KENTUCKY SUPREME COURT

Case No. 2014-SC-725-MR

LARRY LAMONT WHITE — **APPELLANT**

v.

Appeal from Jefferson Circuit Court
Hon. James M. Shake, Judge
Indictment No. 07-CR-4230

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth of Kentucky

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CERTIFICATE OF SERVICE

I certify the appellate record was not withdrawn from the Clerk of this Court for the preparation of this brief, and a copy of this brief was delivered on May 6, 2019, to Annie O'Connell, Judge, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202 (U.S. mail); Tom Wine, Esq., Commonwealth's Attorney, 514 West Liberty, Louisville, Kentucky 40202 (email); and Kathleen Schmidt, Esq. and Erin H. Yang, Esq., Department of Public Advocacy, 5 Mill Creek Park, Section 100, Frankfort, Kentucky 40601 (state messenger-mail).

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STATEMENT CONCERNING CITATIONS TO THE RECORD

The Commonwealth's video record citations will conform to CR 98.

When citing court filing transcripts, the citation format will be "TR[volume number], [page number]."

When citing the appellate briefs filed by the parties in this Court, the citation formats will be "[Color] brief, [page]," *e.g.*, Blue brief, p. 52.

Finally, unless indicated otherwise all discovery material will be cited as "Discovery, [page]" with the page number being the Bates number located in the lower right corner of the page. With some discovery pages, the Bates number is difficult to read because the number is red on a black background.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

In this criminal case 61-year old[1] Appellant, Larry L. White, appeals from the Jefferson Circuit Court judgment memorializing his convictions for rape and murder as well as his sentences of 20 years and death, respectively.

The United States Supreme Court having vacated this Court's unanimous opinion and remanded the case for further proceedings, this supplemental brief has been filed to address the limited remand issue of *Moore v. Texas*, 137 S.Ct. 1039 (2017), and its application to White's claim the trial judge erred by "failing to allow further investigation and conduct a hearing on intellectual disability."

1.0 Brief Procedural History.

1.1 Jefferson Circuit Court.

On July 28, 2014 – *i.e.*, the last day of trial – White filed a motion seeking to preclude imposition of the death penalty based on his alleged intellectual disability.[2]

In support, White looked to his 1971 IQ score of 76 and the Supreme Court's decision in *Hall v. Florida*[3] – rendered two months earlier on May 27, 2014 – which rejected a Florida law prohibiting further exploration of intellectual disability if a defendant had an IQ score of 70 or above.[4] White, then in his mid-50s, also noted "he may have sustained a head injury during his childhood."[5]

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1 TR6, p. 847 (White was born March 30, 1958).

2 TR5, pp. 702-800.

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

4 TR5, pp. 702-800; *Hall v. Florida*, 134 S.Ct. 1986, 1990 (2014) ("Florida law defines intellectual disability to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.").

5 TR5, pp. 702-04.

The trial judge, without an evidentiary hearing, denied White's motion.[6]

1.2 Kentucky Supreme Court – Part 1.

Before this Court, White argued the trial judge violated his constitutional rights by not allowing "further investigation" and "a hearing on intellectual disability."[7] To support his claim, White began by addressing why he raised this issue so late and suggested (with no citation to the record) that he may have denied or masked his symptoms such that his trial counsel were unaware of his condition "until late in the proceedings."[8] He also noted, again without record citation, that "[i]t was not trial attorney strategy to fail to present this claim 30 days pre-trial."[9]

White also maintained that before *Hall* his intellectual disability claim "was not strong" and "[w]hen *Hall* changed the definition of ID by requiring allowance for margin of error and deficits in adaptive behavior for a person with an IQ over 70, it was a sea change that rendered White's ID claim much more viable."[10] He also argued,

> Arguably White was not on notice that he had a viable ID claim until *Hall* was decided. Trial started on 7/14/14. To meet the 30 day deadline in KRS 532.135(1), White would have had until 6/14/14, less than three weeks after *Hall* was decided. This was not enough time to investigate and present evidence regarding White's deficits in adaptive behavior to supplement the existing proof, which included his 76 IQ.[11]

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6 *See* TR6, p. 814 (paragraph 28) & 816-29 (paragraph 28).

7 Red brief, pp. 117-22.

8 Red brief, p. 118 ("But ID is a status that a client may deny or mask, and a client's ID may not become apparent to counsel until late in proceedings. By demanding a hearing before sentencing, White acted in time to avoid prejudice to the Commonwealth and raised an effective challenge to the 30-day requirement.").

9 Red brief, p. 119.

10 Red brief, p. 120.

11 Red brief, p. 120.

In response, the Commonwealth noted White did not raise his intellectual disability claim until the end of trial and that it was prompted not by any real belief that he is intellectually disabled, but instead by the rendering of *Hall* and the desire to add fuel to the endless conflagration that is capital litigation.[12]

Considering White's 76 IQ score as well as the *Hall* decision, this Court concluded the trial judge did not err in his handling of the intellectual disability claim:

> 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*, trial courts must also adjust an individual's score to account for the standard error of measurement. As stated in *Hall*, the standard error of measurement's plus or minus 5 points.
>
> 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. 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." 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.[13]

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12 Blue brief, pp. 108-14 ("White's trial counsel clearly knew from interacting with him that he does not suffer from an intellectual disability and they filed the intellectual disability motion only because of *Hall* and to create yet another claim for this Court to chew on – not because they had any concern White is intellectually disabled").

13 *White v. Commonwealth*, 544 S.W.3d 125, 152-53 (2017) (citations omitted; text reformatted), vacated by *White v. Kentucky*, 139 S.Ct. 532 (2019).

This Court also rejected White's effort to lower his IQ score even further via the "Flynn Effect" and noted there was "ample evidence" of White's "mental acumen."[14]

1.3 United State Supreme Court.

White then sought a writ of certiorari from the United States Supreme Court with respect to this Court's rejection of his intellectual disability claim.[15]

In January 2019, the Supreme Court granted White's petition, vacated this Court's opinion, and remanded the case to this Court for further consideration in light of *Moore*:

> 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).[16]

Three justices dissented, however, noting *Moore* was rendered almost five months before this Court rendered its opinion.[17]

1.4 Kentucky Supreme Court – Part 2.

Following the Supreme Court's directive, on March 8, 2019, this Court instructed the parties to file supplemental briefs addressing the application of *Moore*.

2.0 The Trial Judge Properly Rejected White's Intellectual Disability Claim.

Even though this Court presumably was aware of and considered *Moore* when deciding White's intellectual disability claim in 2017,[18] the Supreme Court has directed this

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14 *White v. Commonwealth*, 544 S.W.3d 125, 152-53 (2017), vacated by *White v. Kentucky*, 139 S.Ct. 532 (2019).

15 *Larry Lamont White v. Kentucky*, 17-9467.

16 *White v. Kentucky*, 139 S.Ct. 532 (2019).

17 *White v. Kentucky*, 139 S.Ct. 532 (2019).

18 *Moore* was rendered on March 28, 2017, while this Court rendered its opinion on August 24, 2017 (and then modified it on March 22, 2018).

Court to do it again for a reason the nation's highest court did not specify. Following this directive, however, should not yield a different result.

