Supreme Court of Kentucky

2014-SC-000725-MR

LARRY LAMONT WHITE — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE
NO. 2007-CR-004230

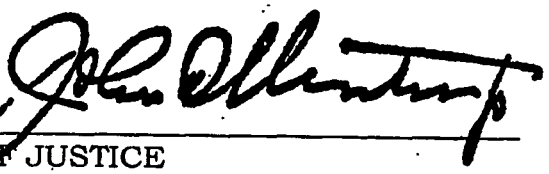
COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER GRANTING PETITION FOR MODIFICATION

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

All sitting. All concur.

ENTERED: March 22, 2018.



CHIEF JUSTICE

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OPINION OF THE COURT BY JUSTICE CUNNINGHAM

AFFIRMING

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

Armstrong was murdered on June 4, 1983. Her body was discovered that same day in a public alley, with her pants and underwear pulled down around her legs and shirt pulled up to her bra line. She suffered from two gunshot wounds. One wound was observed on the left side of the back of her head, while the other wound was in virtually the same spot on the right side. The medical examiner was unable to determine which shot was fired first, but did opine that neither shot alone would have caused immediate death.

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

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

On appeal, Appellant has raised thirty-three claims of error. In reviewing these claims, the Court is statutorily required to "consider the punishment as well as any errors enumerated by way of appeal." KRS 532.075(2). Moreover, since we are dealing with the imposition of death, this appeal is "subject to [a] more expansive and searching review than ordinary criminal cases." *St. Clair v.*

Commonwealth, 455 S.W.3d 869, 880 (Ky. 2015) (citing *Meece v. Commonwealth*, 348 S.W.3d 627, 645 (Ky. 2011)). For the sake of brevity, we will approach all claims as properly preserved unless otherwise specified herein. To the extent claims were not preserved for our examination, we will utilize the following standard of review:

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

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

KRE 404(b) Evidence

Appellant's first and most compelling argument is that the trial court committed reversible error when it allowed the Commonwealth to admit other bad acts evidence of the Appellant as addressed by Kentucky Rules of Evidence ("KRE") 404(b). Prior to trial, the Commonwealth filed notice that it intended to introduce evidence of Appellant's two 1987 murder convictions. These convictions revealed that Appellant pled guilty to murdering Deborah Miles and Yolanda Sweeney.[1] The Commonwealth suggested that the Miles and Sweeney

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

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murders were similar enough to Armstrong's murder to demonstrate that Appellant was her killer.

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

In regards to Sweeney, she was found dead behind a backyard shed approximately four weeks after Armstrong's murder. Sweeney suffered from a fatal gunshot wound to the left side of the back of her head. Her pants were missing and her panties were pulled down around her legs. Appellant stated that he met Sweeney shortly before her death at a nightclub. She agreed to engage in sexual activity with him for $25.00. Appellant claims the two walked to a secluded outside area at which point Appellant provided Sweeney with the money. Appellant admitted to shooting Sweeney after she tried to run away with his money before conducting the agreed upon sexual acts.

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

introduced to the jury for the purpose of establishing Appellant's identity through his modus operandi.

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

KRE 404(b) prohibits the introduction of "[e]vidence of other crimes, wrongs, or acts" used "to prove the character of a person in order to show action in conformity therewith." This evidentiary rule seeks to prevent the admission of evidence of a defendant's previous bad actions which "show a propensity or predisposition to again commit the same or a similar act." *Southworth v. Commonwealth,* 435 S.W.3d 32, 48 (Ky. 2014). However, such evidence may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b)(1). While "modus operandi" is not specifically mentioned within the list of exceptions, this Court has long held that evidence of prior bad acts which are extraordinarily similar to the crimes charged may be admitted to demonstrate a modus operandi for the purposes of proving, *inter alia,* identity. *Billings v. Commonwealth,* 843 S.W.2d 890, 893 (Ky. 1992).

In order for the modus operandi exception to render prior bad acts admissible, "the facts surrounding the prior misconduct must be so strikingly

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

Whether Appellant's prior murder convictions qualify for the modus operandi exception presents a challenging task for the Court, requiring "a searching analysis of the similarities and dissimilarities." *Clark,* 223 S.W.3d at 97. Our review is even more difficult considering that our jurisprudence on this issue has evolved mostly through the lens of sexual abuse cases. These cases hold that a specific act of sexual deviance may be unique enough to demonstrate that the assailant's crimes are "signature" in nature. *See, e.g., Dickerson v. Commonwealth,* 174 S.W.3d 451, 469 (Ky. 2005); *English,* 993 S.W.2d 941 (all victims were relatives of wife and molestation occurred in the same fashion); *see also Anastasi v. Commonwealth,* 754 S.W.2d 860 (Ky. 1988) (tickling and wrestling with young boys while dressed in only underwear).

Outside the realm of sexual abuse, we have but few cases. In *Bowling v. Commonwealth,* 942 S.W.2d 293, 301 (Ky. 1997), a capital murder case, this Court allowed testimony from the survivor of a previously attempted robbery, wherein Bowling was identified as the assailant. The witness claimed that

Bowling came into his service station, attempted to rob the store, and shot at him countless times. *Id.* at 301. The Court upheld the admission of that testimony because there was sufficient similarity between the crimes to demonstrate that Bowling's pattern of conduct was to rob gas stations attended by one worker in the early morning hours. *Id.*

In *St. Clair,* 455 S.W.3d 869, also a death penalty case, this Court upheld the testimony of St. Clair's accomplice, during which he testified about the duo's prior kidnapping and robbery. *Id.* at 886. The accomplice testified that Appellant held the prior victim at gun point, handcuffed him, and stole his late model pick-up truck, taking the victim along for the ride. *Id.* These facts were similar to the crimes to which St. Clair was charged. The Court held that the facts were sufficient to pass muster under the modus operandi exception since in both kidnappings he used the same gun and pair of handcuffs in order to steal a similar type of truck. *Id.* at 887.

What we garner from our case law is that a perpetrator's modus operandi can be established by any number of similarities between the previous criminal acts and the crimes charged, e.g., the type of victims, proximity of the time and location of the crimes, the weapon or ammunition used, the method employed to effectuate the crime, etc. However, we must analyze similarities with caution, as the likeness of the crimes may merely constitute a common characteristic or element of the offense. The Court made this clarification in *Clark v. Commonwealth,* wherein we underscored that "the fundamental principle that conduct that serves to satisfy the statutory elements of an

offense will not suffice to meet the modus operandi exception." 223 S.W.3d at 98. For that reason, "it is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates a modus operandi." *Dickerson*, 174 S.W.3d at 469.

With these cases in mind, we begin with the factual commonalities of the Miles and Sweeney murders with that of Armstrong's. The most noticeable similarity is that all three victims were African-American women in their early twenties, ranging from twenty-one years to twenty-three years old. Another substantial likeness concerns the date and location of all three murders. Appellant murdered Sweeney and Miles within approximately four weeks of murdering Armstrong. The Sweeney and Miles murders also occurred within blocks from Appellant's residence and the location of where Armstrong's body was found. We also place considerable weight on the resemblances between the victims' manners of death. For example, the mode of execution which Miles and Sweeney both suffered was similar to Armstrong's fatal wounds. Specifically, all three victims were shot in the head in the area behind the left ear. Also, and of high importance, the bullets used to kill all three victims were .38 caliber bullets. Moreover, all three victims were each discovered in various stages of undress, which *suggested* they were victims of a sexual assault. The three victims' vaginal areas were likewise all exposed upon the discovery of their bodies.

Turning to the factual differences of the crimes, Miles was killed inside her apartment, while Armstrong and Sweeney were killed outside. In addition,

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

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

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

We find the case of *Newcomb v. Commonwealth,* 410 S.W.3d 63 (Ky. 2013) most instructive. In that case, *Newcomb* raped two women within a ten-day span. *Id.* at 70. Newcomb raped the first woman, a coworker, in her car after she offered to drive him home. *Id.* The second woman was raped in her home after Newcomb unexpectedly stopped by to visit. *Id.* at 71. Newcomb was tried for both crimes together. *Id.* at 72. This Court upheld the joinder of both offenses, stating that evidence of either rape would be admissible in both trials if severed. *Id.* The Court explained that both rapes were similar enough to establish Newcomb's modus operandi. *Id.* at 74. The similarities relied upon included the victims' ages and race, in addition to the temporal proximities of the crimes. *Id.* The nature of force used was also similar in both rapes, as Appellant's attacks began with forcible kissing followed by a statement like, "You know you like me," or, "You know you want me." *Id.* at 75.

Similar to the case before us, there were numerous differences in the two rapes. For example, the locations of the crimes were not consistent. Newcomb

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

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

discretion in finding that the crimes' similarities were sufficient enough to demonstrate Appellant's identity through his modus operandi.

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

In conducting a KRE 403 balancing test with respect to modus operandi evidence, "a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility." *Newcomb,* 410 S.W.3d at 77 (quoting McCormick on Evidence, Ch. 17 § 190).

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

alleged by the witnesses). In addition, and as we have already discussed, the similarities of the murders are substantial. The close proximity in time and location between each murder further heightens the evidence's probativeness.

In regards to the need for evidence and the efficacy of alternative proof, we find these considerations also weigh in favor of admission. The Commonwealth's only method of proving Appellant's identity as the perpetrator was through the use of DNA evidence. While the DNA evidence certainly proved that Appellant had ejaculated on Armstrong, he argued that he had consensual sex with her perhaps days before her death. Since Appellant provided the jury with a plausible explanation for the presence of his semen, evidence of his modus operandi was highly probative in proving his identity. *See Bowling,* 942 S.W.2d at 301 (evidence of other crimes passed KRE 403 balancing test wherein the evidence rebutted a claimed defense and identification of the defendant as the assailant was at issue).

In concluding our analysis on this issue, we acknowledge that Appellant undoubtedly suffered prejudice from the introduction of his two prior murder convictions. However, we believe the trial court actively managed the jury's understanding of the evidence so as to prevent them from developing "overmastering hostility." In an effort to dissuade prejudice, the trial court admonished the jury about the proper use of the 404(b) evidence after the parties' opening statements. *See Johnson v. Commonwealth,* 105 S.W.3d 430, 441 (Ky. 2003) (juries are presumed to follow admonitions). The trial court explicitly explained to the jury that the evidence was only to be considered as

evidence of modus operandi and identity. Furthermore, the trial court instructed the jury that the Commonwealth still had to prove each element of the crimes charged beyond a reasonable doubt and that Appellant's prior murder convictions could not be used to establish action in conformity therewith. The trial court provided the jury with a similar instruction just prior to the guilt-phase deliberations. In light of the trial court's actions, in conjunction with the high probative worth of the evidence, we find that the trial court did not abuse its discretion in allowing evidence of Appellant's prior murder convictions.

Jury Instructions

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

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

In *Lawson v. Commonwealth*, 218 S.W.2d 41, 42 (Ky. 1949), our predecessor Court stated that trial courts must "instruct on the whole law of the case and to include, when necessary or proper, definitions of technical terms used." In support of his argument, Appellant cites *Wright v. Commonwealth*, 391 S.W.3d 743 (Ky. 2013), wherein this Court found that the

trial court's failure to define "unmarried couple" within its instructions constituted error. *Id.* at 748. However, *Wright,* a domestic violence case, is distinguishable from the case before us. In *Wright,* the statutory definition of "unmarried couple" is distinctive from what an average juror would understand as a couple who is unmarried. *See* KRS 403.720 (an "unmarried couple" constitutes two individuals who have a child together and either live together or previously lived together). That is not the case here. We can find no evidence that the two terms go beyond the average juror's understanding. *See Caretenders, Inc. v. Commonwealth,* 821 S.W.2d 83, 87 (Ky. 1991) ("knowingly" and "willfully" are not technical terms requiring instructions). Furthermore, to the extent that these terms needed clarification, we believe they were sufficiently "fleshed out" during closing arguments. *Lumpkins ex rel. Lumpkins v. City of Louisville,* 157 S.W.3d 601, 605 (Ky. 2005) ("The Kentucky practice of 'bare bones' instructions . . . permits the instructions to be 'fleshed out' in closing argument.").

DNA Suppression

Appellant next urges the Court to find reversible error in the trial court's refusal to suppress his DNA sample, which he claims was improperly obtained during an illegal traffic stop. In February of 2006, LMPD Sergeant Aaron Crowell was tasked with covertly obtaining Appellant's DNA. Accordingly, Sergeant Crowell and Detective Hibbs began surveilling Appellant's residence. While watching Appellant's residence, the two officers observed Appellant enter a vehicle as a passenger. The vehicle subsequently left the residence at an

unlawful high rate of speed. The officers then stopped the vehicle due to the speeding violation. During the stop, Sergeant Crowell removed Appellant from the vehicle and performed a pat down to check for weaponry. Appellant placed his lit cigar onto the back of the vehicle. After checking the subjects' driver's licenses and running warrant checks, officers permitted the driver and Appellant to leave. No citation was issued. As the vehicle left the scene, Appellant's cigar fell to the ground and was collected.

Appellant filed a motion to suppress DNA evidence recovered from the cigar based on the illegality of the traffic stop. The trial court denied Appellant's motion following evidentiary hearings.

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

The trial court relied entirely on *Lloyd v. Commonwealth,* 324 S.W.3d 384 (Ky. 2010) in ruling that the traffic stop was lawful. We can find no error in the trial court's reasoning. In *Lloyd,* this Court explained that an officer may conduct a traffic stop as long as he or she has probable cause to believe a traffic violation has occurred, regardless of the officer's subjective motivation. *Id.* at 392 (citing *Wilson v. Commonwealth,* 37 S.W.3d 745 (Ky. 2001)). The

Commonwealth provided sufficient proof that Sergeant Crowell and Detective Hibbs observed the vehicle speeding. Thusly, it is immaterial that Sergeant Crowell desired to obtain Appellant's DNA since adequate probable cause existed.

