No. 20-240

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2019

COMMONWEALTH OF KENTUCKY,
Commonwealth
vs.
LARRY LAMONT WHITE
Respondent

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

RESPONDENT LARRY LAMONT WHITE BRIEF IN OPPOSITION

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October 27, 2020

QUESTION PRESENTED

Whether a State court may order an evidentiary hearing on the intellectual disability claim of a defendant facing the death penalty, despite a *pro se* request by the defendant to waive the claim, where the issue has been properly preserved by defense counsel, the record contains sufficient evidence to form a reasonable doubt as to the defendant's intellectual capabilities, and the Commonwealth agreed below that an intellectual disability claim can be raised until the moment of execution?

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INTRODUCTION

The Commonwealth of Kentucky seeks review of the question "[w]hether a capital defendant can waive a claim of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny." Pet. i. That formulation of the question presented not only grossly oversimplifies the issue decided by the Kentucky Supreme Court, but also ignores the many reasons why this Court's review is unwarranted.

To start, in the Kentucky Supreme Court, the Commonwealth argued that White should be permitted to waive his intellectual disability claim on direct appeal because "the waiver decision at issue is not a 'forever' decision that can never be revisited." Kentucky Supreme Court Brief for Commonwealth, filed 9/11/2019 at 16. App. C 42. As the Commonwealth explained:

> White may raise an intellectual disability claim at any time until he is executed . . . According to [the Kentucky Supreme 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." Therefore, if White later changes his mind ... he can raise the intellectual disability claim via, for example, a [Kentucky Civil Rule] 60.02 motion as other death row inmates have done."

Id. The petition should be denied on that ground alone.

Even looking past the Commonwealth's turnabout, there is neither a conflict among state courts of last resort over the question presented nor a departure from this Court's precedent. The Commonwealth posits that several courts—all of which rendered decisions pre-*Moore v. Texas*, 137 S. Ct. 1039 (2017)—disagree as to whether an *Atkins* claim can be waived. Beyond the fact that the Kentucky Supreme Court's decision relies on the reasoning of *Moore* that none of the other decisions in

the purported split analyzed, the different outcomes in the cited cases are easily reconciled by a key factual difference: Where (unlike here) courts have found waiver, they have done so because both the defendants and their counsel failed to raise a timely intellectual disability claim and there was insufficient evidence of intellectual disability to create a threshold question. By contrast, where (as here) courts have required adjudication of a claim, they have done so because the defendants' counsel have timely raised well-supported intellectual disability claims, even though the defendant may take issue with the claim.

Such a requirement to adjudicate *Atkins* claims where a defendant "has met his burden to receive an evidentiary hearing on his intellectual disability claim," rather than "allow him to *pro se* waive that issue," App. 8, is eminently correct. Regardless of whether constitutional or Eighth Amendment claims can be waived as a general matter, at the very least a *pro se* defendant's request to waive an *Atkins* claim cannot be accepted in the face of evidence sufficient "to form a reasonable doubt as to . . . intellectual capacity," *id.* at 11, without first determining whether the defendant is competent to make that request. Tellingly, even the Commonwealth frames its argument in terms of whether "a defendant can waive a constitutional right that provides [a defendant] no protection *absent the presentation of sufficient supporting evidence*." Pet. 10 (emphasis added). Here, such evidence has been proffered, Pet. App. 7-10, and cannot be overcome by the Commonwealth's bare insistence that White suffers from no intellectual disability. To hold otherwise—

particularly in the name of expediency—would be the opposite of the "rule of law." *Amicus* Br. 6-7.

For the same reasons, this case would be a poor vehicle to determine whether a defendant can waive an *Atkins* claim. Although White may have indicated a desire to waive such a claim, the fact remains that his counsel has fully preserved and is continuing to pursue the vindication of White's Eighth Amendment rights. In short, the supposed waiver underlying the Commonwealth's petition does not exist. And given the Commonwealth's apparent certainty (Pet. 3, 27) that it will prevail on remand and moot this appeal that is all the more reason for this Court not to wade unnecessarily into this interlocutory appeal. To the extent that the Commonwealth is correct that the question presented is one that will recur, it (and its *amici*) will have ample opportunity to seek this Court's review.

STATEMENT OF THE CASE

A. The Trial Record Yields Reasonable Doubt of Intellectual Capabilities

After the Court remanded White's case to the Kentucky Supreme Court to reconsider in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017), the state court found White met his burden of receiving an evidentiary hearing on his claim of intellectual disability. *White v. Commonwealth*, 600 S.W.3d 176, 180-181 (Ky. 2020). That court detailed the record evidence, timely and properly submitted by his counsel, which was sufficient to form a reasonable doubt as to White's intellectual capabilities. Despite that, the Commonwealth does not paint an accurate picture of those events, including White's conduct at trial. The Commonwealth appears to try and convince

the Court that the evidence presented below was insufficient to adequately raise the issue of White's intellectual disability (despite the fact the question it presents to the Court is not based on this assertion), ignoring that the Court granted, vacated and remanded in White's favor based on that evidence. *White v. Kentucky*, 139 S. Ct. 532 (2019) [*White I*].

