No. 18-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2018

LARRY LAMONT WHITE

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

I.
Intellectual Disability

Two months before petitioner's case went to trial, this Court decided *Hall v. Florida,* 134 S. Ct. 1986 (2014), forbidding reliance on a "single factor" in determining whether a defendant is intellectually disabled (ID), mandating "conjunctive and interrelated assessment" of intellectual and adaptive functioning, and mandating application of prevailing diagnostic criteria contained in the latest American Association on Intellectual and Developmental Disabilities [AAIDD] manual and Diagnostic and Statistical Manual [DSM]-5. Petitioner presented evidence of sub-average intellectual functioning from when he was 12, including two IQ scores—73 and 76—and evidence demonstrating deficits in adaptive functioning. Five months before petitioner's case was decided on appeal, this Court rendered *Moore v. Texas*, 137 S. Ct. 1039 (2017), requiring focus on a defendant's weaknesses rather than his strengths, and rejecting the use of stereotypical lay criteria for determining the adaptive functioning prong of ID.

In clear violation of *Hall*, *Moore*, and the Eighth Amendment, the Kentucky Supreme Court found petitioner eligible for the death penalty by 1) relying on a single factor (his IQ score of 76), 2) failing to conduct a "conjunctive and interrelated" assessment of both prongs of ID, 3) refusing to apply prevailing

clinical criteria contained in the AAIDD manual and DSM-5, and 4) focusing on strengths and lay stereotype in evaluating adaptive behavior.

Did the Kentucky Supreme Court violate the Eighth Amendment as interpreted in *Hall* and *Moore* when it denied White the opportunity to present evidence supporting the "conjunctive and interrelated" assessment of both prongs of ID, ignoring an IQ score of 73 presented to the trial court, ignoring a possible Flynn effect and refusing to look past White's other IQ score of 76 adjusted for standard error of measurement? Should this Court grant certiorari, vacate, and remand to allow the Kentucky Supreme Court to reconsider and apply *Hall* and *Moore* to correct clear Eighth Amendment violations?

II.

Search and Seizure

A seizure for a traffic violation justifies a police investigation of that violation. *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015). However, "[t]he scope of the detention must be carefully tailored to its underlying justification." *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325, 75 L. Ed. 2d 229 (1983). Because addressing the infraction is the purpose of the stop, it may "last no longer than is necessary to effectuate th[at] purpose." *Id.* An officer's investigation of matters unrelated to the justification for the traffic are only lawful if those inquiries do not measurably extend the duration of the stop. *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). In the case below, the Kentucky Supreme Court ignored this foundational requirement, finding that the petitioner was legally removed from the

car and frisked while failing to address the fact that the officers involved apparently abandoned their investigation of the traffic violation justifying the initial stop. The question presented is:

Does it violate the Fourth Amendment when officers abandon their duty to address a traffic violation which justified a pretextual stop in order to investigate a passenger?

List of All Parties

Petitioner is Mr. Larry Lamont White. Counsel for Mr. White is the Hon. Kathleen Kallaher Schmidt and Hon. Erin Hoffman Yang, Assistant Public Advocates, Department of Public Advocacy, 5 Mill Creek Park, Suite 100, Frankfort, Kentucky 40601.

Respondent is the Commonwealth of Kentucky, represented by Hon. Jeffrey Allan Cross, Assistant Attorney General, Hon. Emily Lucas, Assistant Attorney General and to Hon. Andy Beshear, Attorney General of the Commonwealth of Kentucky, 1024 Capital Center Drive, P.O. Box 2000, Frankfort, Kentucky 40602-2000, (502) 696-5342, Counsel for Respondent.

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general rule requiring probable cause, this Court has been careful to maintain its narrow scope." *Dunaway v. New York,* 442 U.S. 200, 210 (1979).

Moreover, the opinion below conflicts with the holdings in other states including Maryland, Idaho, Delaware and Illinois. The question presented is a fundamental Fourth Amendment issue. Clear guidelines for law enforcement and a uniform constitutional rule are crucial.

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APPENDIX

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CITATIONS TO OPINIONS BELOW

The Petitioner filed a direct appeal of his convictions and death sentence in the Kentucky Supreme Court. That court rendered a decision which denied relief on Petitioner's intellectual disability claims and affirmed the lower court's ruling denying his motion to suppress evidence on August 24, 2017. It is attached at the Appendix at A53 to A101. The Petitioner filed a Petition for Rehearing. The Kentucky Supreme Court granted the petition to the extent it modified the opinion and the modified opinion was rendered March 22, 2018. The final opinion is reported as *White v. Commonwealth*, 544 S.W.3d 125 (Ky. 2017), as modified (Mar.

22, 2018). That opinion is attached at Appendix A1-A52. The decision of the trial court denying relief on petitioner's claim of intellectual disability is attached at Appendix A170-A183. The trial court order(s) overruling Petitioner's motion to suppress is attached at Appendix A196-A200.