No matter if one considers White's one valid IQ score by itself (even after a five-point adjustment required by *Hall*) or with the limited proof of alleged adaptive deficits he submitted at trial, the trial judge correctly declined to stop the trial and hold an evidentiary hearing on the intellectual disability claim. That is, the scant information White put before the trial judge failed to raise a reasonable doubt as to his intellectual disability and White's failure ended the matter. Therefore, no error occurred and the judgment should be affirmed (again).

2.1 White Failed to Present Sufficient Proof of Intellectual Disability to Warrant a Hearing.

In *Moore*, the Supreme Court set forth the "three core elements" of the "generally accepted, uncontroversial" diagnostic definition of intellectual disability:

> (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 [SEM]";
>
> (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.[19]

"In determining the significance of adaptive deficits, clinicians look to whether an individual's adaptive performance falls two or more standard deviations below the mean in

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[19] *Moore v. Texas*, 137 S.Ct. 1039, 1045 (2017) (citations omitted).

any of the three adaptive skill sets (conceptual, social, and practical)."[20] This definition is significant since a capital offender deemed intellectually disabled cannot be executed.[21]

Not long after *Moore* was rendered, this Court decided that Kentucky's intellectual disability law was unconstitutional.[22] In *Woodall* this Court ruled that Kentucky courts must now follow the dictates of *Moore*:

> We now conclude and hold that any rule of law that states 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, is unconstitutional.
>
> Courts in this Commonwealth must follow the guidelines established by the U.S. Supreme Court in *Moore*, which predicate a finding of intellectual disability by applying prevailing medical standards.
>
> Because prevailing medical standards change as new medical discoveries are made, routine application of a bright-line test alone to determine death-penalty-disqualifying intellectual disability is an exercise in futility.[23]

This Court's declaration notwithstanding, in the same opinion it noted *Moore* was not the model of clarity for evaluating intellectual disability claims and that *Moore* represented a "better, but not much clearer, guidance" and that this "guidance" was not "crystal-clear."[24] Recognizing the Supreme Court has apparently sanctioned the use of a capital offender's SEM-adjusted IQ score as a preliminary screening mechanism for intellectual disability claims and at the same time has suggested such score cannot be the "sole

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20 *Moore v. Texas*, 137 S.Ct. 1039, 1046 (2017).

21 *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

22 *Woodall v. Commonwealth*, 563 S.W.3d 1, 6 (Ky. 2018) (ruling KRS 532.130(2) unconstitutional).

23 *Woodall v. Commonwealth*, 563 S.W.3d 1, 6 (Ky. 2018) (text reformatted; footnote omitted).

24 *Woodall v. Commonwealth*, 563 S.W.3d 1, 4-5 (Ky. 2018).

factor" in determining whether an offender has an intellectual disability, this Court identified two things which it deemed "clear":

> Two things are clear, however: 1) regardless of some of the statements the U.S. Supreme Court has made, the prevailing tone of the U.S. Supreme Court's examination of this issue suggests that a determination based solely on IQ score, even after proper statistical-error adjustments have been made, is highly suspect; and 2) prevailing medical standards should be the basis for a determination as to a defendant's intellectual disability to preclude the imposition of the death penalty.[25]

Attempting to provide its own guidance to Kentucky circuit courts, this Court first highlighted the three-prong intellectual disability test set forth in *Moore* and then emphasized "prevailing medical standards should always take precedence in a court's determination" of intellectual disability.[26]

Unfortunately, this Court has yet to have a chance to clarify its *Woodall* guidance.

Despite the *Woodall* opinion's changes to Kentucky law, there are three points of law it left untouched and that are especially relevant to this case.

First, a capital offender "still bears the burden of proving intellectual disability by a preponderance of the evidence."[27]

Second, not every capital offender is entitled to an intellectual disability hearing.[28]

And third, before being entitled to an evidentiary hearing on his intellectual disability claim a capital offender must make "a *prima facie* showing that there is a reasona-

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25 *Woodall v. Commonwealth*, 563 S.W.3d 1, 4-6 (Ky. 2018).

26 *Woodall v. Commonwealth*, 563 S.W.3d 1, 6-7 (Ky. 2018) (footnote omitted).

27 *Woodall v. Commonwealth*, 563 S.W.3d 1, 6 n. 29 (Ky. 2018).

28 *White v. Commonwealth*, 500 S.W.3d 208, 215 (Ky. 2016) ("To summarize succinctly, we do not hold today that because of *Hall* every inmate in Kentucky under the sentence of death is entitled to an evaluation or a hearing on the issue of serious intellectual disability"), abrogated on unrelated grounds by *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018).

ble basis to believe that [he] suffers from a serious intellectual disability."[29] Put differently, and consistent with Supreme Court precedent,[30] a capital offender must produce proof creating a reasonable doubt as to whether he is intellectually disabled.[31]

2.1.1 White's IQ scores.

On February 3, 1971, when White was just 12-years old, he was administered the Wechsler Intelligence Scale for Children (WISC) and his full-scale IQ was determined to be 76.[32] Accounting for the five point SEM as mandated by *Hall*, the range of White's IQ score is 71 to 81.[33]

Looking to *Moore* and *Woodall*, the low end of White's IQ range did not warrant an evidentiary hearing to consider other proof of his alleged intellectual disability. In the *Moore* opinion the Supreme Court noted,

> Moore's score of 74, adjusted for the standard error of measurement, yields a range of 69 to 79, as the State's retained expert acknowledged. Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning.[34]

Because White's SEM-adjusted low end IQ score did not "fall[] at or below 70," the trial judge did not err by refusing "to move on to consider [White's] adaptive functioning." As

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29 *White v. Commonwealth*, 500 S.W.3d 208, 215 (Ky. 2016), abrogated on unrelated grounds by *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018).

30 *Brumfield v. Cain*, 135 S.Ct. 2269, 2276 (2015) ("Like Brumfield, we do not question the propriety of the legal standard the trial court applied, and presume that a rule according an evidentiary hearing only to those capital defendants who raise a 'reasonable doubt' as to their intellectual disability is consistent with our decision in *Atkins*").

31 *Wilson v. Commonwealth*, 381 S.W.3d 180, 186 (Ky. 2012).

32 TR5, p. 773.

33 *See Hall v. Florida*, 572 U.S. 701, 713 (2014).

34 *Moore v. Texas*, 137 S.Ct. 1039, 1049 (2017) (citations omitted).

this Court recognized in *Woodall*, White's adjusted IQ score did not pass the "preliminary inquiry" and, therefore, consideration of other proof was rightfully foreclosed.[35]

Further, White's contention that the Flynn Effect should be used to lower his score even more should be rejected.[36] In its now vacated opinion, this Court correctly noted that the Supreme Court has never held this effect must be used to lower an IQ score in order to cross the threshold necessary to warrant an evidentiary hearing.[37] Indeed, no Supreme Court opinion mentions the term "Flynn Effect" including the one opinion the Supreme Court directed this Court to consider on remand.[38] And despite this Court's suggestion in *Woodall* that the Flynn Effect could be of use in the intellectual disability determination, this Court did not hold a capital offender can stack the SEM with the Flynn Effect to doubly lower his score and thereby gain an evidentiary hearing.[39] Unless and until the Supreme Court holds the Flynn Effect must be considered during the preliminary inquiry process as to whether an evidentiary hearing is warranted, as it did in *Hall* with the SEM, this Court should refrain from doing so.[40]

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35 *Woodall v. Commonwealth*, 563 S.W.3d 1, 4-5 (Ky. 2018) ("It is also true that the U.S. Supreme Court seems to suggest that a defendant's IQ score, after adjusting for statistical error, acts as the preliminary inquiry that could foreclose consideration of other evidence of intellectual disability, depending on the score").