1. The Commonwealth omits and mischaracterizes material facts about Larry White's behavior at trial.

The Commonwealth relies upon the vacated Kentucky Supreme Court opinion, saying that "White had a better grasp on his case than most." Pet. 2. The Commonwealth ignores that White acted out often at trial, and that he never asked to represent himself. No hearing under *Faretta v. California*, 422 U.S. 806 (1975) was held. Nonetheless, the Commonwealth cherry picks quotes from the direct appeal opinion, painting a skewed portrait of a layman's Atticus Finch. The truth from the written and video record is altogether different.

For example, consider the *pro se* motions filed by White. Some were typed, some handwritten, some had misspellings, some made no sense, and no evidence was heard about who may have written or helped him on these or the letters sent.[1] These include: Motion for Dossier on Prosecuting Witnesses, misspelling "defendent," and "investergation." TR Vol. 1, pp. 20-21; Motion to Withdraw Appointed Public Defender and Appoint Special Attorney, citing "conflict of intrest" and in handwriting

[1] Tellingly, the Commonwealth did not submit accurate copies of the letters White wrote between May 21, 2019 and January 24, 2020. It re-typed those letters rather than attaching true copies.

that appears different from the above motion where "defendant" is spelled correctly. TR Vol. 1, pp. 22-24; Motion to Challenge the Scope of KRE 404 (b) Ruling Made by the Court, typed with many grammatical errors. TR Vol. 3, pp. 310-313; Motion, Memorandum in Support of Writ of Prohibition Pursuant to CR 76.36 typed and containing these errors- "they did obtain this statement illegal and would not use the statement in a new trial," "the patter of offense...criminal signature or serial patter." TR Vol. 2, pp. 292-301; Writ of Prohibition Pursuant to CR 76.36, containing these statements- "The key words used by the Judge is 'almost", well almost only counts in a game of horseshows." "All sapient minds can easily discern...," TR Vol. 3, pp. 343-345; Motion to Dismiss Charging Instrument, typed and claiming he was not served with the indictment. TR Vol. 4, pp. 537-545

It is hard to forget the image of the trial court, standing between the holding cell and the courtroom, trying to inquire of a recalcitrant White, who refused to come into the courtroom for the penalty phase, the questions dictated by state law for giving up his right to be present.[2]

2. The Commonwealth also omits the full substance of the evidence White's attorneys presented at trial regarding White's intellectual disability.

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[2] On the morning of the penalty phase, July 28, 2014, White's attorneys told the trial court White was refusing to put on his clothes or come into the courtroom to participate in the penalty phase. Defense counsel said White did not want to present mitigation or make any argument. The prosecutor asked the court to ask White to come out. The court did but White refused. So, the trial court stood at the door between the hall and the courtroom and talked to White, explaining his rights. They briefly discussed under Kentucky law he must be informed of his right to present mitigation, which he was told he had by counsel and the trial court, and he refused to do this. It came out that White refused to sign waivers so a mitigation specialist could gather records or meet with an expert. The parties also went through the other requirements if a defendant wanted to forgo presenting any mitigation. The court found he waived his right to present mitigating evidence under *St. Clair v. Commonwealth*, 140 S.W.3d 510, 561 (Ky. 2004). VR 7/28/14; 11:20:42-11:23:52, 11:26:17-11:37:45.

A month prior to sentencing, White's counsel filed a timely motion for new trial and asked for an intellectual disability evidentiary hearing, citing *Hall v. Florida*, 572 U.S. 701 (2014) (holding unconstitutional a state rule which forecloses any further exploration of intellectual disability of a capital defendant if an IQ score over 70 exists.). Trial 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*. With that motion, counsel introduced 50 pages of psychological test results, reports, and raw data from 1971. 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), obtained when he was 12 years of age, along with findings from White's youth that he had "Borderline Intellectual functioning" and a "fairly primitive level of socialization." White emphasized the 73 IQ score to the Kentucky Supreme Court afterwards and during his direct appeal oral argument.

The Commonwealth argued at trial that *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 White's IQ score of 73, and relied solely on his higher score of 76. White filed no *pro se* pleadings on this issue. Now before this Court, the Commonwealth attaches the motions filed by White's trial counsel to its Petition for Certiorari, but not the 50 pages of documents supporting the claim that

sufficient evidence existed for a hearing to be heard on whether White is intellectually disabled and should be subject to the death penalty.[3] The Petition omits any mention of White's IQ score of 73, even though that score clearly places him within the intellectual deficit range to proceed further with his intellectual disability claim.