JURISDICTION

The Kentucky Supreme Court decision was originally entered on August 24, 2017, (A53-A101) and a timely request for rehearing was filed by the Petitioner was granted on March 22, 2018. (A1) The Kentucky Supreme Court entered its modified decision on March 22, 2018, (A2-A52). The decision below affirms the complete denial of relief to Petitioner and is a final judgment of the state's highest court. Petitioner sought application of *Hall* to his intellectual-disability claim prior to sentencing and raised *Hall* on appeal. In denying White's ID claim the Kentucky court did not rely on untimeliness or any other procedural bar. Because the Kentucky court decided the ID claim on the merits, the judgment below does not rest on an independent state ground and this Court has jurisdiction to consider the issues raised. *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985). *Moore* was decided on March 28, 2017, five months before the Kentucky Supreme Court's original (unmodified) decision and a year prior to its final decision upholding petitioner's death penalty. The Kentucky Supreme Court misapplied *Hall* and implicitly rejected *Moore*, vesting this Court with jurisdiction under 28 U.S.C. §1257.

The same is true for its treatment of *Arizona v. Johnson*, 555 U.S. 323, 333 (2009), refusing to suppress evidence seized in violation of the Fourth Amendment

as well. This petition has been filed within ninety days of that opinion, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> ...nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws....

Ky. Rev. Stat. 532.130 provides:

> (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 defendant with a serious intellectual disability. "Significantly subaverage general intellectual functioning" is defined as an intelligence quotient (I.Q.) of seventy (70) or below.

Ky. Rev. Stat. 532.135 provides:

> (1) At least thirty (30) days before trial, the defendant shall file a motion with the trial court wherein the defendant may allege that he is a

defendant with a serious intellectual disability and present evidence with regard thereto. The Commonwealth may offer evidence in rebuttal.
(2) At least ten (10) days before the beginning of the trial, the court shall determine whether or not the defendant is a defendant with a serious intellectual disability in accordance with the definition in KRS 532.130.
(3) The decision of the court shall be placed in the record.
(4) The pretrial determination of the trial court shall not preclude the defendant from raising any legal defense during the trial. If it is determined the defendant is an offender with a serious intellectual disability, he shall be sentenced as provided in KRS 532.140.

Ky. Rev. Stat 532.140 provides:

(1) KRS 532.010, 532.025, and 532.030 to the contrary notwithstanding, no offender who has been determined to be an offender with a serious intellectual disability under the provisions of KRS 532.135, shall be subject to execution. The same procedure as required in KRS 532.025 and 532.030 shall be utilized in determining the sentence of the offender with a serious intellectual disability under the provisions of KRS 532.135 and 532.140.
(2) The provisions of KRS 532.135 and 532.140 do not preclude the sentencing of an offender with a serious intellectual disability to any other sentence authorized by KRS 532.010, 532.025, or 532.030 for a crime which is a capital offense.
(3) The provisions of KRS 532.135 and 532.140 shall apply only to trials commenced after July 13, 1990.

STATEMENT OF THE CASE

I. Statement of the Case Regarding Intellectual Disability

Petitioner Larry Lamont White was born March 30, 1958, and grew up in Louisville, Kentucky, in the home of his mother and grandmother. When he was 12, he underwent comprehensive psychological and IQ evaluation resulting in two IQ scores, a 73 and a 76, included within 50 pages of psychological and IQ test results, reports and raw data.[1] (A105-A155).

[1] Trial counsel attached this data to a Motion to Exclude Death as Possible Punishment Based Upon Defendant's Previous Borderline IQ Testing and Recent Decision of Supreme Court in *Hall v. Florida* served on July 28, 2014.

Kentucky's definition of ID includes an arbitrary 70 IQ score cut-off, contained in Kentucky Revised Statutes (KRS) 532.130(2)[2], as follows:

> (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 defendant with a serious intellectual disability. "Significantly subaverage general intellectual functioning" is defined as an intelligence quotient (I.Q.) of seventy (70) or below.

But seven weeks before White's trial, this Court decided *Hall v. Florida*, 572 U.S.__, 134 S. Ct. 1986 (May 27, 2014), requiring application of a five-point standard error of measurement (SEM) in evaluating IQ scores. *Hall* held that Florida's strict cut-off requiring an IQ score of 70 or below (which is virtually identical to Kentucky's cut-off[3]) and Florida's reliance on a single IQ score to deny ID status violated the Eighth Amendment by disregarding established medical practice in two interrelated ways: 1) by taking an IQ score as final and conclusive, and 2) by relying exclusively on an IQ score to deny exemption from the death penalty. *Id.,* at 1995.

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[2] Petitioner alerts this Court to a very recent decision of the Kentucky Supreme Court in *Robert Woodall v. Commonwealth*, 2017-SC-000171 (rendered June 14, 2018). A203-A216. In that opinion, the Kentucky Supreme Court held that KRS 532.130 (2) was unconstitutional under the Eighth Amendment, finding it contained "an outdated test for ascertaining intellectual disability."A203. Woodall, a death row inmate, filed a post-conviction motion asking the trial court to declare him intellectually disabled. The Kentucky Supreme Court remanded to the trial court to hold a hearing, make findings and issue a ruling on intellectual disability. In its opinion, it cites petitioner's opinion of August 24, 2017, and another opinion (from another death row inmate named Karu White) for the principle that they restrict a Kentucky defendant's "ability to attain intellectual-disability status to prevent the consideration of the death penalty on the finding that the defendant has an IQ score of 70 or below." A207. While this opinion is not yet final, the relevance to petitioner's case is plain. Not four months ago, the Kentucky Supreme Court used this same statute to deny relief where petitioner asked it to hold that the trial court erred by failing to hold a hearing on his intellectual disability. It must be noted the Commonwealth conceded Woodall was entitled to a hearing in the trial court. A212.