On appeal, Appellant takes his argument further and suggests that his removal from the car and subsequent pat down was unlawful. The trial court did not address these arguments. Nevertheless, we can quickly dispose of Appellant's contentions. Pursuant to *Owens v. Commonwealth,* 291 S.W.3d 704 (Ky. 2009) an "officer has the authority to order a passenger to exit a vehicle pending completion of a minor traffic stop." *Id.* at 708 (citing *Maryland v. Wilson,* 519 U.S. 408, 414-15 (1997)). Furthermore, Sergeant Crowell was permitted to conduct a pat down of Appellant. As his suppression hearing testimony illustrated, Sergeant Crowell maintained a reasonable and articulable suspicion that Appellant was armed and dangerous. *See Terry v. Ohio,* 392 U.S. 1, 27 (1968). Specifically, Sergeant Crowell testified that he was not only aware of Appellant's proclivity to carry a weapon, but that he previously arrested Appellant for unlawful possession of a handgun. *See also Adkins v. Commonwealth,* 96 S.W.3d 779, 787 (Ky. 2003) ("When an officer believes that he is confronting a murder suspect, he has presumptive reason to believe that he is dealing with an armed and dangerous person."). We have seen no evidence that Sergeant Crowell's quick pat down of Appellant exceeded the scope of *Terry,* nor has Appellant demonstrated that the traffic stop was prolonged to effectuate the pat down.

Recusal

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

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

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

of his prior representation of Appellant. Accordingly, Appellant should have filed his recusal motion long before the trial began.

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

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

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

in the matter in controversy"; or (3) "has knowledge of any other circumstances in which his impartiality might reasonably be questioned."

This Court does not believe any grounds for mandatory recusal existed. In regards to the first basis for disqualification, we disagree with Appellant's argument that his 1981 conviction had some type of evidentiary value to the existence of his modus operandi. Not only was his 1981 conviction not introduced during the guilt phase, but Appellant fails to explain how Judge Shake's purported knowledge of that case renders the murders of Sweeney and Miles more similar to the murder of Armstrong. In regards to the second statutory ground for recusal, we find Appellant's argument unpersuasive. While it is true that Judge Shake previously served as Appellant's attorney, he did so in an unrelated case over thirty-three years prior. That particular conviction plainly does not constitute the same "matter in controversy." *See Bussell,* 882 S.W.2d at 112. Lastly, we find difficulty in reasonably questioning Judge Shake's impartiality. Judge Shake was candid about his recollections and explained that he had no memory of Appellant's cases or having any conversations concerning those cases. We will not assume bias based solely on the fact that Judge Shake represented Appellant more than thirty-three years prior to his trial. *Id.* (holding that judge's prior representation of defendant in a murder case did not render him biased). For these reasons, we find no error in Judge Shake's refusal to disqualify himself from presiding over Appellant's trial.

Chain of Custody

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

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

In reviewing the trial court's ruling, we look for an abuse of discretion. *Thomas,* 153 S.W.3d at 781 (citing *United States v. Jackson,* 649 F.2d 967, 973 (3d Cir. 1981). Our focus is on whether a foundation was sufficiently laid so that there is a reasonable probability that the proffered evidence was not

altered in any material respect. *Id.* In making this determination, we look to "the circumstances surrounding the preservation of the evidence and the likelihood of tampering by intermeddlers." *Thomas,* 153 S.W.3d 782 (citing *Pendland v. Commonwealth,* 463 S.W.2d 130, 133 (1971)).

Cuttings from Armstrong's Panties

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

The second group of cuttings occurred in 2004, when LMPD was investigating another suspect in Armstrong's murder. At that time, the remnants of the intact panties were transported to the KSP laboratory. This is where the second group of cuttings occurred. These cuttings were returned to

LMPD and stored in the property room that same year. The chain of custody for the second group of cuttings has one missing link. After Durbin made the initial selection of cuttings in 1983, there is no direct testimony demonstrating how the remnants of the intact panties made it back to the LMPD property room before being stored until 2004. Nevertheless, discovery indicates that the KSP lab released the panties to LMPD Officer "J. Trusty" on August 10, 1983, the same day they were returned to the LMPD property room. This minimal gap in the chain of custody for the second group of panty cuttings does not render it unreliable. *See Thomas,* 153 S.W.3d at 782. ("All possibility of tampering does not have to be negated. It is sufficient . . . that the actions taken to preserve the integrity of the evidence are reasonable under the circumstances.").

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

Rape Kit

Dr. McCloud collected Armstrong's rape kit, after which it was transferred to Detective Griffin during her autopsy. It is unclear if it was Detective Griffin or another officer who placed the kit in the LMPD property room. Nine days later, Detective Griffin transported the kit to a KSP laboratory. The Commonwealth could not pinpoint who transported the kit back to the LMPD property room where it remained until June of 2004. At that time, the kit was once again transported to the KSP laboratory by an evidence technician where it exchanged hands with several identified analysts and technicians and returned to the LMPD property room. A similar exchange took place in 2007, where the kit was transported to a KSP laboratory by an identified evidence technician and was later returned to the LMPD property room. There was no testimony regarding who handled the kit, if anyone, while at the KSP laboratory.

Although there are several breaks in the rape kit's custodial chain, we do not believe these disruptions render the evidence unreliable. The deficiencies in custody are apparently due to careless record keeping in the form of failure to specify who transported the item, rather than actions that would have altered or possibly contaminated the contents of the rape kit. In *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998), the Court stated that "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been

altered in any material respect.'" (quoting *United States v. Cardenas*, 864 F.2d 1528, 1532 (10th Cir. 1989)). As such, the trial court did not err in admitting the evidence, as there was minimal chance that the contents of the rape kit were altered. Once again, we underscore that breaks in the chain of custody go to the weight of the evidence, rather than its admissibility. *McKinney*, 60 S.W.3d at 511.

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

Buccal Swab and Cigar

As mentioned, Appellant also submits that the Commonwealth failed to establish the chain of custody for his cigar butt and buccal swab. We will not

plunge into a lengthy discussion concerning the custodial history of these items. Instead, we can surmise that Appellant's most persuasive argument is predicated on unidentified individuals who accepted and released the evidence from the LMPD property room. As our analysis has already stated, minor custodial breaches do not automatically render the evidence unreliable. *See Thomas,* 153 S.W.3d at 781. Despite the negligible gaps in custody, the Commonwealth reasonably demonstrated the identity and the integrity of the buccal swab and cigar. Therefore, the trial court did not abuse its discretion by admitting them into evidence.

Prosecutorial Misconduct

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

Guilt Phase

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

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

Appellant's second allegation of prosecutorial misconduct occurred when the Commonwealth commented on Roger Ellington's testimony. Appellant believes the Commonwealth's statements had the effect of offering the prestige of the Commonwealth Attorney's Office to support the witness' credibility. Appellant's brief provides a lengthy quote from the Commonwealth which it argues amounted to improper bolstering. After reviewing the Commonwealth's closing argument, we find no need to provide the quote, as there is no merit in Appellant's contention. The Commonwealth merely summarized Mr. Ellington's testimony in a way that was persuasive to their position. *Compare Armstrong v. Commonwealth*, 517 S.W.2d 233, 236 (Ky. 1974) (improper bolstering occurred when the prosecutor informed the jury that he had known and worked with the witness before and the witness was honest and conscientious).

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

In *Ragland v. Commonwealth,* 191 S.W.3d 569, 589 (Ky. 2006), the Court explained that "a defendant's constitutional privilege against compulsory self-incrimination [is violated] only when it was manifestly intended to be, or was of such character that the jury would necessarily take it to be, a comment upon the defendant's failure to testify." When placed in the context of the defense's theories, we believe the Commonwealth was appropriately responding to Appellant's allegation that Ellington was Armstrong's killer. Such a comment does not constitute a comment on Appellant's failure to testify. *See Bowling,* 873 S.W.2d at 178 (finding that prosecutor's closing argument statement that "We can't tell you what it is because only the man who pulled the trigger knows" did not amount to a comment on defendant's refusal to testify). As we have explained, "[n]ot every comment that refers or alludes to a non-testifying defendant is an impermissible comment on his failure to testify . . . ." *Ragland,* 191 S.W.3d at 589 (quoting *Ex parte Loggins,* 771 So.2d 1093, 1101 (Ala. 2000)).

Appellant also alleges that the Commonwealth improperly shifted the burden of proof when it reminded the jury that Appellant failed to provide proof that he and Armstrong had a relationship prior to her murder. This Court has long held that a prosecutor "may comment on evidence, and may comment as to the falsity of a defense position." *Slaughter v. Commonwealth,* 744 S.W.2d 407, 412 (Ky. 1987). The complained of statement was clearly made to challenge the defense's theory that Appellant's DNA was present in Armstrong's underwear because the two had consensual sex preceding her death. The

Commonwealth's remarks that there was no evidence that such an encounter took place was well within the bounds of closing arguments. We find no error.

Sentencing Phase

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

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

Next Appellant argues that the Commonwealth improperly urged the jury to sentence him to death for his prior murders of Miles and Sweeney. We find

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

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

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

Victim Impact Evidence

Appellant next contends that he was denied a fair trial due to the elicitation of what he believes was victim impact evidence during the guilt phase of trial. This argument is unpreserved and without merit. During redirect examination of one of Armstrong's children, the Commonwealth inquired into the status of Armstrong's other children. The witness merely said that one of his siblings was killed and the other had committed suicide. The witness did not expound on their deaths, nor did he state that their deaths were attributable to their mother's murder. We find no error.

Directed Verdict

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

Statutory Aggravator

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

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

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

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

we assume that juries follow instructions. *Johnson v. Commonwealth,* 105 S.W.3d 430, 436 (Ky. 2003). Accordingly, since the jury wrote the word "rape" on the verdict form which found the existence of the aggravator, in conjunction with the jury's subsequent imposition of death, we find no error.

Invalid Indictment

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

Jury Inquiry

Appellant maintains that the trial court violated his constitutional rights by failing to conduct an adequate inquiry regarding whether any jurors viewed an inflammatory news article. The article at issue was released at the

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

Voir Dire Limitation

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

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

denial of a particular question implicates fundamental fairness. *Lawson v. Commonwealth,* 53 S.W.3d 534, 540 (Ky. 2001). In *Ward v. Commonwealth,* 695 S.W.2d 404 (Ky. 1985), defense counsel attempted to inquire whether potential jurors, when assessing a witness' credibility, could consider the fact that the witness made a deal with the Commonwealth in exchange for his testimony. *Id.* The Court upheld the trial court's limitations on such inquiries because such questions were "to have jurors indicate in advance or commit themselves to certain ideas and views upon final submission of the case . . . ." *Id.* at 407; *see Woodall v. Commonwealth,* 63 S.W.3d 104 (Ky. 2001) (affirming the trial court's limitation of defense counsel's questions concerning whether the jurors could consider a low I.Q. score as mitigating evidence). In light of *Ward,* we do not believe the trial court exceeded its broad discretion. Appellant's questioning would have likely exposed juror views concerning his past murders and possibly committed the jurors to those assessments. As mentioned, less harmful questioning was utilized and allowed Appellant to ascertain whether the jurors could follow the trial court's instruction to consider the evidence for the correct purposes.

Venirepersons Struck For Cause

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

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

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

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

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

Jury Sequester

Appellant complains that he was denied a fair trial due to the trial court's failure to sequester the jury on the weekend between the guilt and sentencing

phases. We find no error. RCr 9.66 states that "[w]hether the jurors in any case shall be sequestered shall be within the discretion of the court." Accordingly, in *St. Clair v. Commonwealth*, 140 S.W.3d 510, 558 (Ky. 2004), this Court made clear that it is not an abuse of discretion to refuse "to sequester a jury between the guilt and sentencing phases of a bifurcated trial . . ." (citing *Wilson v. Commonwealth*, 836 S.W.2d 872, 888 (Ky. 1992), overturned in part by *St. Clair v. Roark*, 10 S.W.3d 482 (Ky. 1999)).

Mitigating Evidence

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

Missing Evidence Instruction

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

food stamps were missing on her person when her body was discovered. In an attempt to confirm her whereabouts that morning, LMPD Detective Les Wilson testified that he obtained a printout from the food stamp office showing Armstrong as a recipient. After Detective Wilson's testimony, the parties realized the printout was missing. Both parties stipulated this fact and the trial court advised the jury that the food stamp printout was not within the case file. Appellant requested an instruction on the missing evidence. The trial court denied the request on the grounds that Appellant failed to demonstrate that the evidence was intentionally destroyed by law enforcement.

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

Alternative Perpetrator Evidence

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

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

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

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

Penalty Phase Exhibit

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

Intellectual Disability

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

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

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

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

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

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

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

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

Competency Hearing

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

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

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

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

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

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

Upon review of Appellant's constitutional right to a competency hearing, we cannot say that there were reasonable grounds to suspect incompetency. As already stated, Appellant assisted in his defense, often advocating on his own behalf through numerous pro se filings. Appellant was steadfast in the defense he wished to present, even notifying the court of his dissatisfaction with his defense team. Moreover, Appellant was able to comport himself well in the courtroom, conveyed his thoughts without difficulty, and demonstrated a thorough understanding of the charges he faced. In fact, the only indication that Appellant was not competent to stand trial was defense counsel's movement for a competency evaluation. As this Court has previously stated, "defense counsel's statements alone could not have been *substantial* evidence." *Padgett,* 312 S.W.3d at 349. For these reasons, we do not believe a reasonable judge would have expressed doubt about Appellant's competency to stand trial.

Death Penalty

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

Moreover, Appellant's contention that our death penalty statute violates the Sixth Amendment pursuant to *Hurst v. Florida,* 136 S.Ct. 616 (2016) is unpersuasive. In *Hurst,* the U.S. Supreme Court found Florida's capital sentencing scheme unconstitutional because the jury only issued a sentencing recommendation, after which the judge made the ultimate factual findings

needed for the imposition of death. *Id.* at 622-24. However, under the Commonwealth's statutory scheme, the trial court does not usurp the jury's role in finding the existence of statutory aggravators needed for the imposition of the death penalty.