Applying the principles of *Moore v Texas* to Kentucky, the Kentucky Supreme Court on remand analyzed the test it announced in *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018), reh'g denied (Dec. 13, 2018), in which it held KRS 532.130(2) unconstitutional, and asked whether White demonstrated:

> (1) intellectual-functioning deficits (indicated by an IQ score 'approximately two standard deviations below the mean'—i.e., a score of roughly 70—adjusted for the 'standard error of measurement'; (2) adaptive deficits ('the inability to learn basic skills and adjust behavior to changing circumstances,'); and (3) the onset of these deficits while still a minor.

White v. Commonwealth, 600 S.W.3d at 180. That court recognized both IQ scores as well as the standard error of measurement which meant White produced scores of between 71-81 and 68-78.[4] *Id.* at 181. The court then detailed the evidence of adaptive deficits White demonstrated, noting his evidence came from around the period of time when he was a minor, White had yet to have an evidentiary hearing to flesh out this factor and had spent all but four of his 43 years of adult life in prison.

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[3] White attached this documents to his Petition for Certiorari in *White I*.

[4] Ironically, when the Commonwealth argued the Otis test was unreliable, the court chided the Commonwealth for taking the opposite position in *Bowling v. Commonwealth*, 163 S.W.3d 361, 384 (Ky. 2005) because the Otis IQ scores were well above 70 and thus supported its argument that the defendant was not intellectually disabled. *Id.* at 181.

Last, the court held "*Moore* requires courts to 'consult current medical standards to determine intellectual disability,' and we direct trial courts to review the *Woodall* test in light of the prevailing medical standards at the time of the evidentiary hearing. 137 S. Ct. at 1048; 563 S.W.3d at 7." *Id.* at 182. Based on this evidence, the court concluded, "White's evidence suffices the reasonable doubt standard entitling him to an evidentiary hearing on the matter of his potential intellectual disability." *Id.* at 182.

B. The Commonwealth's Shifting Positions On Remand

After the Court's remand, the Kentucky Supreme Court ordered simultaneous briefing on the issue of remand; those briefs were filed on May 6, 2019. On June 10, 2019, the Commonwealth filed its Motion to Resolve Conflict between Appellant and his Counsel Regarding Intellectual Disability Claim. On July 1, 2019, White filed a *pro se* "motion to withdraw appeal counsel for the failure to inform the main person about the substance of this certiorari, but mislead me" and on July 5, 2019, a *pro se* response in opposition of defense counsel.

The Commonwealth then asked for supplemental briefing. On August 12, 2019 the Kentucky Supreme Court ordered 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 he is intellectually disabled." App. B 22. Simultaneous briefs were filed on September 11, 2019.

In its pleadings, the Commonwealth waived its argument that White could truly waive his claim and that principles of default would apply. The Commonwealth

argued that White could drop his claim now and revive it at any time. It also stated that it did not matter because White would never be executed due to his age and the status of the case.

REASONS FOR DENYING THE WRIT

A. The Commonwealth waived its argument that White can forgo his intellectual disability claim and be barred from raising it in the future.

The Commonwealth waived the issue of whether White could enter a binding withdrawal of his intellectual disability claim when it took a contrary position before the state court.

Subsequent to this Court's grant, vacate, and remand in *White I*, the Kentucky Supreme Court ordered simultaneous briefing on the issue of intellectual disability. The Commonwealth argued: "Should this Court 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.*" Kentucky Supreme Court Brief for Commonwealth on remand filed May 6, 2019 (emphasis added). App. A 20. The Commonwealth acknowledged, under state law, protection from execution based on an intellectual disability claim "endures to the very moment of execution." *Id.*, citing *Karu White v. Commonwealth*, 500 S.W.3d 208, 215 (Ky. 2016), abrogated on other grounds by *Woodall v. Commonwealth*, 563 S.W.3d 1, 2 (Ky. 2010) (the Commonwealth did not seek certiorari in either of those two cases). According to the Commonwealth, White could use RCr 60.02 to raise the issue of intellectual disability "effectively *whenever* he wants *so long as he has proof to back it up.*" *Id.* (emphasis added).

It is patent the Commonwealth argued that the Kentucky Supreme Court could reject the merits of White's intellectual disability claim yet could raise it again on the merits at any time before execution.

After this first post-remand briefing, the Commonwealth argued that White contacted them, claimed his attorneys had not told him about raising this issue and agreed with them that he wanted to drop this "retarded foolishness." Pet. App. 108. Shockingly, the Commonwealth, while consistently arguing to uphold his conviction and death sentence, claimed White would likely never be executed because of his age and where his litigation stood.

The Kentucky Supreme Court granted the Commonwealth's request for briefing on White's stated desire to waive the intellectual disability claim. The Commonwealth argued the decision to waive an intellectual disability claim "is not a 'forever' decision that can never be revisited." App. C 42. Again, the Commonwealth argued that "White may raise an intellectual disability claim *at any time until he is executed*." *Id.* (emphasis added).