[3] This Court observed that only Kentucky and Virginia have adopted a strict IQ cut-off similar to Florida's. *Hall*, 134 S.Ct. at 1996.

On July 14, 2014, White's trial started, and on July 28, 2014, a jury found him guilty of rape and murder and recommended the death penalty plus 20 years. Sentencing was scheduled for September 26, 2104.

A month prior to sentencing, on August 4, 2014, White's counsel filed a timely motion for new trial and asked for a hearing on ID, citing *Hall.* Motion for New Trial and Judgment Notwithstanding the Verdict. (A158-A169) Counsel also filed a Motion to Exclude Death as Possible Punishment Based Upon Defendant's Previous Borderline IQ Testing and Recent Decision of Supreme Court in *Hall v. Florida* served on July 28, 2014. (A102-A103). With that motion, counsel introduced the 50 pages of psychological test results, reports, and raw data from 1971, including both of White's IQ scores, the 73 (A150-A155) and the 76 (A128-A134).

The trial court noted in passing that the Commonwealth argued White's violation of Kentucky's 30-day pre-trial deadline for claiming exemption from the death penalty due to ID. The Commonwealth also argued Hall required more than a showing of borderline intelligence to eliminate the death penalty. The trial court stated White had not cited any other evidence of intellectual impairment. It summarily denied White relief. The trial court overlooked (or ignored) White's IQ score of 73, and relied solely on his higher score of 76. (A180).

In his direct appeal brief, petitioner submitted to the Kentucky Supreme Court the same 50 pages of ID evidence he presented to the trial court. Included were his IQ scores of 73 on the Otis Quick-Scoring Mental Ability Test (Otis) and his 76 on the original Weschler Intelligence Scale for Children (WISC). White

argued on appeal that the SEM and the Flynn Effect[4] should be applied to lower his IQ scores. Prior to oral argument on appeal, Petitioner filed a Motion for Leave to Cite Supplemental Authority and reminded the Kentucky court not to overlook Mr. White's lower IQ score of 73. (A201-A202).

Yet the Kentucky Supreme Court failed to mention or consider the 73 IQ score. Had the SEM alone been applied to White's 73 Otis score, it would have established his IQ in a range as low as 68, satisfying the first prong of KRS 532.130(2). The Kentucky Supreme Court also categorically rejected considering the Flynn Effect.

The WISC administered to White was published in 1949, but normed in 1947, which was 24 years before White took the test at age 12.[5] Adjusting for the Flynn Effect alone at .31 points per year, the total Flynn adjustment for White's 1971 WISC score would be 7.44 points, reducing his WISC score to as low as 68.56. This is without any adjustment for the SEM. White's WISC score, when adjusted for the Flynn Effect alone, satisfies the "significant subaverage intellectual functioning" prong of ID under KRS 532.130 and KRS 532.135.

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[4] The "Flynn Effect" refers to the observed rise over time in standardized intelligence test scores, documented by Flynn in a study on intelligence quotient (IQ) score gains in the standardization samples of successive versions of Stanford-Binet and Wechsler intelligence tests. Flynn's study revealed a 0.3-point increase per year. The Flynn effect was also supported by calculations of IQ score gains between 1972 and 2006 for tests including the Wechsler Intelligence Scale for Children (WISC). The average increase in IQ scores per year was 0.31, which was consistent with Flynn's earlier findings. U.S. National Library of Medicine, National Institutes of Health website, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4152423/. (last checked April 11, 2018)

[5] https://en.wikipedia.org/wiki/Wechsler_Intelligence_Scale_for_Children, last checked May 5, 2018.

Evidence Meeting Both Prongs of ID at Trial and on Appeal

The 50 pages of testing, reports, and raw data were compiled when White was 12 years old, and there can be no question that his ID manifested during the developmental period.

White's psychological testing and raw data presented at trial and on appeal included a report by licensed psychologist Dennis Wagner, who in 2009 reviewed the 1971 evidence. Psychological Examination Report (A156-A157). Wagner noted that White had completed 10th grade and had a GED. But he also reported that "[i]n 1971, at age 12, Mr. White was found to have Borderline Intellectual functioning and significant learning deficits in reading and mathematics. Reasoning was in the low normal range.... He was immature, turned off with school, and committed to delinquent values, though slight socialization had been internalized." Wagner Report (A157).