Proportionality

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

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

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

"The Eighth Amendment to the United States Constitution mandates that a death sentence be proportionate to the crime the defendant committed." *Commonwealth v. Guernsey*, 501 S.W.3d 884, 888 (Ky. 2016) (citing *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (A death sentence is unconstitutional if it "is grossly out of proportion to the severity of the crime.")). "In addition to this constitutional requirement for an inherently proportional sentence, KRS 532.075 mandates comparative proportionality review in all Kentucky cases in which the death penalty is imposed." *Guernsey*, 501 S.W.3d at 888. "Comparative proportionality review is not mandated by the Eighth Amendment, rather it is a requirement imposed solely

by statute." *Id.* (citing *Pulley v. Harris,* 465 U.S. 37, 43–44, 104 S.Ct. 871, 875, 79 L.Ed.2d 29 (1984)); *see also, Bowling v. Parker,* 344 F.3d 487, 521 (6th Cir. 2003) ("The Supreme Court has held that the Constitution does require proportionality review, but that it only requires proportionality between the punishment and the crime, not between the punishment in this case and that exacted in other cases[]"); *Caudill v. Commonwealth,* 120 S.W.3d 635, 678 (Ky. 2003) ("There is no constitutional right to a [comparative] proportionality review[]").

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

> the sentence is not disproportionate to the penalty imposed in similar cases since 1970 considering both the crime and the defendant. Rather than belaboring this opinion with a string cite containing the cases we examined during the course of our proportionality review, we incorporate by reference the list found in *Hodge v. Commonwealth,* 17 S.W.3d 824, 855 (Ky. 2000). We have incorporated that list in other cases, such as *Parrish v. Commonwealth,* 121 S.W.3d 198, 208 (Ky.2003). We have also reviewed the applicable cases rendered after *Hodge. See, e.g., Fields v. Commonwealth,* 274 S.W.3d 375, 420 (Ky. 2008) (giving "particular attention" to other cases involving single murders in performing proportionality review of death sentence in case involving murder in the course of burglary).

304 S.W.3d at 52.

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

Conclusion

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

All sitting. All concur.

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Supreme Court of Kentucky

2014-SC-000725-MR

LARRY LAMONT WHITE — APPELLANT

V.

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

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE CUNNINGHAM

AFFIRMING

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

Armstrong was murdered on June 4, 1983. Her body was discovered that same day in a public alley, with her pants and underwear pulled down around her legs and shirt pulled up to her bra line. She suffered from two gunshot wounds. One wound was observed on the left side of the back of her head, while the other wound was in virtually the same spot on the right side. The medical examiner was unable to determine which shot was fired first, but did opine that neither shot alone would have caused immediate death.

Although Appellant was originally a suspect, Armstrong's murder remained unsolved for more than twenty years. Yet, in 2004, the Louisville

Metro Police Department ("LMPD") Cold Case Unit reopened Armstrong's case. Through the use of DNA profiling, Detectives sought to eliminate suspects. LMPD officers were able to obtain Appellant's DNA from a cigar he discarded during a traffic stop. Appellant's DNA profile matched the DNA profile found in Armstrong's panties.

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

On appeal, Appellant has raised thirty-three claims of error. In reviewing these claims, the Court is statutorily required to "consider the punishment as well as any errors enumerated by way of appeal." KRS 532.075(2). Moreover, since we are dealing with the imposition of death, this appeal is "subject to [a] more expansive and searching review than ordinary criminal cases." *St. Clair v. Commonwealth*, 455 S.W.3d 869, 880 (Ky. 2015) (citing *Meece v. Commonwealth*, 348 S.W.3d 627, 645 (Ky. 2011)). For the sake of brevity, we

will approach all claims as properly preserved unless otherwise specified herein. To the extent claims were not preserved for our examination, we will utilize the following standard of review:

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

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

KRE 404(b) Evidence

Appellant's first and most compelling argument is that the trial court committed reversible error when it allowed the Commonwealth to admit other bad acts evidence of the Appellant as addressed by Kentucky Rules of Evidence ("KRE") 404(b). Prior to trial, the Commonwealth filed notice that it intended to introduce evidence of Appellant's two 1987 murder convictions. These convictions revealed that Appellant pled guilty to murdering Deborah Miles and Yolanda Sweeney.[1] The Commonwealth suggested that the Miles and Sweeney murders were similar enough to Armstrong's murder to demonstrate that Appellant was her killer.

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

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

In regards to Sweeney, she was found dead behind a backyard shed approximately four weeks after Armstrong's murder. Sweeney suffered from a fatal gunshot wound to the left side of the back of her head. Her pants were missing and her panties were pulled down around her legs. Appellant stated that he met Sweeney shortly before her death at a nightclub. She agreed to engage in sexual activity with him for $25.00. Appellant claims the two walked to a secluded outside area at which point Appellant provided Sweeney with the money. Appellant admitted to shooting Sweeney after she tried to run away with his money before conducting the agreed upon sexual acts.

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

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

KRE 404(b) prohibits the introduction of "[e]vidence of other crimes, wrongs, or acts" used "to prove the character of a person in order to show action in conformity therewith." This evidentiary rule seeks to prevent the admission of evidence of a defendant's previous bad actions which "show a propensity or predisposition to again commit the same or a similar act." *Southworth v. Commonwealth*, 435 S.W.3d 32, 48 (Ky. 2014). However, such evidence may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b)(1). While "modus operandi" is not specifically mentioned within the list of exceptions, this Court has long held that evidence of prior bad acts which are extraordinarily similar to the crimes charged may be admitted to demonstrate a modus operandi for the purposes of proving, *inter alia*, identity. *Billings v. Commonwealth*, 843 S.W.2d 890, 893 (Ky. 1992).

In order for the modus operandi exception to render prior bad acts admissible, "the facts surrounding the prior misconduct must be so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were

accompanied by the same *mens rea." English,* 993 S.W.2d at 945. Therefore, we must compare the facts of Appellant's prior murders to the murder of Armstrong, keeping in mind that "clever attorneys on each side can invariably muster long lists of facts and inferences supporting both similarities and differences between the prior bad acts and the present allegations." *Commonwealth v. Buford,* 197 S.W.3d 66, 71 (Ky. 2006).

Whether Appellant's prior murder convictions qualify for the modus operandi exception presents a challenging task for the Court, requiring "a searching analysis of the similarities and dissimilarities." *Clark,* 223 S.W.3d at 97. Our review is even more difficult considering that our jurisprudence on this issue has evolved mostly through the lens of sexual abuse cases. These cases hold that a specific act of sexual deviance may be unique enough to demonstrate that the assailant's crimes are "signature" in nature. *See, e.g., Dickerson v. Commonwealth,* 174 S.W.3d 451, 469 (Ky. 2005); *English,* 993 S.W.2d 941 (all victims were relatives of wife and molestation occurred in the same fashion); *see also Anastasi v. Commonwealth,* 754 S.W.2d 860 (Ky. 1988) (tickling and wrestling with young boys while dressed in only underwear).

Outside the realm of sexual abuse, we have but few cases. In *Bowling v. Commonwealth,* 942 S.W.2d 293, 301 (Ky. 1997), a capital murder case, this Court allowed testimony from the survivor of a previously attempted robbery, wherein Bowling was identified as the assailant. The witness claimed that Bowling came into his service station, attempted to rob the store, and shot at him countless times. *Id.* at 301. The Court upheld the admission of that

testimony because there was sufficient similarity between the crimes to demonstrate that Bowling's pattern of conduct was to rob gas stations attended by one worker in the early morning hours. *Id.*

In *St. Clair,* 455 S.W.3d 869, also a death penalty case, this Court upheld the testimony of St. Clair's accomplice, during which he testified about the duo's prior kidnapping and robbery. *Id.* at 886. The accomplice testified that Appellant held the prior victim at gun point, handcuffed him, and stole his late model pick-up truck, taking the victim along for the ride. *Id.* These facts were similar to the crimes to which St. Clair was charged. The Court held that the facts were sufficient to pass muster under the modus operandi exception since in both kidnappings he used the same gun and pair of handcuffs in order to steal a similar type of truck. *Id.* at 887.

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

commonality of the facts constituting the crimes that demonstrates a modus operandi." *Dickerson*, 174 S.W.3d at 469.

With these cases in mind, we begin with the factual commonalities of the Miles and Sweeney murders with that of Armstrong's. The most noticeable similarity is that all three victims were African-American women in their early twenties, ranging from twenty-one years to twenty-three years old. Another substantial likeness concerns the date and location of all three murders. Appellant murdered Sweeney and Miles within approximately four weeks of murdering Armstrong. The Sweeney and Miles murders also occurred within blocks from Appellant's residence and the location of where Armstrong's body was found. We also place considerable weight on the resemblances between the victims' manners of death. For example, the mode of execution which Miles and Sweeney both suffered was similar to Armstrong's fatal wounds. Specifically, all three victims were shot in the head in the area behind the left ear. Also, and of high importance, the bullets used to kill all three victims were .38 caliber bullets. Moreover, all three victims were each discovered in various stages of undress, which *suggested* they were victims of a sexual assault. The three victims' vaginal areas were likewise all exposed upon the discovery of their bodies.

Turning to the factual differences of the crimes, Miles was killed inside her apartment, while Armstrong and Sweeney were killed outside. In addition, Appellant maintained different levels of association with the three victims. Appellant claims to have known Miles for a few months prior to her death,

while both Sweeney and Armstrong appear to have been new acquaintances. The crimes also occurred at different times of the day. Armstrong was murdered in mid to late morning, while Miles and Sweeney were killed at night. Another difference is that the gun that killed Armstrong was not used to kill Miles or Sweeney, even though it was the same caliber weapon. Moreover, unlike the other two victims, Armstrong was shot twice, as the first shot did not cause immediate death. Appellant also points out that there was no forensic evidence that Appellant had sexual contact with either Miles or Sweeney, nor was he convicted of sexually assaulting either victim. We should note that Sweeney's body was too badly decomposed for a rape kit to be performed.

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

While the above-mentioned differences are inversely proportional to the degree of similarity needed to meet the modus operandi threshold, our

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

We find the case of *Newcomb v. Commonwealth,* 410 S.W.3d 63 (Ky. 2013) most instructive. In that case, *Newcomb* raped two women within a ten-day span. *Id.* at 70. Newcomb raped the first woman, a coworker, in her car after she offered to drive him home. *Id.* The second woman was raped in her home after Newcomb unexpectedly stopped by to visit. *Id.* at 71. Newcomb was tried for both crimes together. *Id.* at 72. This Court upheld the joinder of both offenses, stating that evidence of either rape would be admissible in both trials if severed. *Id.* The Court explained that both rapes were similar enough to establish Newcomb's modus operandi. *Id.* at 74. The similarities relied upon included the victims' ages and race, in addition to the temporal proximities of the crimes. *Id.* The nature of force used was also similar in both rapes, as Appellant's attacks began with forcible kissing followed by a statement like, "You know you like me," or, "You know you want me." *Id.* at 75.

Similar to the case before us, there were numerous differences in the two rapes. For example, the locations of the crimes were not consistent. Newcomb raped one victim in a car after asking for a ride home, while he raped the other victim inside her home when visiting. *Id.* at 76. The levels of

acquaintanceships were also different. Newcomb knew one victim from work and had previously shared a kiss with her, while he had only minimal interaction with the other victim. *Id.* In addition, and again similar to the case before us, the crimes were not identically followed through. Newcomb held one victim by the hair, but used minimal force with the other victim. *Id.; see also English,* 993 S.W.2d at 942 (English utilized the covering of a blanket to hide the commission of sexual acts with some of his victims, but not with others).

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

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

In conducting a KRE 403 balancing test with respect to modus operandi evidence, "a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility." *Newcomb,* 410 S.W.3d at 77 (quoting McCormick on Evidence, Ch. 17 § 190).

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

similarities of the murders are substantial. The close proximity in time and location between each murder further heightens the evidence's probativeness.

In regards to the need for evidence and the efficacy of alternative proof, we find these considerations also weigh in favor of admission. The Commonwealth's only method of proving Appellant's identity as the perpetrator was through the use of DNA evidence. While the DNA evidence certainly proved that Appellant had ejaculated on Armstrong, he argued that he had consensual sex with her perhaps days before her death. Since Appellant provided the jury with a plausible explanation for the presence of his semen, evidence of his modus operandi was highly probative in proving his identity. *See Bowling,* 942 S.W.2d at 301 (evidence of other crimes passed KRE 403 balancing test wherein the evidence rebutted a claimed defense and identification of the defendant as the assailant was at issue).

In concluding our analysis on this issue, we acknowledge that Appellant undoubtedly suffered prejudice from the introduction of his two prior murder convictions. However, we believe the trial court actively managed the jury's understanding of the evidence so as to prevent them from developing "overmastering hostility." In an effort to dissuade prejudice, the trial court admonished the jury about the proper use of the 404(b) evidence after the parties' opening statements. *See Johnson v. Commonwealth,* 105 S.W.3d 430, 441 (Ky. 2003) (juries are presumed to follow admonitions). The trial court explicitly explained to the jury that the evidence was only to be considered as evidence of modus operandi and identity. Furthermore, the trial court

instructed the jury that the Commonwealth still had to prove each element of the crimes charged beyond a reasonable doubt and that Appellant's prior murder convictions could not be used to establish action in conformity therewith. The trial court provided the jury with a similar instruction just prior to the guilt-phase deliberations. In light of the trial court's actions, in conjunction with the high probative worth of the evidence, we find that the trial court did not abuse its discretion in allowing evidence of Appellant's prior murder convictions.

Jury Instructions

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

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

In *Lawson v. Commonwealth*, 218 S.W.2d 41, 42 (Ky. 1949), our predecessor Court stated that trial courts must "instruct on the whole law of the case and to include, when necessary or proper, definitions of technical terms used." In support of his argument, Appellant cites *Wright v. Commonwealth*, 391 S.W.3d 743 (Ky. 2013), wherein this Court found that the trial court's failure to define "unmarried couple" within its instructions

constituted error. *Id.* at 748. However, *Wright,* a domestic violence case, is distinguishable from the case before us. In *Wright,* the statutory definition of "unmarried couple" is distinctive from what an average juror would understand as a couple who is unmarried. *See* KRS 403.720 (an "unmarried couple" constitutes two individuals who have a child together and either live together or previously lived together). That is not the case here. We can find no evidence that the two terms go beyond the average juror's understanding. *See Caretenders, Inc. v. Commonwealth,* 821 S.W.2d 83, 87 (Ky. 1991) ("knowingly" and "willfully" are not technical terms requiring instructions). Furthermore, to the extent that these terms needed clarification, we believe they were sufficiently "fleshed out" during closing arguments. *Lumpkins ex rel. Lumpkins v. City of Louisville,* 157 S.W.3d 601, 605 (Ky. 2005) ("The Kentucky practice of 'bare bones' instructions . . . permits the instructions to be 'fleshed out' in closing argument.").