36 Red brief, pp. 121-22.

37 *White v. Commonwealth*, 544 S.W.3d 125, 152-53 (2017), vacated by *White v. Kentucky*, 139 S.Ct. 532 (2019).

38 *Moore v. Texas*, 137 S.Ct. 1039 (2017).

39 *Woodall v. Commonwealth*, 563 S.W.3d 1, 7 n. 31 (Ky. 2018) ("For example, in these types of cases, experts frequently testify as to the impact of the 'Flynn Effect,' which is apparently a recently discovered phenomenon that impacts a defendant's IQ score. These are the types of considerations, if proven to be prevailing medical standards, that should guide courts in determining whether an individual is constitutionally ineligible for the death penalty due to intellectual disability.").

40 *See White v. Commonwealth*, 500 S.W.3d 208 (Ky. 2016) ("We have long been mandated to follow the dictates of the U.S. Supreme Court concerning the trial and imposition of sen-

As for the 73 IQ score in the record White may refer to in his supplemental brief, that score stemmed from the multiple-choice Otis Quick-Scoring Mental Ability Test (Beta) also administered when he was 12-years old.[41] The group-administered Otis test, however, is both unreliable and unacceptable for purposes of determining intellectual disability.[42]

According to four professionals who routinely represent capital offenders,[43] "only individually administered, full-scale IQ tests like the Wechsler Scales and the Stanford-Binet Intelligence Scales have been identified as 'gold standard' measures for accurately and reliably determining global intelligence."[44] Citing both the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and other sources, these professionals further note that group-administered tests do not produce valid measures of intelligence:

> The clinical literature is clear that only global measures of intelligence are acceptable for making a diagnosis of intellectual disability.
>
> Group administered tests, by contrast, do not produce valid measures of full-scale, global intelligence.
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> Rather, they are (generally) pencil-and-paper, multiple-choice tests that are typically "self-administered," meaning the test-taker works through a test

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tences in death penalty prosecutions"), abrogated on unrelated grounds by *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018).

41 TR5, pp. 795-800.

42 Johnson, Sheri Lynn; Blume, John H.; Paavola, Emily; & Vann, Lindsey S., *Protecting People With Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 Hofstra L. Rev 1107, 1118-20 (Summer 2018) (citations omitted; text reformatted).

43 These four professionals include two Cornell Law School professors (including one who is the director of the Cornell Death Penalty Project) and two attorneys who work for a private capital litigation organization. Johnson, Sheri Lynn; Blume, John H.; Paavola, Emily; & Vann, Lindsey S., *Protecting People With Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 Hofstra L. Rev 1107, 1159 (Summer 2018).

44 Johnson, Sheri Lynn; Blume, John H.; Paavola, Emily; & Vann, Lindsey S., *Protecting People With Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 Hofstra L. Rev 1107, 1118-20 (Summer 2018).

> booklet without any interaction with the test administrator, who is not required to have any professional training.
>
> This makes group tests fast, easy, and cost-efficient to administer, but presents a number of disadvantages.[45]

The disadvantages cited by these professionals include that group-administered, multiple choice tests provide data only on the number of questions answered correctly and nothing about why the test-taker chose a particular response; multiple choice tests use "'different psychological processes than the open-ended questions typically used in individual testing;'" "'critics suggest that the functions measured by multiple-choice questions have little to do with intelligence;'" as well as the possibility "'the individual received additional help or copied the responses of others.'"[46]

Among the specific group-administered tests cited by these professionals as being unreliable and inappropriate for intellectual disability determinations is the Otis test:

> For example, The Lorge-Thorndike Intelligence Test, subsequently renamed as the Cognitive Abilities Test ("CogAT"), was not designed to be used as an IQ test; instead it was intended to be used as a measure of academic aptitude, provide vocational guidance, assist with curriculum selection, and the like.
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> Similarly, the Otis Intelligence Scales were "designed primarily to assess the pupil's current readiness for school-oriented learning or to predict his likelihood of future success in dealing with the types of tasks encountered in his academic work."
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> Examples of other tests that are likewise not reliable measures of full-scale IQ are the Kaufman Brief Intelligence Test, Slosson Intelligence Test, Beta tests, Culture Fair Intelligence Test, Test on Nonverbal Intelligence

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45 Johnson, Sheri Lynn; Blume, John H.; Paavola, Emily; & Vann, Lindsey S., *Protecting People With Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 Hofstra L. Rev 1107, 1118-20 (Summer 2018) (citations omitted; text reformatted).

46 Johnson, Sheri Lynn; Blume, John H.; Paavola, Emily; & Vann, Lindsey S., *Protecting People With Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 Hofstra L. Rev 1107, 1118-20 (Summer 2018) (citations omitted).

("TONI"), Comprehensive Test of Nonverbal Intelligence ("C-TONI"), General Ability Measure for Adults, Raven's Progressive Matrices, and Peabody Picture Vocabulary Test.[47]

Again, only individually administered, full-scale IQ tests like the Wechsler Scales (*e.g.*, the WISC given to White) and the Stanford-Binet Intelligence Scales are "gold standard" tools for the accurate and reliable measurement of "global intelligence."[48]

Looking to White's Otis test in the record, it is an 80-question multiple-choice test in booklet form in which White was expressly advised he was "not supposed to be able to answer all of [the questions]" but he should still "do the best you can."[49] White answered 13 of the 80 questions correctly and, as if by magic, that translated to an IQ score of 73.[50] Even without the well-supported opinion of the professionals cited in this brief, it is self-evident a standardized multiple-choice test intended to be finished in 30 minutes or less[51] could never be an accurate or reliable means to determine a child's IQ.

This Court should not sanction the IQ bingo game that White wants to play where a defendant presents a marginal IQ score or a score from an obviously unreliable test and then victoriously proclaims, "Bingo, I get a hearing and no death penalty!" Again, not all

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47 Johnson, Sheri Lynn; Blume, John H.; Paavola, Emily; & Vann, Lindsey S., *Protecting People With Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 Hofstra L. Rev 1107, 1120 n. 63 (Summer 2018) (citations omitted) (citations omitted; text reformatted).

48 Johnson, Sheri Lynn; Blume, John H.; Paavola, Emily; & Vann, Lindsey S., *Protecting People With Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 Hofstra L. Rev 1107, 1118-20 (Summer 2018).

49 TR5, p. 795.

50 TR5, p. 796.

51 TR5, p. 795 ("The test contains 80 questions. You are not supposed to be able to answer all of them, but do the best you can. You will be allowed half an hour after the examiner tells you to start. Try to get as many questions right as possible. Be careful not to go so fast that you make mistakes. Do not spend too much time on any one question. No questions about the test will be answered by the examiner after the test begins. Lay your pencil down.").

capital offenders are entitled to an evidentiary hearing just because they lodge an intellectual disability claim as there is a threshold of proof that must be crossed before a hearing is warranted.

Here, White's SEM-adjusted IQ score did not get him across that threshold, especially considering the scant proof of adaptive deficits he presented to the trial judge. The 61-year old White should be forced to wait until another day, perhaps, to prove his claim.