Psychologist Sonia Hess evaluated White in 1971 when he was before the court for truancy and warehouse breaking. Hess stated that at age 12 White had "a significant learning deficit, with reading at the 2.4 grade level and arithmetic at the 3.4 level." Sonia Hess, Psychological Services Report (A107).[6] He showed a "fairly primitive level of socialization" and "[a]social distance from family and friends ... [having] little to do with his brother when the latter was at home." *Id.* Hess noted petitioner "spends his time at home playing cards with his grandmother or watching TV." *Id.* White's mother ascribed White's "present difficulties" in 1971 to

[6] Mr. White is referred to as "Larry Griffin" in the 1971 testing and evaluation.

some older boys with whom he'd been associating. White's 1971 probation officer, M.L. Harris, stated White was "peer group oriented with older sophisticated delinquents." Harris Referral (A137). Hess recommended removal from the home and commitment to a boys' camp. *Id.*

The Trial

Trial started on July 14, 2014. No mitigation evidence apart from White's youthful age of 25 at the time of the murder was presented to the jury.[7] Yet White demonstrated substantial deficits in adaptive behavior to the trial court. White refused to meet with experts and refused to agree to further psychological testing or to sign releases. He refused to dress and come out of his cell for the penalty phase of his trial. Mitigation witnesses were available but White refused to allow their testimony. Prior to sentencing White's counsel submitted White's IQ scores of 73 and 76 with the 1971 psychological tests, reports, and raw data, cited *Hall*, and asked the trial court for a hearing on ID, stating, "[T]his evidence must be heard:..."

Trial Court Ruling on ID

White's counsel pointed out that Kentucky Revised Statute (KRS) 532.130 defining ID ineligibility for the death penalty is essentially identical to the statute struck down in *Hall*. Motion for New Trial (A103). Yet the trial court overlooked or ignored petitioner's score of 73 on the Otis entirely and failed to apply either the SEM or Flynn Effect to petitioner's 76 score. The trial court ignored petitioner's immature behavior and the raw data and reports from White's developmental

[7] White was 25 at the time of the Armstrong murder.

period showing deficits in adaptive behavior. The trial court ruled that White's showing of ID was insufficient to merit exemption from the death penalty:

> ...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.

Trial Court Opinion and Order (A180).

Kentucky Supreme Court Ruling on ID

The Kentucky Supreme Court ignored White's failure to meet the 30-day pre-trial deadline in KRS 532.135 for raising an issue regarding ID. Based entirely on the fact that White's WISC score was still one point above 70 after the SEM was applied, the Kentucky court denied a hearing, refusing to engage in further exploration of White's ID. The court upheld his death sentence, stating in relevant part as follows:

> 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, 122 S.Ct. 2242, 153 L.Ed.2d 335 (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.

White v. Commonwealth, 544 S.W.3d 125, 152 (Ky. 2017), as modified (Mar. 22, 2018) (A45-A46).

II. Statement of the Case Regarding Illegal Search and Seizure

Sergeant Aaron Crowell testified he was directed to find a DNA sample from White. He was surveilling White's residence with Detective William Hibbs on 2/21/06 when a car White had entered as a passenger pulled out and began speeding. Hibbs and Crowell initiated a stop on the Lincoln Town Car White was riding in. Crowell asked White to exit the passenger seat and frisked him, based on his knowledge of White's "propensity to carry weapons." White placed a cigar on the

trunk of the car during the frisk. When the traffic stop ended, the cigar rolled onto the street and was collected by the officers.

Crowell testified that he was entitled to pull White from the car and frisk him to determine if White had a warrant for failing to appear. Crowell testified that he was present for White's court date the day before the stop, but White and his attorney were not. "So it was my understanding when I left the courthouse that day a circuit court warrant was being issued for Mr. White." Crowell claimed that he could not confirm whether or not there was a warrant without asking White to exit the car. Nonetheless, Crowell admitted "whether there was a warrant issued or not, our mission was the same. And we would've conducted the same activity." Contrary to Crowell's testimony, a video tape of the hearing in question, introduced by White's trial counsel, below, showed that White, his attorney, and the prosecution were present. TR 421. But Crowell was not present. TR 421. Crowell's testimony was also contradicted by Hibbs, who stated that a warrant could be verified regardless of whether the defendant exited the car. While the car was purportedly stopped because of speeding, neither Hibbs nor Crowell issued any citation or ticket for speeding. See, Memorandum of Law in Support of Motion to Suppress (A184-A194). The trial court failed to address White's argument that a citation was never made. (A196-A200). Instead, the trial court simply held there was probable cause a speeding violation occurred and speculated that Mr. White's DNA would be subject to inevitable discovery based on a later 2008 Conviction. Id.

The Kentucky Supreme Court affirmed the denial of his suppression motion. The Court held, "we can quickly dispose of Appellant's contentions" that he was illegally removed from the car and frisked. 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, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997)). The Opinion Affirming stated that once White exited the car, Crowell had reasonable suspicion to believe White was armed.

The Kentucky Supreme Court did not address the fact that neither officer issued a citation to the driver of the car. *White v. Commonwealth*, 544 S.W.3d 125, 140 (Ky. 2017), *as modified* (Mar. 22, 2018). But there was no "completion of the minor traffic stop."

REASONS FOR GRANTING, VACATING, AND REMANDING FOR FURTHER CONSIDERATION OF INTELLECTUAL DISABILITY

1) **The Kentucky Supreme Court violated *Hall* and *Moore* in Three Clear Ways, by a) basing its ID decision on a single factor and failing to conduct a "conjunctive and interrelated assessment" of ID, b) failing to apply prevailing diagnostic criteria (the SEM and Flynn Effect) to both of White's IQ Scores, and c) determining White's adaptive functioning by relying on strengths and lay stereotype instead of weaknesses.**

Executing a person with intellectual disability violates the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). *Atkins* left "to the States the task of developing appropriate ways to enforce the constitutional restriction," *Id.*, at 317, But this Court recognized in *Hall v. Florida*, 134 S. Ct. 1986 (2014) and *Moore v. Texas*, 137 S. Ct. 1039 (2017), that states' discretion is "not 'unfettered....'"