DNA Suppression

Appellant next urges the Court to find reversible error in the trial court's refusal to suppress his DNA sample, which he claims was improperly obtained during an illegal traffic stop. In February of 2006, LMPD Sergeant Aaron Crowell was tasked with covertly obtaining Appellant's DNA. Accordingly, Sergeant Crowell and Detective Hibbs began surveilling Appellant's residence. While watching Appellant's residence, the two officers observed Appellant enter a vehicle as a passenger. The vehicle subsequently left the residence at an unlawful high rate of speed. The officers then stopped the vehicle due to the

speeding violation. During the stop, Sergeant Crowell removed Appellant from the vehicle and performed a pat down to check for weaponry. Appellant placed his lit cigar onto the back of the vehicle. After checking the subjects' driver's licenses and running warrant checks, officers permitted the driver and Appellant to leave. No citation was issued. As the vehicle left the scene, Appellant's cigar fell to the ground and was collected.

Appellant filed a motion to suppress DNA evidence recovered from the cigar based on the illegality of the traffic stop. The trial court denied Appellant's motion following evidentiary hearings.

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

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

Hibbs observed the vehicle speeding. Thusly, it is immaterial that Sergeant Crowell desired to obtain Appellant's DNA since adequate probable cause existed.

On appeal, Appellant takes his argument further and suggests that his removal from the car and subsequent pat down was unlawful. The trial court did not address these arguments. Nevertheless, we can quickly dispose of Appellant's contentions. Pursuant to *Owens v. Commonwealth,* 291 S.W.3d 704 (Ky. 2009) an "officer has the authority to order a passenger to exit a vehicle pending completion of a minor traffic stop." *Id.* at 708 (citing *Maryland v. Wilson,* 519 U.S. 408, 414-15 (1997)). Furthermore, Sergeant Crowell was permitted to conduct a pat down of Appellant. As his suppression hearing testimony illustrated, Sergeant Crowell maintained a reasonable and articulable suspicion that Appellant was armed and dangerous. *See Terry v. Ohio,* 392 U.S. 1, 27 (1968). Specifically, Sergeant Crowell testified that he was not only aware of Appellant's proclivity to carry a weapon, but that he previously arrested Appellant for unlawful possession of a handgun. *See also Adkins v. Commonwealth,* 96 S.W.3d 779, 787 (Ky. 2003) ("When an officer believes that he is confronting a murder suspect, he has presumptive reason to believe that he is dealing with an armed and dangerous person."). We have seen no evidence that Sergeant Crowell's quick pat down of Appellant exceeded the scope of *Terry,* nor has Appellant demonstrated that the traffic stop was prolonged to effectuate the pat down.

Recusal

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

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

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

of his prior representation of Appellant. Accordingly, Appellant should have filed his recusal motion long before the trial began.

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

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

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

in the matter in controversy"; or (3) "has knowledge of any other circumstances in which his impartiality might reasonably be questioned."

This Court does not believe any grounds for mandatory recusal existed. In regards to the first basis for disqualification, we disagree with Appellant's argument that his 1981 conviction had some type of evidentiary value to the existence of his modus operandi. Not only was his 1981 conviction not introduced during the guilt phase, but Appellant fails to explain how Judge Shake's purported knowledge of that case renders the murders of Sweeney and Miles more similar to the murder of Armstrong. In regards to the second statutory ground for recusal, we find Appellant's argument unpersuasive. While it is true that Judge Shake previously served as Appellant's attorney, he did so in an unrelated case over thirty-three years prior. That particular conviction plainly does not constitute the same "matter in controversy." *See Bussell,* 882 S.W.2d at 112. Lastly, we find difficulty in reasonably questioning Judge Shake's impartiality. Judge Shake was candid about his recollections and explained that he had no memory of Appellant's cases or having any conversations concerning those cases. We will not assume bias based solely on the fact that Judge Shake represented Appellant more than thirty-three years prior to his trial. *Id.* (holding that judge's prior representation of defendant in a murder case did not render him biased). For these reasons, we find no error in Judge Shake's refusal to disqualify himself from presiding over Appellant's trial.

Chain of Custody

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

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

In reviewing the trial court's ruling, we look for an abuse of discretion. *Thomas,* 153 S.W.3d at 781 (citing *United States v. Jackson,* 649 F.2d 967, 973 (3d Cir. 1981). Our focus is on whether a foundation was sufficiently laid so that there is a reasonable probability that the proffered evidence was not

altered in any material respect. *Id.* In making this determination, we look to "the circumstances surrounding the preservation of the evidence and the likelihood of tampering by intermeddlers." *Thomas,* 153 S.W.3d 782 (citing *Pendland v. Commonwealth,* 463 S.W.2d 130, 133 (1971)).

Cuttings from Armstrong's Panties

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

The second group of cuttings occurred in 2004, when LMPD was investigating another suspect in Armstrong's murder. At that time, the remnants of the intact panties were transported to the KSP laboratory. This is where the second group of cuttings occurred. These cuttings were returned to

LMPD and stored in the property room that same year. The chain of custody for the second group of cuttings has one missing link. After Durbin made the initial selection of cuttings in 1983, there is no direct testimony demonstrating how the remnants of the intact panties made it back to the LMPD property room before being stored until 2004. Nevertheless, discovery indicates that the KSP lab released the panties to LMPD Officer "J. Trusty" on August 10, 1983, the same day they were returned to the LMPD property room. This minimal gap in the chain of custody for the second group of panty cuttings does not render it unreliable. *See Thomas,* 153 S.W.3d at 782. ("All possibility of tampering does not have to be negated. It is sufficient . . . that the actions taken to preserve the integrity of the evidence are reasonable under the circumstances.").

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

Rape Kit

Dr. McCloud collected Armstrong's rape kit, after which it was transferred to Detective Griffin during her autopsy. It is unclear if it was Detective Griffin or another officer who placed the kit in the LMPD property room. Nine days later, Detective Griffin transported the kit to a KSP laboratory. The Commonwealth could not pinpoint who transported the kit back to the LMPD property room where it remained until June of 2004. At that time, the kit was once again transported to the KSP laboratory by an evidence technician where it exchanged hands with several identified analysts and technicians and returned to the LMPD property room. A similar exchange took place in 2007, where the kit was transported to a KSP laboratory by an identified evidence technician and was later returned to the LMPD property room. There was no testimony regarding who handled the kit, if anyone, while at the KSP laboratory.

Although there are several breaks in the rape kit's custodial chain, we do not believe these disruptions render the evidence unreliable. The deficiencies in custody are apparently due to careless record keeping in the form of failure to specify who transported the item, rather than actions that would have altered or possibly contaminated the contents of the rape kit. In *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998), the Court stated that "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been

altered in any material respect.'" (quoting *United States v. Cardenas,* 864 F.2d 1528, 1532 (10th Cir. 1989)). As such, the trial court did not err in admitting the evidence, as there was minimal chance that the contents of the rape kit were altered. Once again, we underscore that breaks in the chain of custody go to the weight of the evidence, rather than its admissibility. *McKinney,* 60 S.W.3d at 511.

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

Buccal Swab and Cigar

As mentioned, Appellant also submits that the Commonwealth failed to establish the chain of custody for his cigar butt and buccal swab. We will not

plunge into a lengthy discussion concerning the custodial history of these items. Instead, we can surmise that Appellant's most persuasive argument is predicated on unidentified individuals who accepted and released the evidence from the LMPD property room. As our analysis has already stated, minor custodial breaches do not automatically render the evidence unreliable. *See Thomas,* 153 S.W.3d at 781. Despite the negligible gaps in custody, the Commonwealth reasonably demonstrated the identity and the integrity of the buccal swab and cigar. Therefore, the trial court did not abuse its discretion by admitting them into evidence.

Prosecutorial Misconduct

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

Guilt Phase

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

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

Appellant's second allegation of prosecutorial misconduct occurred when the Commonwealth commented on Roger Ellington's testimony. Appellant believes the Commonwealth's statements had the effect of offering the prestige of the Commonwealth Attorney's Office to support the witness' credibility. Appellant's brief provides a lengthy quote from the Commonwealth which it argues amounted to improper bolstering. After reviewing the Commonwealth's closing argument, we find no need to provide the quote, as there is no merit in Appellant's contention. The Commonwealth merely summarized Mr. Ellington's testimony in a way that was persuasive to their position. *Compare Armstrong v. Commonwealth*, 517 S.W.2d 233, 236 (Ky. 1974) (improper bolstering occurred when the prosecutor informed the jury that he had known and worked with the witness before and the witness was honest and conscientious).

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

In *Ragland v. Commonwealth*, 191 S.W.3d 569, 589 (Ky. 2006), the Court explained that "a defendant's constitutional privilege against compulsory self-incrimination [is violated] only when it was manifestly intended to be, or was of such character that the jury would necessarily take it to be, a comment upon the defendant's failure to testify." When placed in the context of the defense's theories, we believe the Commonwealth was appropriately responding to Appellant's allegation that Ellington was Armstrong's killer. Such a comment does not constitute a comment on Appellant's failure to testify. *See Bowling*, 873 S.W.2d at 178 (finding that prosecutor's closing argument statement that "We can't tell you what it is because only the man who pulled the trigger knows" did not amount to a comment on defendant's refusal to testify). As we have explained, "[n]ot every comment that refers or alludes to a non-testifying defendant is an impermissible comment on his failure to testify . . . ." *Ragland*, 191 S.W.3d at 589 (quoting *Ex parte Loggins*, 771 So.2d 1093, 1101 (Ala. 2000)).

Appellant also alleges that the Commonwealth improperly shifted the burden of proof when it reminded the jury that Appellant failed to provide proof that he and Armstrong had a relationship prior to her murder. This Court has long held that a prosecutor "may comment on evidence, and may comment as to the falsity of a defense position." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). The complained of statement was clearly made to challenge the defense's theory that Appellant's DNA was present in Armstrong's underwear because the two had consensual sex preceding her death. The

Commonwealth's remarks that there was no evidence that such an encounter took place was well within the bounds of closing arguments. We find no error.

Sentencing Phase

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

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

Next Appellant argues that the Commonwealth improperly urged the jury to sentence him to death for his prior murders of Miles and Sweeney. We find

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

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

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

Victim Impact Evidence

Appellant next contends that he was denied a fair trial due to the elicitation of what he believes was victim impact evidence during the guilt phase of trial. This argument is unpreserved and without merit. During redirect examination of one of Armstrong's children, the Commonwealth inquired into the status of Armstrong's other children. The witness merely said that one of his siblings was killed and the other had committed suicide. The witness did not expound on their deaths, nor did he state that their deaths were attributable to their mother's murder. We find no error.

Directed Verdict

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

Statutory Aggravator

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

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

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

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

we assume that juries follow instructions. *Johnson v. Commonwealth*, 105 S.W.3d 430, 436 (Ky. 2003). Accordingly, since the jury wrote the word "rape" on the verdict form which found the existence of the aggravator, in conjunction with the jury's subsequent imposition of death, we find no error.

Invalid Indictment

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

Jury Inquiry

Appellant maintains that the trial court violated his constitutional rights by failing to conduct an adequate inquiry regarding whether any jurors viewed an inflammatory news article. The article at issue was released at the

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

Voir Dire Limitation

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

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

denial of a particular question implicates fundamental fairness. *Lawson v. Commonwealth,* 53 S.W.3d 534, 540 (Ky. 2001). In *Ward v. Commonwealth,* 695 S.W.2d 404 (Ky. 1985), defense counsel attempted to inquire whether potential jurors, when assessing a witness' credibility, could consider the fact that the witness made a deal with the Commonwealth in exchange for his testimony. *Id.* The Court upheld the trial court's limitations on such inquiries because such questions were "to have jurors indicate in advance or commit themselves to certain ideas and views upon final submission of the case . . . ." *Id.* at 407; *see Woodall v. Commonwealth,* 63 S.W.3d 104 (Ky. 2001) (affirming the trial court's limitation of defense counsel's questions concerning whether the jurors could consider a low I.Q. score as mitigating evidence). In light of *Ward,* we do not believe the trial court exceeded its broad discretion. Appellant's questioning would have likely exposed juror views concerning his past murders and possibly committed the jurors to those assessments. As mentioned, less harmful questioning was utilized and allowed Appellant to ascertain whether the jurors could follow the trial court's instruction to consider the evidence for the correct purposes.

Venirepersons Struck For Cause

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

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

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

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

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

Jury Sequester

Appellant complains that he was denied a fair trial due to the trial court's failure to sequester the jury on the weekend between the guilt and sentencing

phases. We find no error. RCr 9.66 states that "[w]hether the jurors in any case shall be sequestered shall be within the discretion of the court." Accordingly, in *St. Clair v. Commonwealth*, 140 S.W.3d 510, 558 (Ky. 2004), this Court made clear that it is not an abuse of discretion to refuse "to sequester a jury between the guilt and sentencing phases of a bifurcated trial . . ." (citing *Wilson v. Commonwealth*, 836 S.W.2d 872, 888 (Ky. 1992), overturned in part by *St. Clair v. Roark*, 10 S.W.3d 482 (Ky. 1999)).

Mitigating Evidence

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

Missing Evidence Instruction

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

food stamps were missing on her person when her body was discovered. In an attempt to confirm her whereabouts that morning, LMPD Detective Les Wilson testified that he obtained a printout from the food stamp office showing Armstrong as a recipient. After Detective Wilson's testimony, the parties realized the printout was missing. Both parties stipulated this fact and the trial court advised the jury that the food stamp printout was not within the case file. Appellant requested an instruction on the missing evidence. The trial court denied the request on the grounds that Appellant failed to demonstrate that the evidence was intentionally destroyed by law enforcement.

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

Alternative Perpetrator Evidence

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

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

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

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

Penalty Phase Exhibit

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

Intellectual Disability

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

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

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

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

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

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

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

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

Competency Hearing

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

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

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

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

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

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

Upon review of Appellant's constitutional right to a competency hearing, we cannot say that there were reasonable grounds to suspect incompetency. As already stated, Appellant assisted in his defense, often advocating on his own behalf through numerous pro se filings. Appellant was steadfast in the defense he wished to present, even notifying the court of his dissatisfaction with his defense team. Moreover, Appellant was able to comport himself well in the courtroom, conveyed his thoughts without difficulty, and demonstrated a thorough understanding of the charges he faced. In fact, the only indication that Appellant was not competent to stand trial was defense counsel's movement for a competency evaluation. As this Court has previously stated, "defense counsel's statements alone could not have been *substantial* evidence." *Padgett*, 312 S.W.3d at 349. For these reasons, we do not believe a reasonable judge would have expressed doubt about Appellant's competency to stand trial.