The Commonwealth now takes the opposite position, arguing that "Eighth Amendment rights are presumably waivable." But the Commonwealth did not raise the issue of waivability below that it presents now. The Commonwealth's petition asserts that allowing White to waive a determination of intellectual disability would serve the ends of justice for the defendant and the Commonwealth by expediting the RCr 11.42 process.[5] This argument is not properly before the Court because it was

[5] It is also factually wrong. It would cause further delay because of the amount of time expended to litigate whether the claim proceeds and whether White is competent to withdraw the claim in

not presented to the lower court and because the Commonwealth instead argued below that White's ability to claim an intellectual disability exemption to execution *"endures to the very moment of execution."* Certiorari should be denied for this reason alone.

B. There is no split of authority on whether a death-sentenced inmate who has been determined to have presented sufficient evidence of intellectual disability to proceed to an evidentiary hearing can unilaterally withdraw the claim that had been properly presented to the courts.

The Commonwealth simply conflates two separate doctrines and two separate factual scenarios to manufacture a split of authority that does not exist. An individual's attempt generally to withdraw a claim on his own and after sufficient evidence has been presented to raise a genuine question of whether the individual person categorically cannot be executed (*i.e.*, the issue actually presented here) is materially different than a procedural default stemming from counsel's failure to adequately develop and present the claim in a manner that allows the state court's to reach the merits and thus avoid a procedural default (*i.e.*, the issue presented in each of the cases the Commonwealth claims pose a conflict). The latter scenario deals with the long-standing procedural default for which there is no dispute and which the Kentucky Supreme Court still applies to intellectual disability claims. The former

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comparison to the amount of time it would take to conduct the evidentiary hearing and render a decision is likely greater. It would also not further delay post-conviction proceedings because those proceedings could, if the Commonwealth agrees, proceed simultaneously. And, as to the ironic position the Commonwealth takes of desiring to proceed to White being able to litigate his innocence claims that the Commonwealth believes are meritless, it is well-known that innocent intellectually disabled people are more likely to be implicated and convicted of a crime than non-intellectually disabled people. So, White's intellectual disability claim could aid the post-conviction innocence and other claims that the Commonwealth believes should proceed now without any adjudication first of White's intellectual disability.

deals with a fully preserved claim with sufficient evidence of intellectual disability to proceed further. With the former, all courts that have addressed the issue have reached the same conclusion the Kentucky Supreme Court reached. With the latter, all courts, including the Kentucky Supreme Court, are also in agreement. Thus, there is simply no split of authority.

1. No split exists on whether a defendant who falls into a category for which the death penalty is barred can somehow choose to be subject to that penalty anyway; all courts that have addressed the issue of whether a defendant can choose to withdraw a properly presented intellectual disability claim whereby sufficient evidence in support of the claim has been presented have ruled that the claim cannot be withdrawn

Rather than split on the issue, all courts have aligned with Kentucky in holding evidence of intellectual disability cannot be waived *pro se* or otherwise ignored once the claim has been properly presented and is supported with some evidence of intellectual disability.[6] The Commonwealth paints the question broadly-whether an Eight Amendment right can be waived under *any* circumstances. To the contrary, the Kentucky Supreme Court held that a hearing was necessary after it was raised in the trial court and a fact-finding court found sufficient evidence to warrant a hearing. Moreover, the Kentucky Supreme Court has not stripped White of all autonomy in this case, acknowledging that "[i]f, on remand, White persists in expressing disagreement with his counsel's representation concerning his appeal, he may

[6] The Commonwealth's citation to Pennsylvania law as evidence of a "split of authority" on this issue is a reach, based on dicta in a case that does not address the issue at hand. See *Commonwealth v. Robinson*, 623 Pa. 345, 382–83, 82 A.3d 998, 1020 (2013). In *Robinson*, the defendant asked the state court to extend the *Atkins* bar on execution of the intellectually disabled to a person with traumatic brain injury. The discussion of *Atkins* is merely tangential to the overall holding the Supreme Court has not extended the bar on execution to other classes of defendants. Id. at 1020-21.

request an evidentiary hearing regarding his competency to self-represent." *White v. Commonwealth,* 600 S.W.3d 176, 182 (Ky. 2020), citing *Commonwealth v. Mason*, 130 A.3d 601, 671 (2015). In short, the question the Commonwealth asserts is presented by Kentucky Supreme Court's opinion in fact is not presented at all.

Similar to White's correspondence with the Kentucky Supreme Court, in *Commonwealth v. Mason*, Mason wrote the Pennsylvania post-conviction trial court expressing his desire to waive an intellectual disability claim under Pennsylvania's post-conviction relief act (PCRA). *Commonwealth v. Mason*, 130 A.3d 601, 671 (Pa. 2015). The Pennsylvania Supreme Court held that the court below erred by acting directly on Appellant's *pro se* letter, and was required to instead forward the letter to counsel rather than allow Mason to deliver a prepared statement in opposition to counsel's chosen course of representation. *Id.* The court then proceeded to hold that a defendant cannot veto a potentially colorable *Atkins* claim, "where the very question asking whether a defendant meets the psychological criteria of 'intellectually disabled' for purposes of the Eighth Amendment turns on a complex, diagnostic inquiry into whether the defendant experienced onset of both sub-average intellectual functioning as revealed by IQ tests and adaptive functioning deficits based on standards and definitions adopted in the DSM and AAIDD before the age of eighteen." *Mason, supra* at 670.