Moore, at 1042 (quoting *Hall*, 134 S. Ct. at 1998). Fla. Stat. Ann. § 921.137. *Hall* focused on the first prong of ID, intellectual functioning, and held that Florida's ID statute was unconstitutional as applied because Florida failed to comply with the prevailing medical consensus regarding the interpretation of IQ scores. *Hall*, 134 S. Ct. at 1990. *Moore* focused on the second prong of ID, adaptive behavior, and reversed a Texas death sentence because it was based on the defendant's strengths, not his weaknesses, and because it relied on lay stereotypical notions of ID. *Moore* confirmed the holding in *Hall* that a determination whether a defendant is ID must be "informed by the medical community's diagnostic framework," by "current," "established" medical practices, "practices and trends in other states," and "current medical standards," as contained in "the most recent (and still current) leading diagnostic manuals":

> Although *Atkins* and *Hall* left to the States "the task of developing appropriate ways to enforce" the restriction on executing the intellectually disabled, States' discretion, we cautioned, is not "unfettered," Even if "the views of medical experts" do not "dictate" a court's intellectual-disability determination, we clarified, **the determination must be "informed by the medical community's diagnostic framework,"** We relied on **the most recent (and still current) versions of the leading diagnostic manuals—the DSM–5 and AAIDD–11.** Florida, we concluded, had violated the Eighth Amendment by "disregard[ing] **established medical practice.**" We further noted that Florida had parted ways with **practices and trends in other States.** *Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of **current medical standards.**

Moore, 137 S. Ct. at 1048–49 (internal citations omitted) (emphasis added)

***Hall* and *Moore* Resolved a Split, but Courts are Still Confused**

Prior to *Hall* and *Moore* the courts were split regarding the Flynn Effect. In 2015, after the decision in *Hall* but prior to *Moore,* the Seventh Circuit Court of Appeals described the split as follows:

> The Flynn Effect is taking on increased prominence in habeas litigation alleging death ineligibility under *Atkins*. See Frank M. Gresham & Daniel J. Reschly, *Standard of Practice and Flynn Effect Testimony in Death Penalty Cases*, 49 Intellectual & Developmental Disabilities 131 (2011). The circuits are not consistent in their approach on this point. *Compare, e.g., Black v. Bell*, 664 F.3d 81, 95 (6th Cir.2011) (faulting state court for not considering the Flynn Effect under Tennessee law) and *Walker v. True*, 399 F.3d 315, 322–23 (4th Cir.2005) (finding the Flynn Effect relevant to whether someone is two standard deviations below the mean), with *Hooks v. Workman*, 689 F.3d 1148, 1170 (10th Cir.2012) ("Atkins does not mandate an adjustment for the Flynn Effect."). See also *Thomas*, 607 F.3d at 757–58 (collecting cases and noting that no expert consensus exists on how to apply the Flynn Effect to individual cases); *Young, Adjusting for the Flynn Effect, supra*, at 631–41 (analyzing the different approaches used in state and federal courts); Gresham & Reschly, *supra*, at 136–37 (criticizing those administering psychological tests for failing to consider the Flynn Effect). Our circuit has not yet weighed in.

McManus v. Neal, 779 F.3d 634, 653 (7th Cir. 2015) (stating nothing in *Atkins* suggests IQ test scores must be adjusted to account for the Flynn Effect).

This Court should grant certiorari, vacate and remand this case to dispel the persisting confusion exhibited in *McManus* and the present case, and to underscore that while *Atkins* did not address the Flynn Effect, *Hall* and *Moore* have resolved the Flynn Effect issue. Both *Hall* and *Moore* name the DSM-5 and the eleventh edition of the AAIDD Manual as the "leading" manuals and both *Hall* and *Moore* mandate that scientific criteria recommended in those manuals must be applied in determining ID. The DSM-5 and the eleventh edition of the AAIDD Manual both

mandate consideration of the Flynn Effect. The Kentucky court, like the court in *McManus*, failed to recognize that under *Hall* and *Moore* the Flynn Effect must be considered and applied. This Court should grant certiorari, vacate the Kentucky court's decision, and remand for further consideration under *Hall and Moore*.

a) Kentucky Violated *Hall* by Evaluating White's intellectual Functioning Based on a Single Factor, His Highest IQ Score, a 76

In denying White's ID claim the Kentucky court did not rely on untimeliness or any other procedural bar. Because the Kentucky court decided the ID claim on the merits, the judgment below does not rest on an independent state ground and this Court has jurisdiction to consider the issues raised. *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985).

According to the DSM–5, a defendant's IQ score alone is not enough to reject his ID claim, because it is necessary to also consider his adaptive functioning in conjunction with his IQ score. "Simply put, an IQ test score alone is inconclusive." *Sasser v. Hobbs*, 735 F.3d 833, 844 (Eighth Cir. 2013). See also *Brumfield v. Cain*, 135 S. Ct. 2269 (2015) (state court violated due process by determining that prisoner's IQ score of 75 demonstrated that he could not possess subaverage intelligence). *Hall* rejects short-cut reliance on a single factor, like a single IQ score, and states explicitly that intellectual functioning and adaptive functioning must be considered together in a "conjunctive and interrelated assessment" as recommended in the DSM-5. *Hall* refers to this as "the requisite test":

> ...the requisite test for establishing intellectual disability is a "conjunctive and interrelated assessment" under which "[i]t is not sound to view a single factor as dispositive." Id. (quoting the fifth (and most

> recent) edition of the Diagnostic and Statistical Manual of Mental Disorders for the proposition that "a person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score").

