolff
2615 Taylorsville Road
Louisville, Kentucky 40202

BY /s/Mark G. Hall

CERTIFICATE OF SERVICE

I hereby certify that a true copy of hereof has been served via hand delivery, upon the following persons on this the 28th day of July 2014:

Hon. Mark Baker
Assistant Commonwealth Attorney
514 West Liberty Street
Louisville, Kentucky 40202

/s/ Mark G. Hall
MARK G. HALL

APPENDIX H

May 21,st 2019

ANDY BESHEAR
Attorney General of Kentucky
1024 Capital Center Drive
Frankfort, Kentucky 40601

RE: White v. Commonwealth, 586 U.S. (2019)
2014-SC-000725; On Appeal from Jefferson County Circuit Court, 2007-CR-004230

Dear Mr. A. Beshear:

I am writing this letter in regard to the brief that I received from Jeffrey A. Cross and Emily B. Lucas, regarding "Intellectual Disability."

I first like to say that this was something filed without my knowledge and that these are false merits. I was never apprised of existent litigation and had not until here lately received any copies of this litigation about me being retarded, this news was very astonishing to me.

DPA, Ms. Susan Jackson Balliet, and Erin Hoffman Yang was appointed to file my direct appeal by Mr. Timothy G. Arnold knowing that Ms. Balliet is the wife of one of the Jefferson County prosecutors working in that office which to me is a conflict, and she was the one who filed this cert. with Erin H. Yang. After it was filed Ms. Balliet retired and Ms. Schmidt replaced her.

Once my direct appeal was sabotage I did not want any more help from Susan or Erin Yang and I thought that I made that clear, but they went behind my back and made sure I would not get a fair appeal, and all I want is a fair opportunity for post-conviction 11.42, but my lawyers cannot start because of this "retarded foolishness."

After reading Mr. Cross's brief I feel that he actly understand my view point because if given the chance I would argue the same way, and I can't see how Susan and Erin are now psychologies instead of lawyers. Sir, I have been misrepresented from trial throughout my whole proceeding, and I was not fully represented by Ms. Balliet or Yang.

On July 28, 2014 I never filed anything because after sitting through a whole trial of no evidence and being convicted I was not going in another or continue frame up.

I just want Erin H. Yang and Kathleen Schmidt removed so that I can try and prove my innocence, because right now this is a miscarriage of justice the way I am being treated. I just want to heard while I have been misrepresented by D.P.A. I do believe that its your duty to make sure that I am fairly represented and I was not.

Sincerely

Larry Lamont White

APPENDIX I

SUPREME COURT OF KENTUCKY

CASE NO. 2014-SC-725-MR

[Filed July 1, 2019]

LARRY LAMONT WHITE	)
	)
APPELLANT	)
	)
V.	)
	)
COMMONWEALTH OF KENTUCKY	)
	)
APPELLEE	)

* * * * * *

MOTION TO WITHDRAW APPEAL COUNSEL FOR THE FAILURE TO INFORM THE MAIN PERSON ABOUT THE SUBSTANCE OF THIS CERTIORARI, BUT MISLEAD ME

Comes now the appellant LARRY LAMONT WHITE, pro se, and respectfully moves this Honorable Court to please grant appellant motion and allow appellant to proceed with his other chore or avenue which is my post-conviction team.

I never authorize these attorney's to label me guilty, because I'm not guilty of this crime.

The question presented to this court is whether these attorney's acted in the best interest of the client by pleading him guilty of a crime that he never committed, this is a serious issue they have stated to the U.S. Supreme Court and back to this court where I did not receive a favorable ruling.

This was not their right to make a plea for me without my knowledge, and please don't forget Susan Balliet should not have been placed on my appeal any way. I don't understand why nothing is being said about this conflict of interest, because of this conflict is why I am being put in this situation today.

I am a layman of the law, but I know that I have a right to a direct appeal which my appeal was sabotage by Ms. Balliet for Mr. Balliet one the jefferson county prosecutor the other appointed as appellant's attorney. I can see that the six amendment was very much violated here in WHITE v. Commonwealth, 2014-SC-725-MR, I really should receive a do over, but since I was appointed prosecutors instead of defense attorney's I am asking in so many words for help from this Court to make fair, as I've stated before my situation is a miscarriage of justice.

These attorney's in their brief also criticize my way of filing motion's I don't have any currency to purchase a typewriter do that make me a retard?