2.1.2 White's Alleged Adaptive Deficits.

White's proof of adaptive deficits is even weaker than his adjusted IQ score as all he put in the record were some documents produced in 1971 (when White was 12-years old and in the sixth grade) stemming from a probation officer's referral due to White having been charged with "truancy, store house break in, [and] grand larceny."[52]

According to the psychologist who evaluated White, he had a "significant learning deficit, with reading at the 2.4 grade level and arithmetic at the 3.4 level."[53] While White appears to have been lagging his peers in these two subjects, he was only a few grade levels behind his sixth grade classmates and the psychologist noted his reasoning was "in the low normal range" meaning he had "some potential."[54] In light of his documented hatred of school and teachers[55] as well as his "truancy," White's academic shortfall was not surprising and did not raise a reasonable doubt about whether he was intellectually disabled.

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52 TR5, pp. 780-82. Almost a year before White raised the intellectual disability issue, he put in the record a different psychologist's report prepared in 2009 in which this psychologist rehashed White's 1971 evaluation. TR2, pp. 173-76.

53 TR5, p. 752.

54 TR5, p. 752.

55 TR5, pp. 752 & 759.

Similarly, the psychologist's observations that White was asocial, showed "a fairly primitive level of socialization," and distanced himself from family and friends did not create a reasonable doubt about whether he was intellectually disabled.[56] According to his mother, White's troubles stemmed from "some older boys with whom [he] has been associating recently,"[57] *i.e.*, White was hanging out with the wrong crowd. The referring probation officer supported this assessment as he or she noted White had significant relationships with "older sophisticated delinquents" and White's problems could stem from poor parental supervision and following in his brother's ways:

> Possible lack of proper parent supervision. Also, subject could be following in older brother's footsteps who has been before the court on many charges. He [older brother] is presently living with his MGF in Indianapolis.[58]

Not surprisingly, White demonstrated an interest in the accouterments of a criminal or "hedonistic" lifestyle such as "good times, nice clothes, a cashmere coat, recreation and stuff" and the psychologist concluded he identified "with a highly sophisticated, delinquent culture" and "delinquent values."[59] For a 12-year old to be drawn to such things – and to dress the part, as well[60] – revealed not a boy who could be labeled "retarded" per the accepted lingo at the time[61] but instead someone who was well on his way down the road of habitual criminal.

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56 TR5, p. 752.

57 TR5, p. 752.

58 TR5, p. 782.

59 TR5, p. 752.

60 According to the psychologist, sixth-grader White "dressed in a quite sophisticated style" including "Afro hairdo, white leather jacket, purple shirt and shoe boots." TR5, p. 752.

61 *See Hall v. Florida*, 572 U.S. 701, 704 (2014).

Notably, the psychologist who evaluated White did not recommend special classes, special teachers, or summer school to address White's academic problems but, rather, removal from his home and commitment to a "boys camp" since "in his home situation" White had "nothing going for him" and remaining at home "would lead to further delinquency."[62]

Finally, White tacitly admits in his briefs filed with this Court that he has no idea whether he is intellectually disabled and that he has not conducted an investigation necessary to prove that he is. For example, White argues the trial judge denied him "further investigation"[63] of his claim and the timing of *Hall*'s rendition during his trial did not allow enough time "to investigate and present evidence regarding [his] deficits in adaptive behavior to supplement the existing proof[.]"[64] Significantly, White also asks this Court for the following:

> The case should be remanded to allow White to investigate further, to gather school records and other evidence including possible additional IQ scores and evidence of adaptive deficits occurring during his developmental years and to be heard on the issue.[65]

These are not the words of someone who has any clue whether can actually prove that he is intellectually disabled. Rather, these words are from someone who wants to go on a fishing expedition and delay the finality of his conviction and sentence indefinitely while he hunts for likely nonexistent proof and use taxpayer money to do so.

Based on the admittedly limited proof White submitted to the trial judge about his adaptive deficits as well as the unequivocal demand for more time to properly investigate

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62 TR5, p. 752.

63 Red brief, p. 117.

64 Red brief, p. 120.

65 Yellow brief, p. 24.

this claim, there is no question that with respect to the adaptive deficits issue White failed to raise a reasonable doubt as to his alleged intellectual disability. Therefore, this Court should conclude the trial judge properly denied White's intellectual disability claim.

2.2 Should White Marshal the Proof, He Can Raise His Intellectual Disability Claim At Any Time Until His Execution.

Should this Court yet again reject White's intellectual disability claim, he will suffer no harm since he can raise such a claim at any time until he is executed. As this Court recognized just a few years ago, "offenders who raise successful claims under *Atkins* and *Hall* are barred from execution" and this "protection" "endures to the very moment of execution."[66] In other words, if White can actually marshal proof in the future to support his intellectual disability claim, he can raise that claim via, for example, a CR 60.02 motion as other death row inmates have done[67] and have his claim resolved then.

In light of the enduring "protection" he has as a condemned offender and the prohibition against executing intellectually disabled capital offenders, the 61-year old White may raise an intellectual disability claim effectively whenever he wants so long as he has proof to back it up.[68] With such freedom, this Court need not overlook the thin proof he presented during trial and grant him the benefit of the doubt so he can explore this issue. Rather, this Court should affirm the judgment and allow White the time to conduct an in-

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66 *White v. Commonwealth*, 500 S.W.3d 208, 215 (Ky. 2016), abrogated on unrelated grounds by *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018).

67 *Woodall v. Commonwealth*, 563 S.W.3d 1, 2 (Ky. 2018); *White v. Payne*, 332 S.W.3d 45, 47 n. 2 (Ky. 2010) (noting CR 60.02 is appropriate vehicle "for this type of claim").

68 *See Bowling v. Commonwealth*, 163 S.W.3d 361, 372-73 (Ky. 2005), abrogated on unrelated grounds by *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018).

vestigation and see if he can muster the proof necessary to demonstrate he is intellectually disabled[69] for, at this point, it does not appear he can do so.

CONCLUSION

For these reasons, the judgment of the Jefferson Circuit Court should be affirmed.

Respectfully submitted,

ANDY BESHEAR
Attorney General of Kentucky

JEFFREY A. CROSS
EMILY B. LUCAS
Assistant Attorney General

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69 *Woodall v. Commonwealth*, 563 S.W.3d 1, 6 n. 29 (Ky. 2018) ("It is important to note that the defendant still bears the burden of proving intellectual disability by a preponderance of the evidence").

Supreme Court of Kentucky

2014-SC-000725-MR

LARRY LAMONT WHITE — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
NO. 07-CR-004230

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER

Appellee's motion for supplemental briefing regarding whether a death row inmate may waive a claim that he is intellectually disabled, raised by his counsel, before any person or court has determined that he is intellectually disabled, in the above-styled action, is granted. Parties shall file their briefs not to exceed twenty-five pages within thirty (30) days of the date of the entry of this order.

ENTERED: August 12, 2019.

Chief Justice

KENTUCKY SUPREME COURT

Case No. 2014-SC-725-MR

LARRY LAMONT WHITE — **APPELLANT**

v.