Likewise, in Georgia, a defendant wrote the court seeking to withdraw his intellectual disability claim, and the trial court granted his request. The

Georgia Supreme Court reversed and held that the claim could not be waived because sufficient evidence of intellectual disability to proceed further had already been provided. *Rogers v. State*, 575 S.E.2d 879, 882 (Ga. 2003).

The Commonwealth argues Georgia is "internally" inconsistent based on a case also decided in 2003, *Head v. Hill,* 277 587 S.E.2d 613, 618 (2003). In *Hill*, defense counsel did not request a "guilty but mentally retarded" verdict. Hill "*could have obtained* a jury finding on his alleged mental retardation in his original trial if he had asked for one." *Id.* at 620. "Instead, he presented expert testimony showing that he was 'somewhat slow but not mentally retarded, and argued that he had functioned admirably well in society and in his family life despite his intellectual shortcomings.'" *Id.*

Hill is not inconsistent with *Rogers.* Rogers was sentenced to death prior to the exemption for intellectually disabled individuals. Rogers initiated state habeas corpus proceedings by filing a petition seeking a jury trial on the issue of intellectual disability. *Id.* 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." *Id.* at 880-81. The habeas corpus court concluded that a genuine issue of fact existed regarding Rogers' mental retardation and granted the writ for the purpose of conducting a trial to determine whether he was in fact, intellectually disabled. *Id.* at 881. Unlike *Hill*, Roger's counsel did not forego a claim of intellectual disability due to insufficient proof. Like Kentucky, the Georgia Supreme Court rejected the notion

that a defendant could waive a finding of intellectual disability once there was sufficient credible evidence of ID to create an issue of fact to be determined. See section 1, *supra*. The Georgia Supreme Court is consistently applying the same legal principle – waiver after sufficient evidence of intellectual disability has been presented- to differing factual situations.

In White's case, the Kentucky Supreme Court held the same, thereby demonstrating there is no split among the authority of the few courts that have addressed the issued while also demonstrating that the rarity by which the issue arises provides further reason for the Court to pass the opportunity to now get involved in White's case again.

2. The cases cited by the Commonwealth in support of allowing a waiver are factually distinct. In these cases, trial counsel withdrew, or failed to raise, a defendant's claim of intellectual disability and there was insufficient evidence of intellectual disability to warrant a hearing. None involved whether a *pro se* defendant asking to withdraw a claim of intellectual disability and forego a finding on the issue after the court has determined there was sufficient evidence to require an evidentiary hearing can do so.

There are two critical distinctions between the case at issue and the cases cited by the Commonwealth. First, in all of the cases cited by the Commonwealth, the intellectual disability claim, was either never raised or raised and withdrawn by counsel. Also, in all of these cases, there was insufficient evidence of intellectual disability to warrant an evidentiary hearing. Moreover, all the cases cited by the Commonwealth predate *Moore* I and *Moore* II.

In *Frazier v. Jenkins*, trial counsel withdrew a request for an *Atkins* hearing based on the advice of two experts who evaluated the defendant's intellectual

functioning and adaptive skills and found he was not intellectually disabled. 770 F.3d 485, 491–92 (6th Cir. 2014). By withdrawing the motion for an *Atkins* hearing, Frazier failed to create a full record on the issue and to allow the state-trial-court judge—the judicial officer with the best sense of Frazier's actual abilities—to decide whether he was intellectually disabled.

Frazier is distinguishable from White's case. Trial counsel withdrew the claim, not the client, after evidence indicated the defendant was not intellectually disabled. The court noted that "Frazier's own expert found him not to be mentally retarded" and "[l]awyers are permitted to rely upon qualified experts." *Id.* at 501 [internal citations omitted].

In White's case, the claim was raised at sentencing and on direct appeal (with client's knowledge) and is supported by "enough evidence to form a reasonable doubt as to his intellectual capabilities." *White v. Commonwealth*, 600 S.W.3d 176, 178 (Ky. 2020). The question is not of defense counsel's strategy to forego a claim based on lack of evidence, but whether a client can forfeit an intellectual disability claim once it has been raised and adequately supported by the record.

In a Virginia case, the defendant's intellectual disability claims were found to be waived because he deliberately declined to raise a claim of intellectual disability. *Winston v. Commonwealth*, 604 S.E.2d 21, 51 (Va. 2004). Again, this was a strategic waiver by trial counsel, not a case where counsel had raised intellectual disability at trial and on direct appeal. Winston simply failed to make an argument as to or offer

proof of intellectual disability. *Id.* Nonetheless, Winston was later granted habeas relief by federal court.[7]

Ex parte Blue, cited by the Commonwealth, also dealt with whether an intellectual disability claim was defaulted when the defendant filed a petition for habeas subsequent to *Atkins*, and counsel failed to raise the issue. 230 S.W.3d 151, 162 (Tex. Crim. App. 2007). Neither trial counsel not appellate counsel raised the issue as well. Blue then raised the issue on a second petition. *Id.* The court found the Texas legislature has determined "that the State's interest in the finality of its judgments justifies the imposition of higher burdens upon the subsequent applicant who did not avail himself of the opportunity and resources available to him at trial or in an initial writ." 230 S.W. 151 at 162.