Death Penalty

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

Moreover, Appellant's contention that our death penalty statute violates the Sixth Amendment pursuant to *Hurst v. Florida,* 136 S.Ct. 616 (2016) is unpersuasive. In *Hurst,* the U.S. Supreme Court found Florida's capital sentencing scheme unconstitutional because the jury only issued a sentencing recommendation, after which the judge made the ultimate factual findings

needed for the imposition of death. *Id.* at 622-24. However, under the Commonwealth's statutory scheme, the trial court does not usurp the jury's role in finding the existence of statutory aggravators needed for the imposition of the death penalty.

Conclusion

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

All sitting. All concur.

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Erin Hoffman Yang
Assistant Public Advocate

COUNSEL FOR APPELLEE:

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Attorney General of Kentucky

Jeffrey Allan Cross
Assistant Attorney General

Emily Lucas
Assistant Attorney General

NO. 07-CR-4230

JEFFERSON CIRCUIT COURT
DIVISION TWO (2)
JUDGE JAMES M. SHAKE

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

LARRY LAMONT WHITE

DEFENDANT

****

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

Comes the Defendant, Larry Lamont White, by counsel, and hereby moves the Court to enter an Order precluding the death sentence as a possible punishment in this matter based upon the recent opinion of the United States Supreme Court in the case of *Freddie Lee Hall v. Florida*, rendered May 27, 2014. (Opinion Attached in its entirety as Exhibit A.)

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

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

disability and, therefore, protected from execution.

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

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

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

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

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

Respectfully Submitted,
Mark G. Hall

TB

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BY

CERTIFICATE OF SERVICE

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

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

MARK G. HALL

Certificate of Acknowledgement of Authenticity of Records
Pursuant to Kentucky Rule of Evidence 902(8) and (11)

The undersigned, David Morgan, after being duly sworn, hereby certifies that the copies of records attached or enclosed herewith and for which this acknowledgement is made are true and complete reproductions of the original or microfilmed records and that said records are the records of Louisville Metro Archives and that the original documents are housed at 635 Industry Rd. Lou. KY 40208. The undersigned further certifies that the original or a duplicate of a record of regularly conducted activity:

(i) Was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(ii) Is kept in the course of the regularly conducted activity; and

(iii) Was made by the regularly conducted activity as a regular practice.

David B. Morgan
Signature

Dated: 7-15-09

COMMONWEALTH OF KENTUCKY)
)
COUNTY OF JEFFERSON)

Subscribed and sworn to before me by David Morgan on this the 15th day of July 2009.

My commission expires November 2, 2011.

[signature]
Notary Public

750

A-105

U.H.: 2-8-71 (Harris) Add. 1320 So. 28th St.

PSYCHOLOGICAL SERVICES

Re: Larry Griffin N/M
Date tested: 2/3/71
D.O.B.: 3/30/58
Age: 12-10
Court Date:

Tests administered: WRAT, TAT, WISC, CTP, Sentence Completion, Otis, Jeaness and Early Memories
Examiner: S. C. Hess
M. Harris, Social Worker

Referral problem: Larry is before the court for truancy and storehouse breaking (Grand Larceny). He has no past court history. The boy lives with his mother and grandmother; his older brother who had been before the court on many charges, has been living with his maternal grandfather in Indianapolis for about a year. Larry was hit by a car in 1967 and had received head and face injuries.

Behavior: Larry was dressed in a quite sophisticated style - (Afro hairdo, white leather jacket, purple shirt and shoe boots). From a distance he appeared older, but his voice, his embarrassed smiles, his worried look when trying to think of a response, and his mannerisms in general suggested immaturity. His test performance and approach were uneven; on mechanical tasks he showed good logic and minimal trial and error. Initially, he sat and merely responded but as he had some successful feedback, he began to help examiner in handling the material. Generally, he showed interest if he could see favorable results, but appeared frustrated when he felt inadequate. His voice would show disgust and at times it would fade out until barely audible.

Results: These tests indicate borderline intellectual functioning IQ 76, and a significant learning deficit, with reading at the 2.4 grade level and arithmetic at the 3.4 level. Reasoning, however, was within the low normal range. He had a comparatively high Asocial Index (78) and is showing a fairly primitive level of socialization. Projectives indicate distance from family and friends and his mother mentioned that he had little to do with his brother when the latter was at home. He spends his time at home playing cards with his grandmother or watching TV. Mother ascribes the present difficulty to some older boys with whom Larry has been associating recently; during the summer he had a girlfriend and had gone dancing at Fontaine Ferry. On these tests, he expresses anger at school and teachers, distance from family and a hedonistic value system (good times, nice clothes, a cashmere coat, recreation and stuff). His TAT stories, however, showed some sensitivity to feelings beyond the primitive, self-centered level; suggesting he may have internalized some socialization.

Summary: These results show uneven functioning both in behavior and in intellectual funcioning. Though his full scale IQ is 76, (borderline) and he is showing a highly significant learning deficit, his reasoning in the low normal range suggests some potential. Tests and interview indicate identification with a highly sophisticated, delinquent culture, but where he could achieve, his behavior showed some positive aspects. At present, he is seen as immature, turned off with school and committed to more delinquent values, but projectives suggest he has internalized a slight degree of socialization. Removal from home is recommended, and commitment to a boys camp, as in his home situation, he has nothing going for him and this would lead to further delinquency.

Classification: I_3 Cfc

Sonia Hess, Psychologist

APPROVED BY: Dr. S. C. Fulkerson, Consultant

752

vbs 2/15/71 p.m.

PSYCHOLOGICAL SERVICES

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Classification: I_3 Cfc

Sonia Hess, Psychologist

753

APPROVED BY: Dr. S. C. Fullerson, Consultant

vbs 2/15/71 p.m.

A-108

Larry [illegible] N/M
Date: [illegible] - 71
DOB: 3-30-58
Age: 12-10
Ct. date:

T.R. — Gen. Comp. WRAT, TT
WISC, CTP, Otis, Jesness
Early Memories,
Exam. S.O. Haas
M. Harris, Social Worker

Referral problem: Larry is before the court for truancy [illegible] (Grand Larceny). He has no past court history. [illegible] lives with his MGF [illegible] having been before the court in many changes [illegible] living with his MGF [illegible]

Behavior: Larry was dressed in [illegible] style [illegible] white leather jacket, [illegible] shirt & shoe boots [illegible] [illegible] [illegible]

[illegible]

A-109

754

Jerry Griffin N/M
Date: [illegible] — 7[illegible]
DOB: 3-30-55
Age: 12-10
Ct. date:

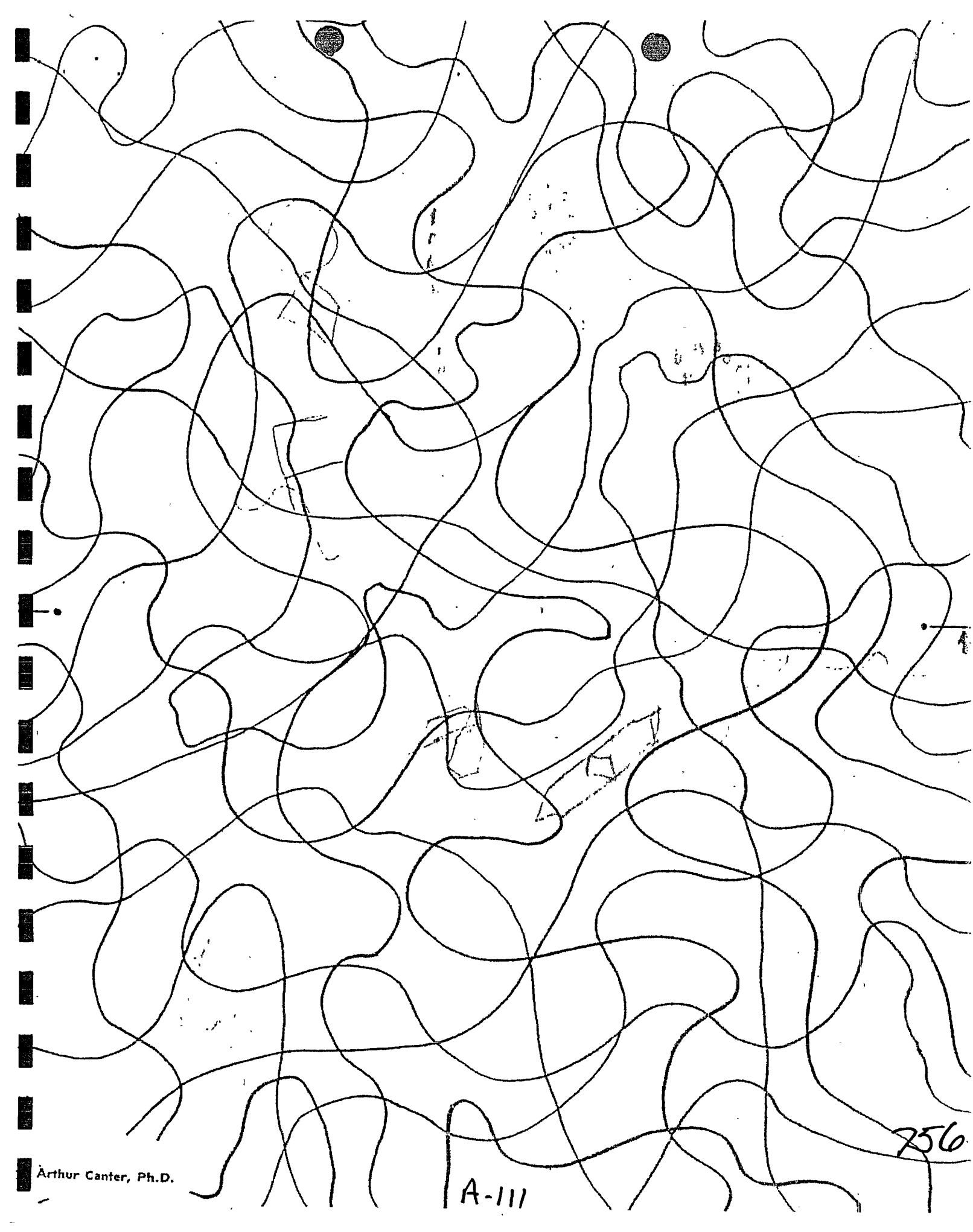
T.A. — Sen. Comp. WRAT, TT, WISC, CTP, Otis, Jesness. Early Memories, Exam. S & [illegible], M. Harris, Social Worker

Referral: [illegible] Jerry [illegible] from the court for truancy [illegible] (truancy) ~~[illegible]~~ He has no past court history. [illegible] older brother [illegible] in many charges, [illegible] MCF [illegible]

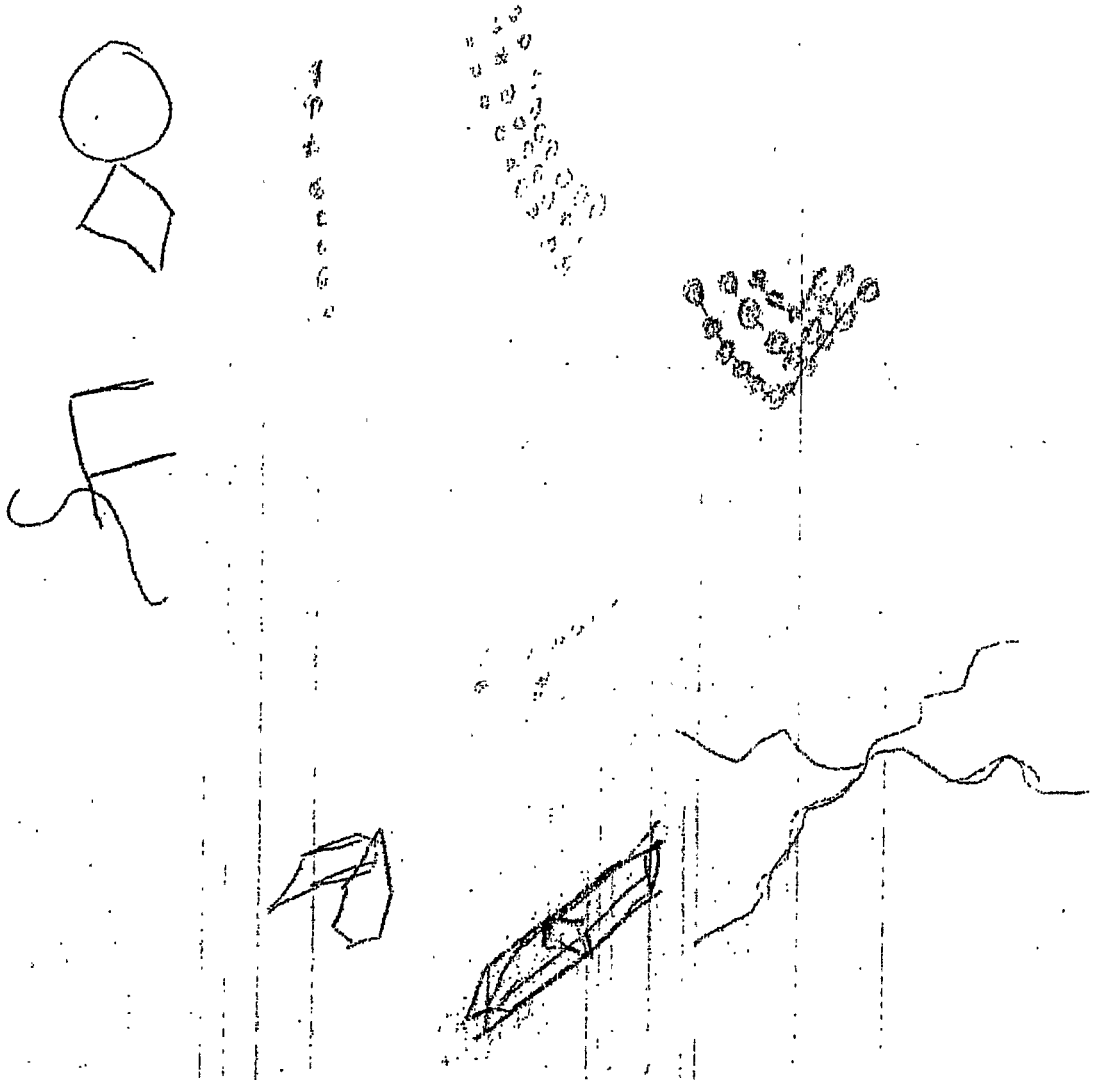
Behavior: Jerry was [illegible] style [illegible] white [illegible] shirt [illegible] ~~[illegible]~~ [illegible] merely responsive but as [illegible] feedback [illegible] His [illegible]

~~[illegible]~~

A-110



Arthur Canter, Ph.D.