Appeal from Jefferson Circuit Court
Hon. James M. Shake, Judge
Indictment No. 07-CR-4230

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth of Kentucky

Submitted by,

ANDY BESHEAR
Attorney General of Kentucky

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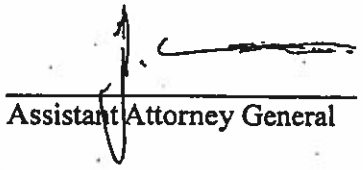
CERTIFICATE OF SERVICE

I certify the appellate record was not withdrawn from the Clerk of this Court for the preparation of this brief, and a copy of this brief was delivered on September 11, 2019, to Annie O'Connell, Judge, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202 (U.S. mail); Tom Wine, Esq., Commonwealth's Attorney, 514 West Liberty, Louisville, Kentucky 40202 (email); and Timothy G. Arnold, Esq., Kathleen Schmidt, Esq., and Erin H. Yang, Esq., Department of Public Advocacy, 5 Mill Creek Park, Section 100, Frankfort, Kentucky 40601 (state messenger-mail).



Assistant Attorney General

STATEMENT CONCERNING CITATIONS TO THE RECORD

The Commonwealth's video record citations will conform to CR 98.

When citing court filing transcripts, the citation format will be "TR[volume number], [page number]."

When citing the appellate briefs filed by the parties in this Court, the citation formats will be "[Color] brief, [page]," *e.g.*, Blue brief, p. 52.

Finally, unless indicated otherwise all discovery material will be cited as "Discovery, [page]" with the page number being the Bates number located in the lower right corner of the page. With some discovery pages, the Bates number is difficult to read because the number is red on a black background.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

In this criminal case 61-year old[1] Appellant, Larry L. White, appeals from the Jefferson Circuit Court judgment memorializing his convictions for rape and murder as well as his sentences of 20 years and death, respectively.

On August 12, 2019, and after a public dispute erupted between White and his appellate attorneys employed by the Department of Public Advocacy (DPA) concerning the intellectual disability claim lodged by DPA on his behalf, this Court granted the motion of Appellee, the Commonwealth of Kentucky, asking to file supplemental briefs on the following:

> [W]hether a death row inmate may waive a claim that he is intellectually disabled, raised by his counsel, before any person or court has determined that he is intellectually disabled.

This brief is being filed in compliance with this Court's order.

1.0 Brief Procedural History Since Post-Remand Briefing.

1.1 White's Unsolicited Letter to the Attorney General.

In early 2019, the United States Supreme Court granted White's petition for *certiorari*, vacated this Court's opinion affirming White's convictions and sentence, and remanded the case to this Court for further consideration in light of *Moore v. Texas*:

> 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).[2]

Following this directive, on March 8, 2019, this Court instructed the parties to file supplemental briefs addressing the application of *Moore*. The parties complied and filed their briefs on May 6, 2019.

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1 TR6, p. 847 (White was born March 30, 1958).

2 *White v. Kentucky*, 139 S.Ct. 532 (2019).

Having read the Commonwealth's supplemental brief, on May 21, 2019, White wrote a two page letter to the Attorney General (a copy was attached to the motion to resolve conflict filed by the Commonwealth on June 10, 2019).[3]

In his letter, White begins by advising the Attorney General that he disagrees with the decision of his appellate attorneys to contest his intellectual capacity and, until recently, he was unaware of this strategy:

> 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.[4]

Communicating plainly, White makes clear he does not want to be labeled as "retarded."[5]

In the following two paragraphs, White complains about his appellate attorneys, correctly noting his lead direct appeal counsel, Susan J. Balliet, is the wife of John Balliet who worked in the same office that prosecuted him, an arrangement White asserts was a "conflict."[6]

Significantly, White claims that "all" he wants at this point is for his appellate attorneys to stop what he calls their pursuit of "this 'retarded foolishness'" so he can pursue post-conviction relief via RCr 11.42.[7] Demonstrating a keen awareness of his case, White

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3 White letter of May 21, 2019, p. 1 ("I am writing this letter in regard to the brief that I received from Jeffrey A. Cross and Emily B. Lucas, regarding 'Intellectual Disability.'").

4 White letter of May 21, 2019, p. 1.

5 White letter of May 21, 2019, p. 1.

6 White letter of May 21, 2019, p. 1.

7 White letter of May 21, 2019, p. 1 (". . . all I want is a fair opportunity for post-conviction 11.42, but my lawyers cannot start because of this 'retarded foolishness.'").

correctly notes that due to his attorneys pursuing "this 'retarded foolishness,'" they cannot start the post-conviction process that he desires.[8]

Moving to page two of his letter, in the first paragraph White astonishingly writes that he agrees with the Commonwealth's position on the intellectual disability issue:

> After reading Mr. Cross's brief I feel that he [actually] understand[s] my view point because if given the chance I would argue the same way, and I can't see how Susan [J. Balliet] and Erin [H. Yang] are now [psychologists] 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.[9]

That is, White agrees with the Commonwealth's position that he is *not* intellectually disabled and that further proceedings on that claim are unwarranted.[10]

White ends his letter by asking that his appellate attorneys be removed from his case and the Attorney General fulfill his "duty to make sure that I am fairly represented."[11]

1.2 White's *Pro Se* Filing of July 1, 2019.

On July 1, 2019, White, *pro se*, filed a two page "motion" in which he expressed a desire to move things along so he could seek post-conviction relief as his trial and appellate attorneys have provided deficient representation.[12]

Further, White took issue with being labeled a "retard" and advised that he is "not guilty of this crime."[13]

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8 White letter of May 21, 2019, p. 1.

9 White letter of May 21, 2019, p. 2 (spelling errors corrected).

10 *See* Post-Remand Blue Brief.

11 White letter of May 21, 2019, p. 2 ("I do believe that it's your duty to make sure that I am fairly represented and I was not.").

12 "Motion to Withdraw Appeal Counsel For the Failure to Inform the Main Person About the Substance of This Certiorari, But Mislead Me," filed July 1, 2019.

Finally, in clear terms White made his wishes concerning the intellectual disability issue known directly to this Court:

> [T]he 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 attorneys are my assistance therefore they were obligated to inform appellant of their plan to cross me out.[14]

White's feelings on this issue and the frustration with his counsel's "plan to cross me out" could not be any more plain.

1.3 White's *Pro Se* Filing of July 5, 2019.

On July 5, 2019, White, *pro se*, filed a response to an earlier DPA filing concerning whether he wanted to pursue the intellectual disability claim, stating the following:

> 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.[15]

White also maintained his innocence and complained he was being treated differently by DPA because he is a black man:

> Because I am a 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.

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13 "Motion to Withdraw Appeal Counsel For the Failure to Inform the Main Person About the Substance of This Certiorari, But Mislead Me," filed July 1, 2019, pp. 1-2.

14 "Motion to Withdraw Appeal Counsel For the Failure to Inform the Main Person About the Substance of This Certiorari, But Mislead Me," filed July 1, 2019, p. 2.

15 "Response In Opposition of Defense Counsel," filed July 5, 2019, p. 1.

> 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 issues aside, instead of representing me like they do their white clients . . . I did not commit this crime and if it takes reviewing my whole case then I am asking that it be done.[16]

White concluded his response by highlighting the Sixth Amendment provides for the assistance of counsel, not for counsel to "take control" and that he "is more than able to make my own decision."[17] White also noted he wanted to "move on to prove my innocence[.]"[18]

1.4 White's *Pro Se* Filing of August 16, 2019.

On August 16, 2019, White, *pro se*, filed a response to earlier DPA filings and advised this Court he wants "my voice to be heard."[19] He also again claimed to be innocent and noted he was "framed."[20]

Further, and after outlining problems he has with DPA and the appellate attorneys he has dealt with, White left no doubt he would never cooperate with DPA with respect to its attempt to portray him as intellectually disabled:

> 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

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16 "Response In Opposition of Defense Counsel," filed July 5, 2019, pp. 1-2 (text reformatted).