Notably, the holding in *Blue* was fact driven, and has been subsequently called into question. When an applicant raises an *Atkins* claim for the first time in a subsequent habeas application, Texas requires " 'a *threshold* showing of evidence that would be at least *sufficient* to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find mental retardation'". *Sorto v. Davis*, 859 F.3d 356, 362 (5th Cir. 2017), reh'g granted, opinion withdrawn, 881 F.3d 933 (5th Cir. 2018), and on reh'g, 716 Fed. Appx. 366 (5th Cir. 2018), citing Blue at 163.[8] The state court found that was not the case in *Blue*. The only IQ score, based on

[7] *See Winston v. Kelly*, 784 F. Supp. 2d 623, 634 (W.D. Va. 2011), aff'd sub nom. *Winston v. Pearson*, 683 F.3d 489 (4th Cir. 2012).

[8] The rehearing was on the basis of expert funding, not the intellectual disability determination.

incomplete testing, indicated a score between 75 and 80. *Blue*, 230 S.W. 151 at 162. As for adaptive deficits, Blue offered "sketchy, anecdotal evidence and opinions" from family and friends. *Id.* At 165. Without IQ scores indicative of significant sub-average intelligence, Blue's evidence fell short of "evidence that could reasonably support a firm belief or conviction that [Blue] is mentally retarded." *Id.* at 166.

The Kentucky Supreme Court's holding in White's case is also distinguishable from *Bowling v. Commonwealth*, 163 S.W.3d 361, 368 (Ky. 2005), abrogated by *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018). Bowling (who had counsel) "simply did not assert [intellectual disability] at his trial or in his RCr 11.42 motion." *Id.* at 371. Also, unlike White, Bowling failed to make a *prima facie* showing sufficient to create a doubt as to whether he was intellectually disabled, as he had prior IQ scores of 86 and 87 respectively. *Id.* at 373.

The cases cited as "split of authority" are factually different-as they involve counsel –rather than a *pro se* litigant-who alternatively withdrew, or failed to raise intellectually disability claims.

C. Once this Court imposes a categorical bar abolishing the death penalty for intellectually disabled inmates, and evidence reasonably indicates the inmate falls within that category, that bar is not subject to *pro se* waiver by the inmate himself.

The Commonwealth argues the question of whether White is intellectually disabled is a defense which he controls. This position is contrary to well-established law. This Court upheld the facial constitutionality of the death penalty as a whole based on the principle that it would not be applied arbitrarily or capriciously. "Capital punishment must be limited to those offenders who commit 'a narrow category of the

most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' *Atkins, supra*, at 319, 122 S.Ct. 2242." *Roper v. Simmons*, 543 U.S. 551, 568, *citing Atkins v. Virginia*, 536 U.S. 304 (2002). *See also Gregg v. Georgia*, 428 U.S. 153 (1976).

"The inquiry into our society's evolving standards of decency" has led this Court to abolish the death penalty as disproportionate for a number of groups and crimes. *Roper v. Simmons,* 543 U.S. at 563.

> There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (rape of an adult woman); *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (felony murder where **1195 defendant did not kill, attempt to kill, or intend to kill). The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. *Thompson v. Oklahoma*, *supra*; *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); *Atkins, supra*. These rules vindicate the underlying principle *569 that the death penalty is reserved for a narrow category of crimes and offenders.

Roper v. Simmons, 543 U.S. at 568–69.

The Court explained why intellectually disabled criminals must not be executed.

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

Atkins v. Virginia, 536 U.S. at 318 (citations omitted). The Court held that there was "serious question" whether the execution of intellectually disabled persons "measurably contributes" to the twin justifications for capital punishment-retribution and deterrence. *Id.* at 318-319, citing *Enmund*, 458 U.S. at 798.

To whatever extent a categorical bar could be waived, the nature of intellectual disability is such that once sufficient evidence is presented to believe a death row inmate falls in this category, he cannot waive that claim. Intellectually disabled individuals frequently do not "self-identify" as intellectually disabled. *"One reason for the lack of precise data about the number of mentally retarded inmates on death row is that the mentally retarded themselves struggle to hide their disability, even though in many cases it is the one thing that might save them from execution."* [9] As one expert psychologist noted, "Who wants to say they are mentally retarded?"[10] Indeed many individuals would rather "pass." Since intellectually disabled people are often ashamed of their own limitations, they may go to great lengths to hide their disability, fooling those with no expertise in the subject. "They may wrap themselves in a 'cloak of competence,' hiding their disability even from those who want to help them, including their lawyers."[11] Nonetheless, the Eighth Amendment categorically bars execution of an intellectually disabled defendant. In light of the colorable evidence of

[9] https://www.nytimes.com/2000/08/07/us/executing-the-mentally-retarded-even-as-laws-begin-to-shift.html

[10] *Id.*

[11] https://www.hrw.org/reports/2001/ustat/ustat0301-01.htm

intellectual disability, a hearing on the matter is warranted. *Wilson v. Commonwealth,* 381 S.W.3d 180. 183 (Ky. 2012).