When I have prosecutor's disguising as defense attorney's, some one needs to look into these attorney's, because Susan J. Balliet and Erin H. Yang violated my six amendment right, because I never had the

assistance of counsel for my defence at trial or direct appeal.

WHEREFORE, the appellant asks this Court to take the words of mine and not allow this intellectual disability issue to stand. I am asking this Court to dismiss the issue, because it was argued without my approval and the law states that these attorney's are my assistance therefore they were obligated to inform appellant of their plan to cross me out.

Respectfully submitted
Larry L. White
Appellant of this case

I am asking this court clerk to please send copied to each individual that should have one, I thank you very much.

NOTICE AND CERTIFICATE OF SERVICE

On this 24th day of June, 2019, this document was filed in the office of the clerk of the Supreme Court.

APPENDIX J

KENTUCKY SUPREME COURT

CASE NO. 2014-SC-000725

[Filed July 5, 2019]

LARRY LAMONT WHITE	)
	)
APPELLANT	)
	)
V.	)
	)
COMMONWEALTH OF KENTUCKY	)
	)
APPELLEE	)

RESPONSE IN OPPOSITION
OF DEFENSE COUNSEL

* * * * * *

Comes now the real party in interest LARRY LAMONT WHITE, pro se, and asking this court to please grant my wishes in this proceeding.

After reading the motion of Ms. Yang and Ms. Schmidt there is a clear understanding of conflict of interest between DPA counsel and myself, because everything they are filing is against my wishes, but they continue to say that I am in agreement with them and I am not, it was my position to write the Attorney General ANDY BESHEAR in the first place, because

its his duty to make sure that justice is faithfully carried out in this Commonwealth.

Like I stated in the beginning of these proceedings the DPA appointed Susan J. Balliet and Erin H. Yang to represent me knowing that Susan and John Balliet were husband and wife, John represent the Jefferson County prosecution office and Susan, represent DPA. She should not have been appointed to my case.

My direct appeal was sabotage by Susan and Ms. Yang and I pray that they are not allow to continue this injustice. Because I am black don't mean that I'm retarded, give me the same standard of the law as everybody else, I don't know why I am perceived in this manner. I am innocent of these charges and don't understand where this intellectual disable "foolishness" come from, they are trying or have toss my real issue aside, instead of representing me like they do their white clients.

The Commonwealth never inserted themselves into anything. I wrote them asking that these DPA attorney's be stopped from pleading me guilty of these charges, my plea was not guilty and how these DPA direct appeal lawyers can now plead me guilty?

They are not entitle to write the court and say that I'm guilty its up to the client, and for Susan, Yang and Schmidt to go behind my back and tell the U.S. Supreme Court that I am guilty is a miscarriage of justice, I did not commit this crime and if it takes reviewing my whole case then I am asking that it be done.

The Commonwealth has also failed me with their responsibility to be the chief law officer of the state and before the direct appeal took place the assistance attorney general should had properly reviewed all trial tapes, pretrial, Suppression hearing which would have revealed error throughout the trial and the trial was design to deny me a fair trial.

Last but less, the Sixth Amendment to the Federal Constitution guarantee the accused in a criminal prosecution "the assistance of counsel" for his/her defense, which means effective assistance, Gideon v. Wainwright, 572 U.S. 335. "Assistance," aide, help not take control this ordinarily refers to employee whose duties are to help his client, to whom the attorney's must look for authority to act, which means that Susan and Erin or Schmidt acted on their own without my approval.

WHEREFORE, the Appellant opposes the motion filed by DPA attorney's Erin H. Yang and Kathleen K. Schmidt on writ of certiorari and motion to response in opposition be dismiss and that motion for the Commonwealth be granted. Appellant is more than able to make my own decision.

I pray that this Honorable court please grant this pro se motion so appellant can move on to prove my innocence, something Ms. Yang or Schmidt has failed to do repeatedly in this matter.

Respectfully submitted
Larry L. White

APPENDIX K

COMMONWEALTH OF KENTUCKY

KENTUCKY SUPREME COURT

CASE NO. 2014-SC-000725-MR

[Filed August 16, 2019]

LARRY LAMONT WHITE	)
	)
APPELLANT	)
	)
V.	)
	)
COMMONWEALTH OF KENTUCKY	)
	)
APPELLEE	)

APPELLANT'S RESPONSE TO THE DPA'S MOTION ON TRYING TO SPEAK FOR ME

* * * * * *

Comes now appellant LARRY LAMONT WHITE, pro se, and respectfully moves this Honorable Court to allow my voice to be heard.