17 "Response In Opposition of Defense Counsel," filed July 5, 2019, p. 2.

18 "Response In Opposition of Defense Counsel," filed July 5, 2019, p. 3.

19 "Appellant's Response to the DPA's Motion on Trying to Speak for Me," filed August 16, 2019, p. 1.

20 "Appellant's Response to the DPA's Motion on Trying to Speak for Me," filed August 16, 2019, p. 1.

[to] intellectual disability and conflict. I pray that this Honorable Court deny all of their motions at this time.[21]

2.0 White May Waive the Intellectual Disability Claim.

The Sixth Amendment guarantees the accused in a criminal proceeding the right to have "the Assistance of Counsel for his defence."[22]

The Sixth Amendment, however, "does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."[23] Indeed, "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[24]

Further, the assistance of counsel functions as "an aid to a willing defendant," and counsel must ultimately act as "an assistant" to the defense, not its "master."[25] A defendant, therefore, has the right both to the effective assistance of counsel and to be the master of his own defense.

The United States Supreme Court has repeatedly recognized "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty."[26] And because the accused's liberty – and in capital cases, the accused's life – is at stake in a criminal prosecution, the accused must have the ultimate authority to control the objectives of his defense and to make certain "fundamental decisions" that inform those objectives.

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21 "Appellant's Response to the DPA's Motion on Trying to Speak for Me," filed August 16, 2019, pp. 1-2.

22 U.S. Const. Amend. VI.

23 *Faretta v. California*, 422 U.S. 806, 819 (1975).

24 *Faretta v. California*, 422 U.S. 806, 819-20 (1975) (footnote omitted).

25 *Faretta v. California*, 422 U.S. 806, 820 (1975).

26 *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017).

While the nation's high court has to date provided only examples of "fundamental decisions" and not a complete list,[27] in general these decisions fall into one of two broad categories in which a defendant's autonomy is at a peak.

First, a defendant has the right to decide whether to avail himself of certain structural elements of the criminal justice system, such as whether to enter a plea, waive a jury trial, or take an appeal.[28]

Second, the defendant has the right to determine his level of personal involvement (or non-involvement) in his case, and the fundamental objectives of his defense. Such decisions include whether he attends his own trial and pretrial proceedings, whether he testifies and what he will say, and whether he will cooperate with his counsel in the presentation of mitigation proof (or even allow counsel to present such proof at all).[29]

These categories of "fundamental decisions" concern not just the means by which a defendant's objectives will be pursued, but what those objectives actually are.[30]

As for the subject of this supplemental brief – whether "a death row inmate may waive a claim that he is intellectually disabled, raised by his counsel, before any person

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27 *See Jones v. Barnes*, 463 U.S. 745, 751 (1963) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal").

28 *Garza v. Idaho*, 139 S.Ct. 738, 746 (2019); *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Jones v. Barnes*, 463 U.S. 745, 751 (1963); *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966); SCR 3.130(1.2) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered [and] whether to waive jury trial").

29 *Jones v. Barnes*, 463 U.S. 745, 751 (1963); *Chapman v. Commonwealth*, 265 S.W.3d 156, 171 (Ky. 2007) ("We will not compel a competent capital defendant to present mitigation evidence against that defendant's wishes. This view is in accordance with that expressed by other courts."); SCR 3.130(1.2) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to . . . whether the client will testify").

30 *See* SCR 3.130(1.2) ("Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.").

or court has determined that he is intellectually disabled" – that waiver decision constitutes a "fundamental decision" reserved for, and to be made solely by, the inmate.

2.1 Whether to Waive or Pursue An Intellectual Disability Claim Is a "Fundamental Decision" Left to the Death Row Inmate.

In *McCoy v. Louisiana*,[31] the United States Supreme Court faced a situation where counsel for a criminal defendant felt the government's case was strong and it was impossible to deny that his client murdered his family.[32] Based on his assessment – and over the strong insistence of his client, McCoy – counsel told "the jury the evidence is 'unambiguous,' 'my client committed three murders.'"[33] And despite McCoy testifying he did not murder his family, during closing arguments counsel "reiterated that McCoy was the killer."[34] In the end, the jury found McCoy guilty and recommended three death verdicts.[35]

Reversing, the Supreme Court recognized that while trial management is reserved for counsel, some decisions are reserved for the client and this includes that the objective of the defense is to maintain innocence:

> Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category.
>
> Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial.

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31 *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018).

32 *McCoy v. Louisiana*, 138 S.Ct. 1500, 1512 (2018).

33 *McCoy v. Louisiana*, 138 S.Ct. 1500, 1507-08 (2018).

34 *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018).

35 *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018).

> These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact *are*.[36]

Discussing possible conflicts between counsel's assessment of how best to avoid a death sentence for his client and how the criminal client views things, the Supreme Court made clear the client controls the objectives:

> Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as [McCoy's counsel] did in this case.
>
> But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration.[37]

When a client states the objective of his defense is to maintain innocence – in McCoy's case, "I did not kill the members of my family" – "his lawyer must abide by that objective and may not override it by conceding guilt."[38] The violation of McCoy's "protected autonomy was complete when the court allowed counsel to usurp control of an issue that was in McCoy's prerogative."[39]

For White, having his attorneys argue to the world that he is "retarded" (his word) is the equivalent of McCoy's counsel admitting McCoy murdered his family. White clearly does not want to suffer the disgrace (or "opprobrium") of being portrayed as "slow" or "stupid," or admitting he suffers from these faults, or arguing that a court should permanently label him a "retard" (again, his word). And White, via his *pro se* filings, has made it clear he wants to focus on proving his innocence, not on how to get off death row.

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36 *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018) (text reformatted; emphasis in original).

37 *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018) (text reformatted).

38 *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018).

39 *McCoy v. Louisiana*, 138 S.Ct. 1500, 1511 (2018).

Of course, White's concerns are perfectly valid. No one wants to be labeled intellectually disabled when he is not, especially a 61-year old man who has zero to gain from such a label and being taken off death row since he is almost certain never to be executed due to his advanced age and the infancy of this case.[40]

Having never been declared intellectually disabled by anyone to date, the embarrassment White would suffer from playing along with DPA's ruse would undoubtedly be monumental in his eyes – especially should he ever return to his community. This embarrassment and frustration are exacerbated by the fact White does not want to simply get off death row; he wants to prove his innocence and be free. No person – even a death row inmate – should be forced by his attorneys to suffer like this and have his dignity stomped on.

In *Chapman*,[41] this Court faced a situation in which an admitted murdered wanted to plead guilty so he could be executed.[42] In its analysis, this Court recognized the inherent dignity of someone in this position:

> Adhering to a defendant's choice to seek the death penalty honors the last vestiges of personal dignity available to such a defendant.
>
> Therefore, we hold that a competent criminal defendant is entitled to seek to plead guilty to a capital offense and, furthermore, to seek to receive the death penalty.

---

40 If White is truly innocent as he claims, it is in his best interests to remain on death row during his post-conviction proceedings so that he can receive the benefits of multiple lawyers, investigators, and other special resources DPA reserves for its death row clients. Should he be deemed intellectually disabled and removed from death row, the special treatment from DPA would end since instead of being a death row inmate he would just be another felon convicted of murder.