Hall at 1994.

According to Merriam Webster "requisite" means "essential, necessary."[8] By using the word "requisite" *Hall* indicated that a "conjunctive and interrelated" assessment is mandatory. "Interrelated' means "having a mutual or reciprocal relation."[9] And "conjunctive" means "connective, conjunct, or conjoined."[10] By using both "conjunctive" and "interrelated" to describe the nature of the requisite assessment, *Hall's* ruling is clear that intellectual functioning is *not* to be evaluated on its own, that adaptive functioning must be considered simultaneously with intellectual functioning, no matter what a defendant's IQ scores may be.

By mandating a "conjunctive and interrelated" assessment, and requiring conjoined consideration of intellectual and adaptive functioning, *Hall* recognizes that deficiencies in adaptive behavior can lower an IQ score. Even when an IQ score adjusted for SEM remains above 70, assessment of ID does not stop.

The Kentucky court's refusal to consider White's adaptive functioning at all clearly and obviously violated *Hall.* Under *Hall* a court cannot cherry-pick a single factor—like a defendant's highest IQ score— and ignore another lower score. Yet

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[8] Merriam Webster online dictionary, https://www.merriam-webster.com/dictionary/requisite last consulted on May 7, 2018.
[9] Merriam Webster online dictionary, https://www.merriam-webster.com/dictionary/interrelated, last consulted on May 7, 2018.
[10] Merriam Webster online dictionary, https://www.merriam-webster.com/dictionary/conjunctive, last consulted on May 5. 2018.

the Kentucky court focused solely on White's WISC score of 76 to deny his ID status. Kentucky ignored White's lower IQ score of 73, and failed to apply the SEM to that score, which would have lowered it to 68 and satisfied the first prong of KRS 532.130. Relying solely on White's highest IQ score as a single factor was a clear violation of *Hall*. Kentucky violated *Hall* and *Moore* by relying on a single factor, the WISC score, ignoring White's 73 IQ score, and refusing to conduct the requisite interrelated and conjunctive assessment of White's IQ scores in the light of his adaptive deficits as required by *Moore*. This Court should grant certiorari, vacate, and remand to allow Kentucky to comply with *Hall* and *Moore*.

b) Kentucky Violated *Hall* and *Moore* by Failing to Apply Prevailing Diagnostic Criteria (SEM and Flynn Effect) to White's IQ Scores.

The current AAIDD, eleventh edition, recognizes the Flynn Effect as a "challenge" to the reliability and validity of an I.Q. test score, AAIDD-11, at 37, and mandates application of the Flynn Effect by naming it a "best practice" for a clinician administering a test with outdated norms. *See* AAIDD–11 at 95–96; *id.* at 37 ("[B]est practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score."). The DSM–5 likewise recognizes the Flynn Effect as a factor that may affect IQ test scores. *See* DSM–5 at 37. *See also, United States v. Roland*, 281 F. Supp. 3d 470, 503 (D.N.J. 2017) (recognizing application of the Flynn Effect as a "best practice")

Hall noted that "[o]nly the Kentucky and Virginia Legislatures have adopted a fixed score cutoff identical to Florida's," thus pointedly calling Kentucky's KRS

532.130(2) into question. *Hall*, at 1996. In marginal, grudging compliance with *Hall*, the Kentucky court applied the SEM to White's 76 WISC score. But Kentucky violated *Hall* by failing to even recognize and then apply the SEM to White's 73 IQ score, and violated *Hall* by failing to apply the Flynn Effect to either of White's two IQ scores. Both *Hall* and *Moore* require that a decision on ID must be informed by the current AAIDD and the DSM. The Kentucky court refused to apply the Flynn Effect to either of White's IQ scores, stating that White had "failed to cite any precedential or statutory authority indicating that trial courts must take into account the Flynn Effect." This is incorrect, because White cited *Hall,* and *Hall* requires states to take into account prevailing diagnostic criteria contained in the latest AAIDD manual and DSM-5, and the AAIDD and current DSM-5 both require accounting for the Flynn Effect, particularly in a test as outdated as the 1949 original version of the WISC administered to Mr. White in 1971.

The Kentucky court's failure to apply even the SEM to White's 73 Otis score is an obvious, clear violation of *Hall.* Failure to apply both the SEM and the Flynn Effect to White's 73 score and failure to apply the Flynn Effect to his 76 score violated *Hall* and resulted in a deadly exaggeration of White's IQ, rendering him eligible for the death penalty when he should be exempt.[11] The Court should grant certiorari, vacate, and remand this case under *Hall.*

[11] The WISC test administered to petitioner was published in 1949, but normed in 1947, which was 24 years earlier. Adjusting for the Flynn Effect at .3 points per year, the total Flynn adjustment for petitioner's 1971 WISC score would be 7.2 points. Accordingly, petitioner's WISC score of 76 adjusted solely for the Flynn Effect even (without considering the SEM) would be 69. A 69 score satisfies the "significant subaverage intellectual functioning" prong of ID under KRS 532.130.

c) Kentucky Violated *Moore* when it Determined White's Adaptive Functioning by Relying on his Strengths and Lay Stereotype Instead of His Weaknesses.