757

A-112

Larry [illegible]

Rot – ||||

Integ – |

Dist – |

7 errors

758

A-113

by 56 H

Name Terry Griffin — Date 2-3-70

DIRECTIONS: COMPLETE THESE SENTENCES TO EXPRESS YOUR REAL FEELING. TRY TO DO EVERY ONE. BE SURE TO MAKE A COMPLETE SENTENCE.

1. I like to go places instead of stayin in the house - recreation and stay
2. The happiest time is on Xmas
3. What bothers me teachers (wi voices contempt)
4. A mother can't think of nothin for that one
5. I feel pretty good.
6. In school nothin -
7. As a child 4
8. Some day I'll be beauty school
9. I need nothin -
10. I am best when I'm happy
11. I hate teachers
12. I wish I didn't have to go to school
13. I try hard D.K.
14. My father DK -
15. I always wanted to be can't think of nothin I always contestable
16. My schoolwork is hard
17. I don't like school
18. Ten years from now I would like to be in college I guess - I just D.L.
19. Ten years from now I will probably - - - - clam pdl. if I got the money.
20. Planting people -
21. Work at home
22. My greatest longing a coat a cashmere -
23. My clothes is dirty.
24. My looks D.K. - nothin for that one

759

A-114

25. I feel most proud of (Pooh head)

26. My greatest ambition noth — no — a lawyer

27. I'm afraid when —

28. One's closest friends can DK

29. When I grow up I be glad!

30. My greatest trouble goin to school.

31. I am very tired of stayin the house (q. that's what the Judge sa

32. At home I watch T.V.

33. When I'm sick —

34. Being lonely —

35. Money

36. I love my Mother

37. I've always wanted to play ball

38. What worries me —

39. I'm unhappy when —

40. My family —

41. It is hard to —

42. My friends my is in School

I'd rather be anywhere than here —

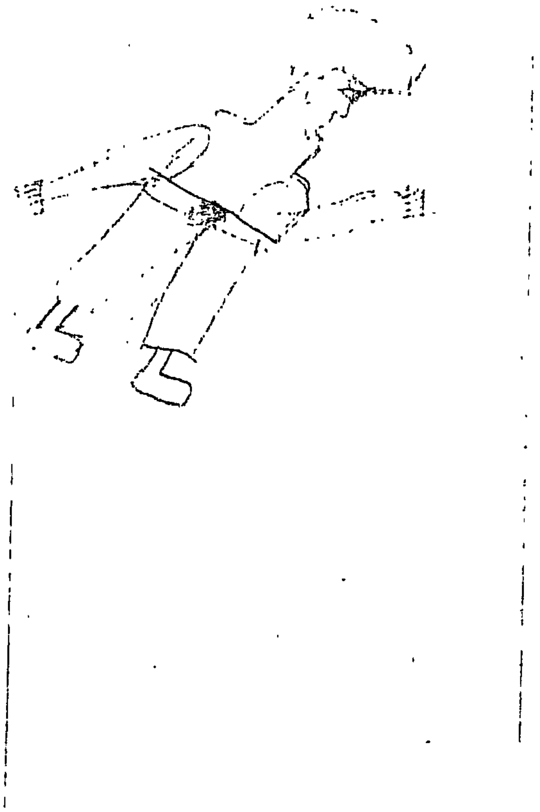
popular whole school be friend

B/. ct — some lady — some teacher over at school said she saw me leave sch. w. the instruments — but she wasn't to court (music room broken into!)

+ for not goin to school

760

A-115



I guess he just walking down the street -

761

卌 卌 卌 卌 |||| = 7-6

A-116

~~[illegible]~~

~~[illegible]~~

Early Memories — long time —

— when in 1st grade I went to Lou Zoo — just [illegible] giraffes monkeys & lions & elephants —

— Then I went to circus when I was in the 3rd grade — (?) nothin too much —

voice [illegible] on this stuff

Can't think of nothin else —

Interview —

1 bro — Charles Louis Griffin — older
live w/ my GF in Indianapolis just [illegible]
Bro kinda tall — kinda short hair —
He like to play — basketball — I DK. [illegible] he [illegible] to do — [illegible]

Mo — She don't do nothin much. She at home most of time.
Fa — DK where he is
I'm more like my Mo — My bro. more like my [illegible] [illegible]

Fa — He ain't too good — I [illegible] him just the same as my Mo —

One teacher — [illegible]
I get along w/ teachers — bec. they always [illegible] at me [illegible] anything — [illegible]

760

Punished — I ain't did nothing — just
(i.e. one time since we moved [illegible]) — for
staying out late — [illegible] — I had to stay in the
house —

Get mad when people holler at me —
when Play wrong — (keep throwing things at you or
hitting you..) —
I just tell 'em leave me alone — if [illegible] I just hit
'em —

763

Inter. wi Mo —

(16 + 18)
Older boys influencing him & things
I know he was seein them a lot
other boys go with them to —
A guy on [illegible] — younger boys that
lived by — had an apt. The boy that
had the apt goes to [illegible] — he
took the boys up there during school hrs
When I got up there they was just sittin
and talkin — OK I was comin
they told me he wasn't there — but I
caught & saw him coming down —

He goes there
I think he feels all right at home —
He do a little cleaning up around house.
plays cards & things in my rm (MG)
Other times he just watch T.V.
When he was goin to school regular he
was doin pretty good — few A's & C's
Not doin too good now —
I had a talk w/ his teacher yesterday
Teacher said he comes & just sits up there &
do nothin — if she could only get
him to do his work — he's awful
slow in his work.
He gone since he was 4 —
Just started [illegible] last year
Actually when he was here [illegible] & [illegible]
too much wi one another —

Punishment — when not home or DD his homework
he has to stay in —
Ever since I moved down in the West

764

End of [illegible] trouble —
[House was going to be repaired (?) [illegible] &
I had to move — (B'way)
Went to [illegible] Bych — 26th & Madison ...

I thought [illegible] going to do better — [illegible]
lot of improvement ...

DK what bothers him & broke [illegible]
Was ~~interested~~ in drums & sent him to
drum school for a while but couldn't
afford to keep it up —
Off & on ~~almost~~ about a year —
he was going pretty big ..
There was something he wanted to do ...

Grp. on Havelock — larger boys had a band —
& he told Mo he would like to get in
a group — Those boys needed money &
said younger boys ont forget it. [illegible]
They had nice instruments & neither
one of em's working —

He used to go down to F. Ferry — this past summer — And dances or
stuff & he enjoyed that — he likes to
dance — he says he has a girlfriend
brought a picture home —

765

A-120

2i ö → sq[illegible] – [illegible] ([illegible])

– B.G. #3 [illegible] c. 3rd [illegible] turned [illegible]
[illegible] – [illegible] posit. [illegible] (turned

– Quite [illegible] [illegible] #8 turn [illegible]
#8 [illegible] rot?.
[illegible] & [illegible] (card –
[illegible]

wants to LC [illegible]
[illegible]

Voice sounds disgusted w/ DK
[illegible] it almost [illegible] DK.
somewhat threatened –

Interested [illegible] getting [illegible] –
easily frustrated [illegible]
e.g. [illegible] – [illegible]
[illegible]
[illegible] –
began to help in putting out & away

[illegible] 6:00

[illegible] –
[illegible]

766

Terry Griffin

TAT

1 — All I can say he just thinking of playing the ... he unhappy [illegible] OK

3BM — The LL he is unhappy to me — I was on nobody, love to stay in the house & I have nothing to do.

4 — He is mad at her — she trying to keep him for not leaving, she want him to stay here — she trying to make up to him —

6BM — The prob. saying sg & then she got mad at [illegible] trying to apologize to her & she won't listen to him —

7BM — Who Father talking to him & telling him what not to do & what to do —

7GF — They sitting around talking, she's holding the doll in her hand — Look at T.V. I guess —

9GF — She made her [illegible] running [illegible] she might get drowned .. she's calling her to come back —

10 — They just got married — they happy .. celebrating their marriage. That's the end of that one

12M — He's trying to make him into a monster & then he going to kill him — take him away & choke him to death —

767

186F She dove went out & got [illegible] a [illegible]
No [illegible] - [illegible] [illegible] [illegible]
[illegible] D[illegible]

16 There is also a story of the man — this man turned into a vampire & he [illegible]. The [illegible] [illegible] [illegible] [illegible] then the [illegible] & [illegible] he [illegible] flies upon the [illegible] [illegible] then he turned into a man — & everybody police & things there & so at the end he turned into a vampire & flew down with the police & they shot him & when they turned him over they found he was a real man & they thought he was a vampire

768

WIDE RANGE ACHIEVEMENT TEST

Reading, Spelling, Arithmetic from Pre-School to College

By J. F. Jastak, S. W. Bijou, S. R. Jastak

Printed in U.S.A.
1937, 1946, 1963
Revised Edition
1965

Name Larry Griffin Birthdate M. F. Chron. Age

School Grade Reading Score 22 Grade 2.4 Stand-Sc. %ile

Referred by Spelling Score Grade Stand-Sc. %ile

Date Examiner Arithmetic Score 13 Grade 3.4 Stand-Sc. %ile

Percentiles and Standard Scores corresponding to grade ratings and age may be found in the Manual.

Level I—Spelling—Grade Norms.

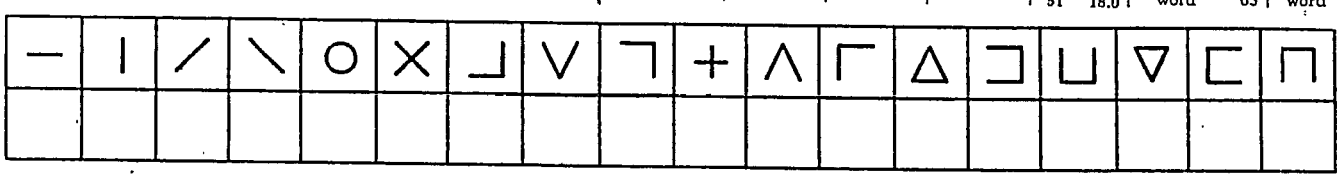
Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade
1	N.5	12	Kg.4	23	1.5	34	3.0	45	5.7	56	10.3
2	N.8	13	Kg.5	24	1.6	35	3.2	46	6.0	57	10.9
3	Pk.1	14	Kg.6	25	1.7	36	3.5	47	6.3	58	11.5
4	Pk.2	15	Kg.7	26	1.8	37	3.7	48	6.5	59	12.2
5	Pk.3	16	Kg.8	27	2.0	38	3.9	49	6.8	60	13.0
6	Pk.5	17	Kg.9	28	2.2	39	4.2	50	7.2	61	13.8
7	Pk.7	18	Gr.1.0	29	2.3	40	4.5	51	7.7	62	14.5
8	Pk.9	19	1.1	30	2.5	41	4.7	52	8.2	63	15.2
9	Kg.1	20	1.2	31	2.6	42	5.0	53	8.7	64	15.9
10	Kg.2	21	1.3	32	2.7	43	5.3	54	9.2	65	16.7
11	Kg.3	22	1.4	33	2.9	44	5.5	55	9.7		

Level II—Spelling—Grade Norms.

Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade
0	Kg.2	11	4.0	21	6.7	31	9.0	41	12.4		
1	Kg.6	12	4.3	22	6.8	32	9.3	42	12.8		
2	Gr.1.0	13	4.6	23	7.0	33	9.6	43	13.2		
3	1.3	14	4.9	24	7.2	34	9.9	44	13.6		
4	1.6	15	5.2	25	7.4	35	10.2	45	14.0		
5	1.9	16	5.5	26	7.6	36	10.5	46	14.4		
6	2.2	17	5.8	27	7.8	37	10.8	47	15.0		
7	2.6	18	6.1	28	8.1	38	11.2	48	15.7		
8	3.0	19	6.3	29	8.4	39	11.6	49	16.4		
9	3.3	20	6.5	30	8.7	40	12.0	50	17.2		
10	3.7							51	18.0		

Spelling Scores

Level I		Level II	
Test	Cumul Score	Test	Cumul Score
Copying		Copying	
1 point	1	4-9	1
per	to	10-17	2
mark	18	18	3
Name		Name	
1 letter	19	1 letter	4
2 letters	20	2 letters	5
Spelling		Spelling	
1 point	21	1 point	6
per	to	per	to
word	65	word	51



Name _____ 31. _____

1. _____ 16. _____ 32. _____

2. _____ 17. _____ 33. _____

3. _____ 18. _____ 34. _____

4. _____ 19. _____ 35. _____

5. _____ 20. _____ 36. _____

6. _____ 21. _____ 37. _____

7. _____ 22. _____ 38. _____

8. _____ 23. _____ 39. _____

9. _____ 24. _____ 40. _____

10. _____ 25. _____ 41. _____

11. _____ 26. _____ 42. _____

12. _____ 27. _____ 43. _____

13. _____ 28. _____ 44. _____

14. _____ 29. _____ 45. _____ 769

15. _____ 30. _____ 46. _____

A-124

Page 2. Arithmetic
LEVEL I. Oral Part

41 17 9 5 3 3 Fingers, 8 fingers. 9 or 6? 42 or 28? 17

3 pennies, spend 1 ?_____ ; 3 + 4 apples?_____ ; 9 marbles, lose 3?_____ 20

Written part.