People with intellectual disabilities possess "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" *People v. Patillo*, 185 A.D.3d 46, 46 (N.Y. 2020) citing *Atkins*, 536 U.S. at 318. Moreover, they may be "easily confused, highly suggestible, and easy to manipulate." *Id.* And indeed in this case, the Commonwealth seeks to manipulate White into believing it is an ally, rather than a person seeking his execution.

The Supreme Court of New York noted that people with intellectual disabilities are less able to meaningfully assist their counsel. *Patillo*, 185 A.D.3d at 48, citing *Hall v. Florida*, 572 U.S. at 709. Even if an intellectually disabled individual is competent to be tried, "a court must account for his diminished mental capacity in ensuring that any waiver of constitutional rights is knowing, intelligent and voluntary." *Id.* citing *People v. Bradshaw*, 18 N.Y.3d 257, 266, 938 N.Y.S.2d 254, 961 N.E.2d 645 (2011) (trial court was obliged to "give defendant a thorough explanation" and to ensure that "defendant fully grasped the nature of this fundamental right that he was foregoing," in light of the defendant's background and history of mental illness). As such, it is impossible to determine whether White's waiver is

knowing, voluntary, and intelligent without holding the evidentiary hearing on the issue the Kentucky Supreme Court ordered.

D. This case would be a poor vehicle to determine whether a defendant can waive an *Atkins* claim.

1. No factual determination after a full hearing in state court has ever been made about White's communication with counsel and whether he desires and is competent to waive counsel.

Even if a death sentenced inmate could waive a categorical bar to the death penalty, the Court is in no position to make that finding based on the record as it exists now. Perhaps the most disturbing aspect of the Commonwealth's argument is the assertion that based on the record as it exists now, the Court should find White has already waived the claim that he is intellectually disabled. Despite his letters after this Court's remand, White did not object on the record to his attorneys raising the issue of whether intellectual disability barred a death sentence at trial. He did not ask the state court to strike the direct appeal briefing that included that issue nor did he write the Court to complain when his counsel filed the Petition in *White I* based in part on this issue.

The Commonwealth accepts at face value White's assertions about his communications with counsel and muses he is competent to waive any rights he has. The Commonwealth tries to put White's counsel in the unenviable position of either refuting their client's allegations in his letters, or, because of attorney-client privilege, not refuting them thoroughly and risking this Court having an incomplete

picture of the communications between White and his counsel. White's relationship with his counsel has not been fully fleshed out on the record.

The Kentucky Supreme Court noted, "While we are not a fact-finding court, we acknowledge White's displeasure with his current and former counsel, as well as his lack of participation in the proceedings below." *White v. Commonwealth*, 600 S.W.3d at 182. The Kentucky Supreme Court went on the note that on remand to the trial court White could request a hearing on his right to self-representation. White cannot waive his intellectual disability claim unless he is competent to waive his right to counsel and his claim.

"'This Court, in holding that a State must provide counsel for an indigent appellant on his first appeal as of right, recognized the superior ability of trained counsel in the 'examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf,' *Douglas v. California*, 372 U.S., at 358, 83 S.Ct. at 817. Yet by promulgating a per se rule that the client, not the professional advocate, must be allowed to decide what issues are to be pressed, the Court of Appeals seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). "There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts—often to as little as 15 minutes—and when page limits on briefs are widely imposed." *Jones v.*, 463 U.S. at 752–53.

Without a waiver of counsel, White's appellate attorneys performed as this Court, and Kentucky Rules of Ethics, expect. Counsel has in no way usurped White's right to set the goal of litigation which is to obtain a new trial to prove his innocence. The Commonwealth presumes While is competent to waive his right to counsel or his Atkins claim. But no such determination has been made that White is competent to knowingly and intelligently forfeit that right. This is a far cry from *McCoy v. Louisiana*, 138 S. Ct. 1500, 1507 (2018), which did not address either a defendant with a colorable intellectual disability claim or a defendant who might have been incompetent to waive counsel.

To be clear, despite the Commonwealth's reliance on White's *pro se* actions at trial, the trial court held no hearing comporting with this Court's requirements in *Faretta v. California*, 422 U.S. 806 (1975). In *Faretta*, the Court held, "The Sixth Amendment 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." *Id.* at 819.