The Court in *Moore* denounced the CCA's determination that Moore's ability to perform tasks such as mowing lawns and playing pool for money outweighed "the considerable objective evidence of Moore's adaptive deficits." *Id.* Yet just like the CCA, the Kentucky court relied on the lay, stereotypical fact that White had filed numerous *pro se* motions:

> 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.

White v. Commonwealth, *supra* at 153 (A46).

Such reasoning is directly contrary to *Moore*, which invalidated Texas's ID standard because the Texas Court of Criminal Appeals (CCA) emphasized Moore's strengths and relied on stereotypes. See *Moore,* 137 S. Ct. at 1052-53. The Court explained that the current medical manuals for diagnosing ID, including the DSM-5 and the eleventh edition of the AAIDD Manual, "offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.' " *Id.* at 1053 (quoting DSM-5, at xli). The Court criticized the CCA for "overemphasiz[ing] Moore's perceived adaptive strengths" when "the medical community focuses the adaptive-functioning inquiry on adaptive deficits." *Id.* at 1050. As in *Moore*, the evidence that White wrote *pro se* pleadings did not outweigh the "considerable objective evidence" of White's adaptive deficits. There was no way

on the record to determine even whether Mr. White personally wrote any of the *pro se* pleadings he filed, or if he did, what sort of help he had.

The evidence of Mr. White's work as a plumber's helper and plumber was similar to the evidence of mowing lawns and playing pool for money that was denounced in *Moore*. The DSM-5 recognizes adults with mild ID often obtain competitive employment "in jobs that do not emphasize conceptual skills." DSM-5, at 35. The record reflects White dressed in a flashy manner and took pride in his personal appearance. But clinical standards acknowledge persons with mild ID "may function age-appropriately in personal care." DSM-5, at 34. See also *Brumfield*, at 2281 (recognizing that intellectually disabled persons may have strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation).

White Showed Deficits in Two Adaptive Skill Domains

There are three adaptive skill domains, the conceptual, social and practical. DSM-5, at 33, 38. 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 **any one** of the three adaptive skill sets. *Moore*, 137 S. Ct. at 1046, citing AAIDD Manual, at 43. The DSM-5 also instructs that "deficits in only one of the three adaptive-skills domains [conceptual, social, or practical] suffice to show adaptive deficits." *Moore*, 137 S. Ct. at 1050 (citing DSM-5, at 33, 38).

The 50 pages of psychological reports and raw data presented to the trial court and on direct appeal to the Kentucky Supreme Court by White demonstrate

his adaptive deficits in at least two domains, the conceptual (academic) and the social. The DSM-5 explicitly states that academic skills fall within the conceptual domain for purposes of diagnosing ID. See DSM-5, at 34-35, Table 1 (for adults with mild ID, impairments in the conceptual domain include "functional use of academic skills." A 12-year-old who reads at second grade level and comprehends only third-grade level math is displaying a substantial conceptual deficit, severe enough support the conclusion that White's IQ is 70 or lower. How White ever finished 10th grade and passed a GED do not appear in the record.

White also showed deficits in the social domain. A boy who at age 12 spends his time at home playing cards with his grandmother, and when he does venture out is led and influenced by older delinquent boys to commit crimes is exhibiting substantial deficits in the social domain. When that same boy, as a grown man, faces the death penalty yet lacks the conceptual and social acumen to allow evidence that could save his life, and who instead refuses even to dress and appear at the penalty phase of his death trial is displaying substantial deficits in both the conceptual and social domains. In light of all the adaptive behavior evidence, and in light of his other, lower Otis IQ score, an accurate assessment of White's intellectual functioning would have placed White's IQ at 70 or below.

The Kentucky court violated *Hall* and *Moore* when it failed to conduct the conjunctive and interrelated assessment mandated by *Hall,* when it refused to consider White's 73 score and the 50 pages of psychological testing, reports, and raw data and White's immature behavior before and during trial. All of these factors

should have been weighed together, simultaneously. Together they spell a person with severe deficits in intellectual and adaptive functioning, a person with ID.

The Kentucky Supreme Court's refusal to perform an interrelated conjunctive assessment of both intellectual and adaptive functioning clearly violated *Hall* and *Moore*. With White's WISC score reduced to 71 by the SEM, his adaptive deficits in the conceptual and social domains were more than enough to support a reduction in his IQ to 70. The Court's refusal to consider White's 73 score on the Otis (a 68 when the SEM is applied) and refusal to apply the Flynn Effect to either of White's scores and refusal to consider his adaptive deficits in an interrelated assessment violated current medical standards and the prohibition in *Hall*, *Moore*, and the Eighth Amendment against executing an intellectually disabled person.