$1 + 1 =$ _____ $4 - 1 =$ _____

$\begin{array}{r} 6 \\ +\ 2 \\ \hline \end{array}$ $\begin{array}{r} 5 \\ -\ 3 \\ \hline \end{array}$ $\begin{array}{r} 32 \\ 24 \\ +\ 40 \\ \hline \end{array}$ $4 \times 2 =$ _____ $\begin{array}{r} 23 \\ \times\ 3 \\ \hline \end{array}$ $\begin{array}{r} 29 \\ -\ 18 \\ \hline \end{array}$ $\begin{array}{r} 75 \\ +\ 8 \\ \hline \end{array}$ 29

$\begin{array}{r} 452 \\ 137 \\ +\ 245 \\ \hline \end{array}$ $6 \div 2 =$ _____ $\begin{array}{r} \$62.04 \\ -\ 5.30 \\ \hline \end{array}$ $1\frac{1}{2}$ hr. = ____ min. $6\overline{)968}$

$\frac{1}{3} + \frac{1}{3} =$ _____ 35

$\frac{15}{5} =$ _____ $\frac{7}{9} - \frac{5}{9} =$ _____ $\begin{array}{r} 823 \\ \times\ 96 \\ \hline \end{array}$ $\begin{array}{r} 4\frac{5}{6} \\ 3\frac{1}{3} \\ +\ 2\frac{1}{2} \\ \hline \end{array}$ $\frac{2}{5}$ of 35 = _____

$\frac{1}{2}$ yd. = ____ in. $1\frac{3}{4} = \frac{\quad}{4}$ 42

$27\overline{)384}$ $\frac{3}{4}$ yr. = ____ mo. Multiply: $\begin{array}{r} 7.96 \\ \times\ 30.8 \\ \hline \end{array}$

$\frac{2}{3} = \frac{\quad}{12}$ $\begin{array}{r} 5 \\ -\ 1\frac{1}{3} \\ \hline \end{array}$ $2\frac{1}{3}$ doz. = _____ 48

Which is more?
$\frac{7}{8}$ or $\frac{13}{15}$ Ans. _____

Find the average of
24, 18, 21, 26, 17
Ans. _____

Write as a percent
$\frac{3}{4} =$ _____ %

$4\frac{1}{5} \times 3\frac{1}{3} =$ _____ 52

$\frac{3}{10} \div \frac{3}{4} =$ _____ $\frac{8}{9} \times \frac{9}{4} \times \frac{1}{2} =$ _____

Write as decimal:
$\frac{2}{3} =$ _____ 20% of 120 = _____ 56

$6^2 =$ _____ $8.2\overline{)62.703}$

Change to familiar numerals:
M C X L II = _____

$(-5)(+9) =$ _____ 60

Find interest on
$300 at $4\frac{1}{2}\%$ for 7 mo.
Ans. _____

Solve:
$y + (9 - 8y) = 65$
$y =$ _____

Find square root: $\sqrt{3348.9}$ 63

Arithmetic—Level I—Grade Norms. Percentiles and Standard Scores corresponding to grade rating and age may be found in Manual.

Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade
1	N.5	8	Kg.1	15	Kg.9	22	2.1	29	3.6	36	5.3	43	6.7	50	10.0	57	14.9
2	N.8	9	Kg.2	16	Gr.1.0	23	2.2	30	3.9	37	5.5	44	7.0	51	10.7	58	15.6
3	Pk.1	10	Kg.3	17	1.2	24	2.4	31	4.2	38	5.7	45	7.2	52	11.4	59	16.3
4	Pk.2	11	Kg.4	18	1.4	25	2.6	32	4.5	39	5.9	46	7.6	53	12.1		
5	Pk.4	12	Kg.5	19	1.6	26	2.8	33	4.7	40	6.1	47	8.2	54	12.8		
6	Pk.6	13	Kg.6	20	1.8	27	3.0	34	5.0	41	6.3	48	8.8	55	13.5		
7	Pk.8	14	Kg.7	21	1.9	28	3.2	35	5.2	42	6.5	49	9.4	56	14.2		

770

A-125

LEVEL II, Oral Part 1. Counts 1-5 2. Counts 6-15 3. Reads 3 4. Reads 5 5. Reads 6
6. Reads 17 7. Reads 41 8. Pennies 3-1 9. Apples 3 + 4 10. Marbles 9-3 10

Written part.

43 + 6 = ____

94 − 64 = ____

$4.95 × 3 = ____

726 − 349 = ____

$2\frac{1}{2} + 1\frac{1}{2} =$ ____

$\frac{1}{6}$ of 30 = ____

229 + 5048 + 63 + 1381 = ____ 17

9) 4527

$1\frac{1}{3}$ ft. = ____ in.

$2 -$ ____ $= \frac{1}{4}$

Add: $6\frac{1}{4}$, $1\frac{5}{8}$, $4\frac{1}{2}$

809 × 47

Write as percent: .42 = ____% 23

Subtract: $10\frac{1}{4} - 7\frac{2}{3}$

Multiply: 6.23 × 12.7

Find average: 34, 16, 45, 39, 27 Ans. ____

Write as decimal: $52\frac{1}{2}\% =$ ____

Write as percent: $\frac{3}{8} =$ ____%

2.9) 308.85 29

Add: 3 ft. 6 in.
5 ft. 5 in.
8 ft. 11 in.

M + 2 = 5
M = ____

2x = 3
x = ____

$6 \times 3\frac{7}{8} =$ ____

15% of 175 = ____

Write as common fraction in lowest terms: .075 = ____

The complement of an angle of 30° = ____ 36

$4^3 =$ ____

$.25 \div 1\frac{1}{5} =$ ____

If a = 7, b = 3, $a^2 + 3b =$ ____

$\frac{1}{4}\%$ of 60 = ____

66 sq. ft. = ____ sq. yd.

Solve: $\frac{7 - (6 + 8)}{2} =$ ____

Add: $-x - y - 23$
$x - y + 22$ 43

Factor: $r^2 + 25 - 10r$ Ans. ____

$\frac{r^2 - 5r - 6}{r + 1}$ Ans. ____

Change to familiar numerals: M D C X C I = ____

Find interest on $1,200 at 6% for 70 days. Ans. ____

3p − q = 10
2p − q = 7
p = ____
q = ____

$\sqrt{2ax} = 6$ Ans. ____

$\frac{7}{17} = \frac{6}{x}$ x = ____ 51

Find square root: $\sqrt{67081}$

$\log_{10}\left(\frac{1}{100}\right)$ Ans. ____

$\log_5 5\sqrt{5}$ Ans. ____

Reduce: $\frac{k^2 + k}{k^2} \cdot \frac{3k - 3}{k^2 - 1}$ Ans. ____

Find root: $2x^2 - 36x = 162$ Ans. ____ 56

Arithmetic—Level II—Grade Norms. Percentiles and Standard Scores corresponding to grade rating and age may be found in Manual.

Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade
0	N.9	7	Kg.8	14	3.9	21	6.5	28	8.5	35	12.3	42	15.9
1	Pk.2	8	Gr.1.0	15	4.4	22	6.7	29	9.0	36	12.8	43	16.5
2	Pk.5	9	1.5	16	4.9	23	6.9	30	9.5	37	13.3	44	17.1
3	Pk.9	10	1.9	17	5.3	24	7.1	31	10.1	38	13.8	45	17.7
4	Kg.2	11	2.3	18	5.7	25	7.4	32	10.8	39	14.4	46	18.3
5	Kg.4	12	2.9	19	6.1	26	7.7	33	11.3	40	14.9	47	18.9
6	Kg.6	13	3.4	20	6.3	27	8.0	34	11.8	41	15.4	48	19.5
												49	20.0

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*Percentiles and Standard Scores corresponding to grade rating and age may be found in the Manual.

Level I—Reading—Grade Norms.

Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade
1	N.3	16-17	Kg.6	36-37	1.9	53	3.3	66	5.3	79	8.1	92	12.9
2	N.8	18	Kg.7	38	2.0	54	3.5	67	5.5	80	8.4	93	13.3
3	Pk.1	19-20	Kg.8	39-40	2.1	55	3.6	68	5.7	81	8.7	94	13.7
4	Pk.2	21	Kg.9	41	2.2	56	3.8	69	5.9	82	9.0	95	14.1
5	Pk.4	22	Gr.1.0	42-43	2.3	57	3.9	70	6.1	83	9.3	96	14.5
6	Pk.5	23	1.1	44	2.4	58	4.1	71	6.3	84	9.7	97	14.9
7	Pk.7	24-25	1.2	45-46	2.5	59	4.2	72	6.5	85	10.1	98	15.4
8	Pk.9	26-27	1.3	47	2.6	60	4.4	73	6.7	86	10.5	99	15.8
9	Kg.1	28-29	1.4	48	2.7	61	4.5	74	6.8	87	10.9	100	16.2
10-11	Kg.2	30-31	1.5	49	2.8	62	4.7	75	7.0	88	11.3		
12	Kg.3	32-33	1.6	50	2.9	63	4.8	76	7.2	89	11.7		
13-14	Kg.4	34	1.7	51	3.0	64	5.0	77	7.5	90	12.1		
15	Kg.5	35	1.8	52	3.1	65	5.1	78	7.8	91	12.5		

Level II—Reading—Grade Norms

Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade
0	Pk.5	16	1.3	29	4.5	42	6.8	55	9.3	68	13.0	81	16.8
1	Pk.8	17	1.5	30	4.6	43	6.9	56	9.6	69	13.2	82	17.1
2	Kg.1	18	1.7	31	4.8	44	7.1	57	9.9	70	13.5	83	17.4
3-4	Kg.2	19	1.8	32	5.0	45	7.3	58	10.2	71	13.8	84	17.7
5-6	Kg.3	20	2.0	33	5.2	46	7.5	59	10.5	72	14.1	85	18.0
7	Kg.4	21	2.2	34	5.4	47	7.7	60	10.8	73	14.4	86	18.3
8	Kg.5	22	2.4	35	5.6	48	7.9	61	11.3	74	14.7	87	18.6
9	Kg.6	23	2.6	36	5.8	49	8.1	62	11.6	75	15.0	88	19.0
10-11	Kg.7	24	2.8	37	6.0	50	8.3	63	11.9	76	15.3	89	19.5
12	Kg.8	25	3.2	38	6.2	51	8.5	64	12.2	77	15.6		
13	Kg.9	26	3.5	39	6.3	52	8.7	65	12.4	78	15.9		
14	Gr.1.0	27	3.9	40	6.5	53	8.9	66	12.6	79	16.2		
15	1.1	28	4.2	41	6.6	54	9.1	67	12.8	80	16.5		

LEVEL 2

Two letters in name (2) A B O S E R T H P I U Z Q (13) 15

milk city in tree animal himself between chin split form 25

grunt stretch theory contagious grieve toughen aboard triumph 33

contemporary escape eliminate tranquillity conspiracy image ethics 40

deny rancid humiliate bibliography unanimous predatory alcove 47

scald mosaic municipal decisive contemptuous deteriorate stratagem 54

benign desolate protuberance prevalence regime irascible peculiarity 61

pugilist enigmatic predilection covetousness soliloquize longevity abysmal 68

ingratiating oligarchy coercion vehemence sepulcher emaciated evanescence 75

centrifugal subtlety beatify succinct regicidal schism ebullience 82

misogyny beneficent desuetude egregious heinous internecine synecdoche 89

LEVEL I

cat see red to big work book eat was him how 36

then open letter jar deep even spell awake block size 46

weather should lip finger tray felt stalk cliff lame struck 56

approve plot huge quality sour imply humidity urge 64

bulk exhaust abuse collapse glutton clarify 70

recession threshold horizon residence participate quarantine 76

luxurious rescinded emphasis aeronautic intrigue repugnant 82

putative endeavor heresy discretionary persevere anomaly 88

rudimentary miscreant usurp novice audacious mitosis 94

seismograph spurious idiosyncrasy itinerary pseudonym aborigines 100

A R Z H I Q S E B O 10

Two letters in name (2) A B O S E R T H P I U Z Q 25

WISC RECORD FORM

NAME Larry Griffin AGE 12-1 SEX M

ADDRESS

PARENT'S NAME

SCHOOL Parkland Elem GRADE 6

REFERRED BY

	Year	Month	Day
Date Tested	71	2	3
Date of Birth	58	3	30
Age	12	10	3

	Scaled Score	IQ
Verbal Scale	34*	80
Performance Scale	33*	76
Full Scale	67	76

*Prorated if necessary

	Raw Score	Scaled Score
VERBAL TESTS		
Information	10	5
Comprehension	9	5
Arithmetic	10	9
Similarities	10	9
Vocabulary	28	6
(Digit Span)		
Sum of Verbal Tests		34
PERFORMANCE TESTS		
Picture Completion	9	6
Picture Arrangement	25	8
Block Design	6	4
Object Assembly	29	8
Coding	36	7
(Mazes)		
Sum of Performance Tests		33

NOTES

Examiner

773

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66-333 AS

A-128

Hrg. voice — worn.

1. INFORMATION

1. INFORMATION	Score 1 or 0		Score 1 or 0		Score 1 or 0
1. Ears	/	11. Season—Year *Su W F Sp*	/	21. Pounds—Ton	
2. Finger	/	12. Color—Rubies *Clear or any color*	'	22. Capital—Greece	
3. Legs	/	13. Sun—Set *DK*	-	23. Turpentine	
4. Animal—Milk *cow*	/	14. Stomach *DK*	'	24. New York—Chicago	
5. Water—Boil *on stove*	/	15. Oil—Float *DK*	'	25. Labor Day	
6. Store—Sugar *groc*	/	16. Romeo—Juliet *DK "*		26. South Pole	
7. Pennies *5*	/	17. Fourth—July		27. Barometer	
8. Days—Week *7*	/	18. C.O.D.		28. Hieroglyphic	
9. Discoverer—America *DK*	'	19. American—Man		29. Genghis Khan	
10. Things—Dozen *12 ga*	/	20. Chile		30. Lien	
					10

2. COMPREHENSION

2. COMPREHENSION	Score 2, 1 or 0
1. Cut—Finger *If it is bad go to the hosp. — (Q) just wash it + put B.A.*	*2*
2. Lose—Balls (Dolls) *Just tell em you lost it.*	*0*
3. Loaf—Bread *Bring the money back home or go try anoth. store.*	*2*
4. Fight *Walk away I guess*	*2*
5. Train—Track *Ain't nothin I can do - just let it keep goin — can't stop it —*	*0*
6. House—Brick *Brick more safer (Q) If storm Br. house stay up longer*	*/*
7. Criminals *Bec. they comm. a crime + broke the law*	*0*
8. Women—Children *So they won't get killed I guess Children live longer —*	*/*
9. Bills—Check *Like pay it in? — so if send by mail if say the check can't cash it*	*/*
10. Charity—Beggar *Help em out — They contribute to anyway to get by - anybody walkin sts shld have a job*	*'*
11. Government—Examinations *DK*	*-*
12. Cotton—Fiber *DK*	*-*
13. Senators	
14. Promise—Kept	
	9

gets mostly to be ref.