41 *Chapman v. Commonwealth*, 265 S.W.3d 156 (Ky. 2007).

42 *Chapman v. Commonwealth*, 265 S.W.3d 156, 160 (Ky. 2007) ("The ultimate question is whether a defendant may enter into a plea agreement to forgo a jury trial and sentencing and volunteer for the death penalty. We answer that question in the affirmative.").

> Thus, we reject [Chapman's appellate counsel's] argument that the state's overriding interest in assuring that the death penalty is meted out in a constitutionally permissible manner invariably overrides a defendant's right to accept criminal responsibility for his past misconduct.
>
> . . .
>
> Indeed, the rights of citizens of a free society to make these types of choices concerning their own future are essential to the proper functioning of society as a whole, as well as our system of criminal justice.[43]

In the end, this Court permitted the death row inmate to maintain his dignity and proceed forward as he wanted.[44]

Of course, White is not in any way trying to imitate the now-deceased Marco Allen Chapman. (White believes his fight has just begun.) And neither is what White is trying to do (waive an intellectual disability claim) on the same plane as what Chapman actually succeeded in doing (plead guilty so he could be executed).

Those significant differences notwithstanding, this Court's express recognition of Chapman's personal dignity and the role that dignity played in Chapman's right to decide how to proceed in his case, is pivotal to the issue at hand.

Here, White has made it clear to this Court over and over again that one of the objectives for his case is to maintain his dignity. He has never been deemed "retarded" (his word), does not want to claim that he is "retarded," and ultimately does not want to be labeled as such. White's letter to the Attorney General and his *pro se* filings with this Court erase all doubt that maintaining his honor, value, and self-worth are of utmost importance to him, and going along with DPA's intellectual disability claim – which he deems bogus – runs directly counter to that objective.

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43 *Chapman v. Commonwealth*, 265 S.W.3d 156, 175-76 (Ky. 2007) (text reformatted; footnotes omitted).

44 *Chapman v. Commonwealth*, 265 S.W.3d 156, 160 (Ky. 2007).

Moreover, White has remained loyal to this objective throughout his case via (1) insisting he is innocent; (2) refusing to accept a plea deal; (3) refusing to cooperate with a mental health professional in order to develop penalty phase mitigation proof (*i.e.*, proof that could be viewed as an acknowledgement of guilt);[45] (4) refusing to seek mercy from the jury for an act he insists he did not do (*e.g.*, declining to participate in the trial's penalty phase and preventing his counsel from presenting any proof during that phase);[46] and (5) declining to beg for mercy during final sentencing.[47] White's current actions are nothing more than a continuation of his long-standing objective to maintain his dignity.

In addition, White correctly believes "this 'retarded foolishness'" DPA is pressing against his wishes is delaying his pursuit of RCr 11.42 relief and with it the possibility of a new trial where he can again pursue his innocence.[48] Although DPA maintains that pursuing this claim will somehow support White's aim of proving his innocence, its articulation of this path is both nebulous and highly uncertain.[49] What is certain, however, is that even if DPA prevails over its client and somehow years later prevails on the intellectual disability claim, the *direct and immediate result* of such victories will not be a new trial let alone White walking out of prison a free man.

Being in his 60s, White does not have a great deal of time left (irrespective of his criminal problems). He clearly wants to move down the innocence-proving path as quick-

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45 VR, 05/24/10, 11:43:10-11:52:20.

46 VR, 07/28/14, 11:20:30-11:40:05 & 14:25:50.

47 VR, 09/26/14, 09:50:20-10:04:15.

48 White letter of May 21, 2019, p. 1 (". . . all I want is a fair opportunity for post-conviction 11.42, but my lawyers cannot start because of this 'retarded foolishness.'").

49 DPA's Response to "Motion to Withdraw Appeals Counsel for the Failure to Inform the Main Person About the Substance of this Certiorari, But Mislead Me," tendered July 11, 2019, p. 3 (par. 5).

ly and directly as possible, not the get-off-death-row-into-general-population path. This stated objective is being blocked by DPA and its "retarded foolishness."

As for DPA's legal authority to support its position, it offers two distinguishable state court opinions in which, unlike here, there was proof from an expert witness that the death row inmate was indeed intellectually disabled[50] and there was *no* "disagreement between counsel and [the death row inmate] with respect to the overarching objectives" of the post-conviction challenge.[51] And while it is indeed true that it is not the criminal defendant's role to decide what arguments to press on appeal,[52] attorneys are barred from pursuing claims that are unwinnable (whether factually, legally, or both).[53]

White has made his objectives perfectly clear to his counsel, and his counsel have responded by usurping control of an issue that is White's sole prerogative. Although DPA has no regard for White's stated desires to maintain his honor and self-worth – confirmed by its position that White's litigation objective is merely "a new trial and eventual acquittal"[54] – this Court must not sanction DPA's power grab and instead it should adhere to its

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50 *Rogers v. State*, 575 S.E.2d 879, 880-81 (Ga. 2003) ("Following the procedure outlined by this Court in *Fleming*, in 1994 Rogers initiated state habeas corpus proceedings by filing a petition seeking a jury trial on the issue of mental retardation. At a hearing on his petition, Rogers presented evidence of mental retardation, including affidavits of mental health experts who diagnosed him as mentally retarded and suffering from significant neurological impairment." (footnote omitted)).

51 *Commonwealth v. Mason*, 130 A.3d 601, 671 (Pa. 2015) ("In light of the foregoing, we find that, where confronted with neither a basic, fundamental decision concerning Appellant's PCRA challenge nor disagreement between counsel and Appellant with respect to the overarching objectives of the challenge, the PCRA court erred in ruling that counsels' authority to seek an *Atkins* hearing was subject to Appellant's veto").

52 *Garza v. Idaho*, 139 S.Ct. 738, 748 (2019) ("Moreover, while it is the defendant's prerogative whether to appeal, it is not the defendant's role to decide what arguments to press").

53 CR 11.

54 DPA's Response to Commonwealth's "Motion to Reconsider Order Granting Leave to Department of Public Advocacy to File Response," filed August 5, 2019, p. 2.

precedent and recognize a 61-year old death row inmate has the inalienable right to maintain his dignity by choosing not to self-identify as intellectually disabled *for the first time* for the purpose of getting off death row.

Put simply, this Court should hold that a death row inmate, who is competent and has never been deemed intellectually disabled by anyone, has the right to make the "fundamental decision" whether to waive (*i.e.*, drop) a claim lodged by counsel that he is intellectually disabled.

2.2 White Is Competent to Waive the Intellectual Disability Claim.

In its now vacated opinion this Court noted White stated on the record that he was competent and refused to be evaluated due to this belief.[55] This Court also recognized the "only indication" White "was not competent to stand trial was defense counsel's movement for a competency evaluation" and that no "reasonable judge would have expressed doubt about [his] competency to stand trial."[56]

Similarly, after the guilty verdicts were rendered, White refused to enter the courtroom or participate in his trial's penalty phase.[57] Despite this development, White's counsel, White, and the trial judge engaged in a lengthy, detailed discussion pursuant to one of the *St. Clair*[58] opinions and the trial judge found White validly waived his right to present

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55 *White v. Commonwealth*, 544 S.W.3d 125, 153-54 (Ky. 2017), vacated by *White v. Kentucky*, 139 S.Ct. 532 (2019).