The Kentucky Supreme Court's violations of *Hall* and *Moore* were outcome-determinative. This Court should grant certiorari, vacate the decision below, and remand for further proceedings. Allowing the Kentucky Supreme Court to reconsider the import of *Hall* and *Moore* would "conserve[] the scarce resources of this Court that might otherwise be expended on plenary consideration, assist[] the court below by flagging a particular issue that it does not appear to have fully considered, [and] assist[] this Court by procuring the benefit of the lower court's insight before ... rul[ing] on the merits." *Lawrence v. Chater,* 516 U.S. 163, 167 (1996) (quoting *United States v. Johnson*, 457 U.S. 537, 555, n. 16 (1982)). The Court followed this approach in *Carroll v. Alabama*, 137 S. Ct. 2093 (2017), when it granted certiorari, vacated, and remanded for further consideration in light of

Moore. The same result is appropriate here, and is necessary to enforce the Eighth Amendment's prohibition against executing "anyone in 'the entire category of [intellectually disabled] offenders[.]' " *Moore*, 137 S. Ct. at 1051 (quoting *Roper v. Simmons,* 543 U.S. 551, 563-64 (2005)).

In fact, the Kentucky Supreme Court demonstrated in *Woodall* that it can and will apply the requirements of *Hall* and *Moore* despite Kentucky's infirm statute defining intellectual disability. Petitioner should have that opportunity. Otherwise, there is a significant risk that the petitioner will be denied relief in subsequent proceedings before the Kentucky Supreme Court based on Kentucky's law of the case doctrine. See generally *Ragland v. DiGiuro,* 352 S.W.3d 908, 912-13 (Ky. App. 2010). It is easy to assume petitioner may get relief in post-conviction based on *Woodall* but that it not a sure thing. The current direct appeal represents the best opportunity for the Kentucky Supreme Court to correct its faulty approach to *Hall* and *Moore* in petitioner's case just as it did three months later in *Woodall.*

II.) The Kentucky Supreme Court's Decision that White's DNA was not illegally seized is inconsistent with this Court's cases

This court should grant review because the Kentucky Supreme Court's decision is inconsistent with this Court's cases narrowly circumscribing the Fourth Amendment exception embodied in *Terry v. Ohio,* 392 U.S. 1, 24 (1968). Absent any follow-through regarding a valid purpose for stopping the car, no time period was created in which the police would have had authority to remove White and complete a pat down.

When a person is lawfully stopped for a traffic violation, the officer may detain the individual only as long as necessary to effectuate the purpose of the stop. *Florida v. Royer,* 460 U.S. 491, 500 (1983). The purpose of a traffic stop may not be abandoned so an intervening investigation may run its course. An investigative detention must remain within the scope of the traffic stop to be reasonable. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis. *Whren v. United States*, 517 U.S. 806, 813 (1996). Rather "[t]he foremost method of enforcing traffic and vehicle safety regulations ... is acting upon observed violations," *Id.* at 817. In the case below, the officers did not act on observed violations, but instead pursued an investigation into the passenger. This Court allows an officer to pursue matters unrelated to the justification for the traffic stop, but those inquiries do not measurably extend the duration of the stop. *Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015). The Kentucky Supreme Court upheld the removal of Mr. White from the car despite without addressing whether there was a traffic related reason to continue the stop.

In addition, a number of states have acknowledged that failure to pursue the justification for a traffic stop in order to investigate a separate crime violates due process. The Maryland Supreme Court held that the purpose of a traffic stop may not be abandoned so an intervening investigation may run its course. *Charity v. State*, 753 A.2d 556, 565 (Md. 2000). Similar to the petitioner's case, a warning, or even a citation, could have been issued immediately. *Id.* at 567. The extension of the

traffic stop was simply used as "cover" for the detention involved in conducting the narcotics investigation. *Id.* Likewise, the Delaware Supreme Court noted that an "officer's observation of a traffic violation 'does not confer the right to abandon or never begin to take action related to the traffic laws and, instead, to attempt to secure a waiver of Fourth Amendment rights....'" *Caldwell v. State*, 780 A.2d 1037, 1047–48 (Del. 2001). Likewise, in *State v. Luna*, Idaho's appellate court considered the propriety of detention when an officer who initiated a traffic stop decided he would not cite the driver for any offense. 236, 880 P.2d 265, 266 (Idaho Ct. App. 1994). The court determined that the continued detention of the vehicle and its occupants became unreasonable after the reasons for the initial stop dissipated and the officer concluded that the driver was not operating the vehicle while under the influence, was not wanted on any outstanding warrant and would not be cited for any traffic violation. *Id.* at 267. Likewise, in *People v. Brownlee*, the Illinois appellate court held that the continued detention of the car's occupants after a decision not to issue a citation violated the defendant's constitutional rights. 713 N.E.2d 556, 565 (Ill. 1999).

In short, the court below side stepped a foundational issue-whether an officer must address the violation justifying an initial stop in order to permissibly pursue unrelated investigations. Traffic stops are ubiquitous in today's society. Frequently, officers initiating a traffic stop hoping to glean evidence of a separate offense. However, it is unclear if they can cease working on a traffic citation in order to

investigate the car's occupants. A decision would also offer law enforcement a bright line rule as to what is constitutionally permissible.

CONCLUSION

The petition for writ of certiorari should be granted. The decision of the Kentucky Supreme Court should be vacated, and this case should be remanded for further proceedings on ID in light of *Hall* and *Moore*. This Court should also reverse the decision of the Kentucky Supreme Court and order that the DNA evidence seized should be suppressed.

Respectfully submitted,

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