As stated before my United State Constitutional rights has been violated by the DPA, Stating as Following:

1.) Jefferson Circuit Court put in the request for DPA to appoint counsel for my direct appeal in which

I was framed of this murder and rape which was never proven, (The Murder or Rape) at trial.

2.) Mr. Timothy Arnold took it upon himself to appoint Susan J. Balliet the wife of John Balliet who is a Jefferson County Commonwealth attorney who works hand and hand with Mark Baker the individual who frame me of this murder and rape that I did not commit, and Susan Balliet made sure that I did not receive a reveral which I should have received.

This is clearly a conflict between this DPA and myself, and after Susan J. Balliet sabotage my direct appeal, she put together this intellectual disability foolishness that we are talking about right now, so what Susan did is still continuing. This is why the conflict will always exist as long as Timothy Arnold is a director of DPA.

4.) As for the way Mr. Arnold want to twist the motion it all comes down to him appointing Susan J. Balliet to represent me on direct appeal. Erin H. Yang help Susan sabotage my direct appeal and if I did want new counsel to represent my case it should be permitted, and not by DPA.

5.) If Mr. Arnold was trying to be fair, it seem that he would want to make it right by any means necessary, but instead he's making arguments like I should be happy about what he did in destorying my life.

6.) If you, (which I know you don't) have information that can help you to state your claim better then let everyone hear it, because Susan and Yang only spoke with me at most three times since they were appointed to my case and all Susan did was lied to me I knew that

she wasn't any good and Yang just set quiet and when she was asked a question she would give a false answer. I never trust them and if I knew that Susan was the wife of any one in the prosecution office I would have done just what I'm doing right now, to stop DPA from representing me at first.

7.) You, Mr. Arnold have sabotage my case enough, I am on death row for a crime that I did not commit and thanks to you I can't prove my case until I am dead and you have the guts to try and twist everything on me.

Well, this is the way that I feel it should go, I am waiving my attorney client confidential so you can tell this Honorable Court what you feel they should know, because like the Commonwealth has stated, I will never participate in anything that deals with the DPA, its as simple as that.

WHEREFORE: For the foregoing reasons, Appellant asks that this court deny anything that the Department of Public Advocacy has filed relating intellectual disability and conflict, I pray that this Honorable court deny all of their motions at this time.

Respectfully submitted
Larry L. White

LARRY LAMONT WHITE
KENTUCKY STATE PENITENTIARY
266 WATER STREET
Eddyville, KENTUCKY 42038

NOTICE

This response will be filed in the Kentucky Supreme Court clerk office on Monday, August 12th 2019.

APPENDIX L

KENTUCKY SUPREME COURT

CASE NO. 2014-SC-725-MR

[Filed January 24, 2020]

LARRY LAMONT WHITE	)
	)
APPELLANT	)
	)
V.	)
	)
COMMONWEALTH OF KENTUCKY	)
	)
APPELLEE	)

MOTION ASKING THIS HONORABLE COURT TO RULE ON THE INTELLECTUAL DISABILITY ISSUE

Comes the appellant, LARRY LAMONT WHITE, suo nomine sui juris and request this Honorable Court to please make a ruling on this issue of "Intellectual Disability" and "The conflict of interest," with the DPA, because after all how can this agency be trusted when they have cheated me before, and now in this court going against my wishes.

Since this matter has been in this court DPA has not had any contact with appellant, which Mr. Timothy Arnold just happen to be in charge of, now I have not heard anything from post-conviction attorney's that

was appointed to represent appellant, this has stopped since this matter has been going on. With this being said I am asking also that this court please appoint "pro bono" representation in all further legal proceedings because appellant do not have any confidence in the DPA to make any more appointments in my case.

Mr. JEFFREY A. CROSS has been remove from this matter and I have not been enlighten of his replacement.

Its really something when the appellant rely on the Commonwealth rather than the DPA.

WHEREFORE: Appellant pray that this Honorable Court grant the motion that DPA attorney's can't force appellant to accept something not in appellant's best interest. I am not suppose to be on death row.

Submitted by

Larry L. White