> For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits. *Johnson v. Zerbst*, 304 U.S., at 464—465, 58 S.Ct., at 1023. Cf. *Von Moltke v. Gillies*, 332 U.S. 708, 723—724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' *Adams v. United States ex rel. McCann*, 317 U.S., at 279, 63 S.Ct., at 242.

Id. at 835

No finding was made that White could waive counsel in whole or in part and represent himself at trial. No finding was made by the Kentucky Supreme Court during the direct appeal that White has waived his right to counsel.

If White had written the letters from May 21, 2019 to January 24, 2020, to the trial court, that court, under Kentucky law applying the baseline requirements of this Court in *Faretta*, would have been required to hold a hearing to determine what White's desires were regarding counsel and whether he could represent himself.

2. No evidentiary hearing has been held on the ultimate issue of whether White is intellectually disabled.

Whether White, a death sentenced person, can waive a colorable claim of intellectual disability obviously turns on whether he is intellectually disabled. That finding has not been made under the current standards dictated by the Eighth and Fourteenth Amendments. The Kentucky Supreme Court, based on the record before it, remanded for a hearing to determine that very issue. Despite the attempts of the Commonwealth to read White's mind, any number of outcomes are possible at that hearing. White will have new counsel and may communicate more productively with them. White may change his mind and fully participate in the litigation of this issue. He might at least acquiesce to the hearing. The Commonwealth assumes White must participate in testing to press his claim- that is not necessarily true. Evidence already exists of his intellectual disability. The trial court might find White is not intellectually disabled.

Until these scenarios play out, the question the Commonwealth presents is not ripe for review. The delay the Commonwealth rails against, pretending to sympathize with White and promote the view that the delay is the fault of White's counsel, has been caused by the Commonwealth itself. The answers to what would happen at an evidentiary hearing on intellectual disability could have been answered if that hearing had been allowed to proceed.

3. Even if White could waive a finding of intellectual disability, a competency hearing would still be required.

White's recent negative reaction to the intellectual disability issue which has been percolating in his case since 2014 for mitigates against finding he could represent himself or voluntarily waive this issue. Being ineligible for the death penalty in no way harms his defense of innocence. In fact, evidence exists that jurors who are death-qualified are more conviction prone. *Lockhart v. McCree*, 476 U.S. 162, 173 (1986). At the very least, not being subject to the death penalty does not deter his desire for a new trial on which to proclaim he is innocent. Yet White clearly cannot grasp the difference between an intellectual disability claim and a defense of innocence. He cannot distinguish that one does not foreclose the other in any way. He states in one letter that his appellate counsel "label him guilty." Pet. App. 109. In another he says they "plead him guilty and asserts the intellectual disability claim is being made because he is black. Pet. App. 113. He says he is not supposed to be on death row. Pet. App. 120. Defense counsel has never asserted he is guilty and fully supports his goal of proving his innocence. While the Commonwealth makes it seem like White's resistance to this claim is merely one related to his perception it will

delay his post-conviction litigation, his letters focus much more on an inability to understand it does not undermine his innocence claim. Serious doubt remains about White's competency.

In reality, the Court cannot decide this issue because it cannot be resolved factually on the face of this record. In *Rees v. Payton*, 384 U.S. 312, 313 (1966), a death row inmate's counsel filed a writ of certiorari with this Court. Thereafter, Rees wrote this Court, moving to withdraw the petition and forego further litigation of his sentence. Counsel argued they could not conscientiously accede to Rees' wishes without a psychiatric evaluation to determine his competency to withdraw his petition. *Id.* This Court determined that the district court where Rees' claim had commenced was the proper venue to determine whether Rees had the capacity to make a rational choice. *Id.* at 314. These are factual determinations that require a hearing.

4. Few courts have addressed this issue and as demonstrated there is no split among courts.

The Commonwealth cites no cases showing this is an issue being discussed in the federal circuit courts. The few state courts that have addressed it side with the Kentucky Supreme Court. The cases cited by the Commonwealth are inapposite as shown in Section B, *supra*. This is not an issue of great importance that is worthy of this Court's time.

CONCLUSION

The Commonwealth's thinly veiled efforts to use a potentially intellectually disabled death sentenced inmate's misunderstanding about proving his innocence and frustration with the speed of his litigation to cut short a procedure to determine if he is intellectually disabled, a claim properly raised by both his trial counsel and appellate counsel and supported by sufficient evidence, should deeply disturb this Court. This is especially true when the Commonwealth argued to the Kentucky Supreme Court an opposite view- that no "forever" waiver exists for intellectual disability claims. The Commonwealth does not care whether White is intellectually disabled and is not acting with his best interests at heart. In fact, it is the Commonwealth (and amicus) that want a swift execution. The rule it espouses- allowing a death row inmate to *pro se* waive a colorable claim of intellectual disability without any evidentially hearing to determine his intellectual disability, his competency to waive counsel or waive a claim of intellectual disability- is extreme and supported by no court in this nation. That rule would violate the Eighth and Fourteenth Amendments. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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