56 *White v. Commonwealth*, 544 S.W.3d 125, 153-54 (Ky. 2017), vacated by *White v. Kentucky*, 139 S.Ct. 532 (2019).

57 VR, 07/28/14, 11:20:30-11:29:25.

58 *Chapman v. Commonwealth*, 265 S.W.3d 156, 171 (Ky. 2007) ("We will not compel a competent capital defendant to present mitigation evidence against that defendant's wishes. This view is in accordance with that expressed by other courts."); *St. Clair v. Commonwealth*, 140 S.W.3d 510, 559-60 (Ky. 2004).

mitigation proof.[59] Not surprisingly, at no point in its now vacated opinion did this Court suggest White lacked all that was necessary (*e.g.*, understanding and mental acumen and capacity) to waive the presentation of mitigation proof.

If White's competency to stand trial was on such solid footing, then surely he has the capacity to forego being deemed intellectually disabled. Put differently, if it was acceptable for White to waive presenting what all criminal defense attorneys consider key trial proof in a capital case *and* to not even be in the courtroom for the penalty phase of his trial, it must likewise be acceptable for him to direct his appellate and post-conviction counsel that he does not want to try to be stigmatized as intellectually disabled.

Further, because White is so unequivocally competent he should not have to submit to a mental health evaluation as his public defenders want before he makes the waiver decision:

> This Court should not permit Mr. White to make this critical decision without reassuring itself that Mr. White is capable of understanding this decision and making a rational choice among his options.
>
> Accordingly, if it believes that Mr. White should have the authority to make this critical choice, it should nevertheless not let him do so unless he has fully participated in an evaluation, and the Court is satisfied from that evaluation that he has met the requirements of *Chapman*.[60]

Stated differently, DPA is pushing a "you must be evaluated before you can drop a claim that requires you to be evaluated" position.

Such a position should be rejected by this Court. No competent death row inmate should be compelled to do the very thing he does not want to do (be evaluated by a men-

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59 VR, 07/28/14, 11:29:35-11:38:00.

60 DPA's Response to "Motion to Withdraw Appeals Counsel for the Failure to Inform the Main Person About the Substance of This Certiorari, But Mislead Me," tendered July 11, 2019, p. 8 (text reformatted; footnote omitted).

tal health professional) in order to make a "fundamental decision" to forego a legal claim and process he wants no part of.

Putting aside White's competence, the absurdity of DPA's "do what we want before you maybe get to do what you want" position rises to the surface when one realizes the waiver decision at issue is not a "forever" decision that can never be revisited.

To the contrary, White may raise an intellectual disability claim at any time until he is executed (from a probability standpoint, that means until White dies of natural causes). According to this Court just three years ago, "offenders who raise successful claims under *Atkins* and *Hall* are barred from execution" and this "protection" "endures to the very moment of execution."[61] Therefore, if White later changes his mind (or, more likely, his appointed attorneys wear him down), he can raise the intellectual disability claim via, for example, a CR 60.02 motion as other death row inmates have done.[62]

In light of this enduring "protection" White has, there is no reason for this Court to accept DPA's hoop-jumping demand and compel White to endure a mental health evaluation and years of fruitless litigation that he wants no part of. Indeed, this decision DPA so desperately wants to keep from its uncooperative yet fully competent client is a decision that its client can revisit at any point before he dies.

White is a 61-year old grown man who is deeply familiar with the criminal justice system[63] and who, according to this Court, is perfectly competent and capable of making

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61 *White v. Commonwealth*, 500 S.W.3d 208, 215 (Ky. 2016), abrogated on unrelated grounds by *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018).

62 *Woodall v. Commonwealth*, 563 S.W.3d 1, 2 (Ky. 2018); *White v. Payne*, 332 S.W.3d 45, 47 n. 2 (Ky. 2010) (noting CR 60.02 is appropriate vehicle "for this type of claim").

63 *See White v. Commonwealth*, No. 2006-CA-2255-MR, 2008 WL 2065240 (Ky. App. May 16, 2018); *White v. Commonwealth*, 725 S.W.2d 597 (Ky. 1987).

legal decisions for himself. There is nothing in the record that undermines or calls into question his decision-making capabilities. White, therefore, should have the right to make the "fundamental decision" to waive the pending intellectual disability claim without first having to prove he is mentally capable of doing so.

2.3 The Pending Intellectual Disability Claim Fails Without White's Full Involvement And Is, Therefore, Futile.

As noted earlier, a criminal defendant has the right to determine his level of personal involvement (or non-involvement) in his case.[64] The significance of this basic right is undeniable in the context of an intellectual disability claim.

If DPA wants to pursue the intellectual disability claim on White's behalf and ultimately have him deemed intellectually disabled, then it will need his full and complete cooperation. Without such cooperation, the claim will fail.

Specifically, DPA will need its client to sign waiver forms to allow for the collection of background records; his extensive cooperation with mental health professionals to assess his intellectual abilities, *e.g.*, IQ test; as well as the cooperation of White's friends and family.

Absent White being fully on board and doing what DPA tells him to do, all DPA has to prove the intellectual disability claim are two 48-year old IQ scores – one of which is of dubious value – and some equivocal school records that do almost nothing towards establishing the necessary adaptive deficits.[65] That's it.

Unsurprisingly, DPA tacitly admits in the briefs it filed with this Court (on behalf of White) that it has no idea whether its client is intellectually disabled and it also has not

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64 Section 2.0, *supra*.

65 Post-Remand Blue Brief, pp. 1-16; *Moore v. Texas*, 137 S.Ct. 1039, 1045 (2017).

conducted an investigation necessary to prove that he is.[66] Consistent with its uncertainty, DPA asked this Court to remand the intellectual disability claim so it could then "investigate further, to gather school records and other evidence including possible additional IQ scores and evidence of adaptive deficits occurring during his developmental years[.]"[67] Of course, these are not the words of attorneys who have any clue whether they can actually prove their client is intellectually disabled. Rather, these words reveal a desire to go fishing for likely nonexistent proof and use taxpayer money to do so.

With White repeatedly proclaiming "no way, no how" to going down the road of being declared intellectually disabled, it is clear he will never cooperate with DPA or its mental health experts and, in fact, he is almost certain to tell his friends and family not to help DPA. And with White having already established that he will be present in the courtroom only when he feels like it, he is unlikely to attend any intellectual disability hearing except for the sole purpose of arguing against DPA.

With DPA having stale and unpersuasive proof, no hope of gaining any additional proof of any value, and White being dug in and taking the extraordinary steps of asking the Attorney General and this Court for assistance to stop his attorneys, there is literally no point to what DPA is trying to do other than needless delay. Without White's cooperation, the intellectually disability claim is unwinnable and effectively dead on arrival.

This Court should not sanction DPA's futile endeavor or lend its hand to DPA in order to force White to pursue something he does not want. Rather, this Court should end DPA's pointless pursuit by recognizing that (1) waiving the intellectual disability claim

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66 Post-Remand Blue Brief, pp. 15-16.

67 Yellow brief, p. 24.

foisted upon him by DPA is a "fundamental decision" reserved solely for White and (2) White, via his repeated declarations made to this Court, has indeed made such waiver.

CONCLUSION

For these reasons, Larry Lamont White should be permitted to waive the pending intellectual disability claim lodged by his counsel, and the judgment of the Jefferson Circuit Court should be affirmed.

Respectfully submitted,

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