3. ARITHMETIC

Problem	Response	Time	Score 1 or 0
1. 45"			*/*
2. 45"			*/*
3. 45"			*/*
4. 30"	*2*	*/*	*/*
5. 30"	*6*	*/*	*/*
6. 30"	*14*	*/*	*/*
7. 30"	*7*	*3*	*/*
8. 30"	*14*	*12*	*/*
9. 30"	*15 ea.*	*7.50*	*·*
10. 30"	*14 da*	*T*	*·*
11. 30"	*21*	*10*	*/*
12. 60"	*10c*	*11*	*/*
13. 30"	*DK*	*20*	*-*
14. 60"	*125*	*30*	*-*
15. 120"	*DK*	*2*	*-*
16. 120"			
			10

4. SIMILARITIES	Score 1 or 0
1. Lemons—Sugar	
2. Walk—Throw	
3. Boys—Girls	
4. Knife—Glass	1
5. Plum—Peach peel pit Ex	Score 2, 1 or 0: 1
6. Cat—Mouse animals	2
7. Beer—Wine both alcohol	1
8. Piano—Violin both musical make sounds	1
9. Paper—Coal burn	1
10. Pound—Yard DK	0
11. Scissors—Copper Pan DK	0
12. Mountain—Lake DK	0
13. Salt—Water	
14. Liberty—Justice	
15. First—Last	
16. 49—121	
	10

SUPPLEMENTARY TESTS

DIGIT SPAN

Digits Forward	Score (Circle)	Digits Backward	Score (Circle)
3-8-6	3	2-5	2
6-1-2	3	6-3	2
3-4-1-7	4	5-7-4	3
6-1-5-8	4	2-5-9	3
8-4-2-3-9	5	7-2-9-6	4
5-2-1-8-6	5	8-4-9-3	4
3-8-9-1-7-4	6	4-1-3-5-7	5
7-9-6-4-8-3	6	9-7-8-5-2	5
5-1-7-4-2-3-8	7	1-6-5-2-9-8	6
9-8-5-2-1-6-3	7	3-6-7-1-9-4	6
1-6-4-5-9-7-6-3	8	8-5-9-2-3-4-2	7
2-9-7-6-3-1-5-4	8	4-5-7-9-2-8-1	7
5-3-8-7-1-2-4-6-9	9	6-9-1-6-3-2-5-8	8
4-2-6-9-1-7-8-3-5	9	3-1-7-9-5-4-8-2	8

F____ + B____ = ____
Highest numbers circled

MAZES

Maze	Max. Errors	Errors	Score
A. 30"	2		0 1 2
B. 30"	2		0 1 2
C. 30"	2		0 1 2
1. 30"	3		0 1 2 3
2. 45"	3		0 1 2 3
3. 60"	5		0 1 2 3
4. 120"	6		0 1 2 3
5. 120"	8		0 1 2 3

Notes:

775

5. VOCABULARY

	Score 2 or 0	
1. Bicycle	2	got two wheels seat etc
2. Knife	2	sharp pc of metal on wooden handle
3. Hat	2	material like — wear it on ur head
4. Letter	2	pc of paper — put things in it — write on —
5. Umbrella	2	keeps you fr. gettin wet — material, [illegible] plastic etc
	Score 2, 1 or 0	
6. Cushion	2	Sg you sit on
7. Nail	1	drive nails into things — use wh. workin
8. Donkey	2	animal
9. Fur	2	most is hair fr. an animal
10. Diamond	1	Sg you wear on ur finger [illegible] — just a pc of [illegible]
11. Join	1	like ask you to join a club —
12. Spade	1	a card + shaped like a leaf
13. Sword	2	it's a knife — [illegible] + nothin but a big knife — that's all
14. Nuisance	0	DK unless u mean Sg Don't act right — hollerin [illegible]
15. Brave	2	when ain't scared nothin —
16. Nonsense	2	an + got no sense (Q) like [illegible] tell u to do Sg + u don't do it
17. Hero	0	Do Sg + rewarded for it — [illegible]
18. Gamble	1	Put up money + shoot dice, ppl cards
19. Nitroglycerine	2	Sg. like blow up, Sg like that —
20. Microscope	0	Look out of — (Q) [illegible]
21. Shilling	0	DK
22. Fable	0	DK
23. Belfry	0	DK
24. Espionage	0	like a spaceship or Sg
25. Stanza		
26. Seclude		
27. Spangle		
28. Hara-Kiri		
29. Recede		
30. Affliction		
31. Ballast		
32. Catacomb		
33. Imminent		
34. Mantis		
35. Vesper		
36. Aseptic		
37. Chattel		
38. Dilatory		
39. Flout		
40. Traduce		
	28	

TK

0100

A-131

TIME (120") _____ NO. RIGHT _____ SCORE _____

SAMPLE

CODING A
(5-7)

CODING B
(8-15)

SAMPLE

2	1	4	6	3	5	2	1	3	4	2	1	3	1	2	3	1	4	2	6	3	1	2	5	1
)	÷	+	V	+	7	)	÷	+	H	)	—	+	—	)	7	÷	H	)	V	+	÷	)	7	÷

3	1	5	4	2	7	4	6	9	2	5	8	4	7	6	1	8	7	5	4	8	6	9	4	3
+	÷	7	H	)	(	H	V	—	)	7	—	+	(	V	÷	—	(								

1	8	2	9	7	6	2	5	4	7	3	6	8	5	9	4	1	6	8	9	3	7	5	1	4

9	1	5	8	7	6	9	7	8	2	4	8	3	5	6	7	1	9	4	3	6	2	7	9	3

0120

TIME (120") _____ SCORE (NO. RIGHT) 36

A-132

[illegible] alone, [illegible] [illegible] [illegible] (apologizing [illegible]) celebrating marriage of "Fa[illegible]" telling him [illegible] what [illegible] to do & not to do – all of which suggest some sensitivity to feelings beyond the primitive self-centered [illegible] level, and suggesting [illegible] socialization internalized. However there is a degree of immaturity in his mode of expression.

The latter, his identification with more sophisticated recreation and commitment to more delinquent ways of ~~fulfilling~~ meeting his desires, are all suggestive of an Iz CFC in need of a structured environment ([illegible] [illegible] on JNTC.

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KENNETH A. SCHMIED
MAYOR

Div. of Administration

John M. Wall
Executive Director

METROPOLITAN SOCIAL SERVICES DEPARTMENT

DIAGNOSTIC AND DETENTION CENTER

316 E. Chestnut St.
Louisville, Kentucky 40202
589-3060

Ronald M. Walford
Detention Director

E. P. SAWYER
COUNTY JUDGE

Div. of Delinquency Services

Newton McCravy, Jr.
Deputy Director

January 26, 1971

Mr. and Mrs. Griffin
1320 South 28th Street
Louisville, Kentucky

Dear Mr. and Mrs. Griffin:

Your son/~~daughter~~, Larry Griffin, has been referred to the Psychological ~~Diagnostic~~ Services Department for an evaluation. I have scheduled an appointment for him/~~her~~ to see me in my office on Wednesday, February 3, 19 71 at 9:00 a.m. My office is located at the Diagnostic and Detention Center, 316 E. Chestnut Street.

Also, he/she is to report to the Center on Saturday, January 30, 1971 at 8:30 a.m. for testing purposes. If these appointments are not kept, this information will be forwarded to Juvenile Court Judge.

If you have any questions concerning the above, please feel free to call - 589-3060, Ext. 441.

Yours truly,

Sonia G. Hess
Psychological ~~Diagnostic~~ Services Dept.

lt

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A-135

REFERRAL TO DIAGNOSTIC SERVICES

Date Jan 25, 1971

NAME OF CHILD Larry L. Griffin Sex M Age 12

Name of parent or guardian Margie Griffin

Address 1320 S. 28th Phone No phone

For what reason is child before the Court? Truancy, Store House Breakin Grand Larceny

Past Court History (Briefly list on back) Inf. None Formal ✓

Next court date? Feb 8, 1971

What services are requested? Testing, Evaluation & Recommendation

Is child presently being held in detention? No

Has child ever been seen in or by other treatment or diagnostic services (psychiatric, psychological or social work)?

No If so, what were they:

SCHOOL HISTORY

School Parkland Elementary Grade 6th Passing

Failing Attends regularly Attends irregularly ✓

SOCIAL HISTORY

Has scoial investigation been conducted? Yes

Description of home environment (Dwelling, neighborhood, etc.

With whom is child living? Mother + Grandmother Other children in home (give ages)

None

781.

State how child gets along with parent(s)

How does child get along with siblings? Unknown

Other relationships if significant (friends, teachers, etc.) Peer group oriented - older sophisticated delinquents

Probation Officer's assessment of the problem. (Be specific - using other side if necessary) Possibly lack of proper parent supervision. Also subject could be following in older brother's footsteps who has been before the court on many charges. He is presently living with his MGF in Indianapolis

What other factors about this client and/or family do you think are significant for the Diagnostic Department to be aware of? Subject was hit by car in 1967 - head and face injuries

M L. Harris

Probation Officer

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Signature of Supervisor

783

TCC 1

Elementary • GRADES 4-5-6-7-8 • form AA

California Test of Personality

skipped Section 2B 1953 Revision

Devised by

LOUIS P. THORPE, WILLIS W. CLARK, AND ERNEST W. TIEGS

poor reading ability

Do not write or mark on this booklet unless told to do so by the examiner.

Name Griffin Larry Lamar (Last, First, Middle) Grade 6 N (CIRCLE ONE) (Boy) Girl

School Parkwood 20 ~~City~~ Date of Test 1 – 30 – 71 (Month, Day, Year)

~~Examiner~~ ( ) Pupil's Age 12 Date of Birth Jan 30 59 (Month, Day, Year)

E

INSTRUCTIONS TO PUPILS:

This booklet contains some questions which can be answered YES or NO. Your answers will show what you usually think, how you usually feel, or what you usually do about things. Work as fast as you can without making mistakes.

DO NOT TURN THIS PAGE UNTIL TOLD TO DO SO

784

CTB PUBLISHED BY CALIFORNIA TEST BUREAU / A DIVISION OF McGRAW-HILL BOOK COMPANY, DEL MONTE RESEARCH PARK, MONTEREY, CALIFORNIA

9 8 7 6 5 4 3 2 1

A-139

INSTRUCTIONS TO PUPILS

DO NOT WRITE OR MARK ON THIS TEST BOOKLET UNLESS TOLD TO DO SO BY THE EXAMINER.

You are to decide for each question whether the answer is YES or NO and mark it as you are told. The following are two sample questions:

SAMPLES

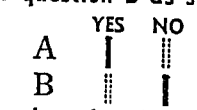
A. Do you have a dog at home? YES NO

B. Can you ride a bicycle? YES NO

DIRECTIONS FOR MARKING ANSWERS

ON ANSWER SHEETS

Make a heavy black mark under the word YES or NO to show your answer. If you have a dog at home, you would mark under the YES for question A as shown below. If you cannot ride a bicycle, you would mark under the NO for question B as shown below.



Remember, you mark under the word that shows your answer. Now find Samples A and B on your answer sheet and show your answer for each by marking YES or NO. Do it now. Find answer row number 1 on your answer sheet. Now wait until the examiner tells you to begin.

ON TEST BOOKLETS

Draw a circle around the word YES or NO, whichever shows your answer. If you have a dog at home, draw a circle around the word YES in Sample A above; if not, draw a circle around the word NO. Do it now.

If you can ride a bicycle, draw a circle around the word YES in Sample B above; if not, draw a circle around the word NO. Do it now.

Now wait until the examiner tells you to begin.

After the examiner tells you to begin, go right on from one page to another until you have finished the test or are told to stop. Work as fast as you can without making mistakes. Now look at item 1 on page 3. Ready, begin.

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A-140

SECTION 1 A

1. Do you usually keep at your work until it is done? YES NO
2. Do you usually apologize when you are wrong? YES NO
3. Do you help other boys and girls have a good time at parties? YES NO
4. Do you usually believe what other boys or girls tell you? YES NO
5. Is it easy for you to recite or talk in class? YES NO
6. When you have some free time, do you usually ask your parents or teacher what to do? YES NO
7. Do you usually go to bed on time, even when you wish to stay up? YES NO
8. Is it hard to do your work when someone blames you for something? YES NO
9. Can you often get boys and girls to do what you want them to? YES NO
10. Do your parents or teachers usually need to tell you to do your work? YES NO
11. If you are a boy, do you talk to new girls? If you are a girl, do you talk to new boys ? YES NO
12. Would you rather plan your own work than to have someone else plan it for you? YES NO

GO RIGHT ON TO THE NEXT COLUMN

Section 1 A (number right) 6

SECTION 1 B

13. Do your friends generally think that your ideas are good? YES NO
14. Do people often do nice things for you? YES NO
15. Do you wish that your father (or mother) had a better job? YES NO
16. Are your friends and classmates usually interested in the things you do? YES NO
17. Do your classmates seem to think that you are not a good friend? YES NO
18. Do your friends and classmates often want to help you? YES NO
19. Are you sometimes cheated when you trade things? YES NO
20. Do your classmates and friends usually feel that they know more than you do? YES NO
21. Do your folks seem to think that you are doing well? YES NO
22. Can you do most of the things you try? YES NO
23. Do people often think that you cannot do things very well? YES NO
24. Do most of your friends and classmates think you are bright? YES NO

GO RIGHT ON TO THE NEXT PAGE

Section 1 B (number right) 9

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SECTION 1 C

25. Do you feel that your folks boss you too much? YES NO

26. Are you allowed enough time to play? YES NO

27. May you usually bring your friends home when you want to? YES NO

28. Do others usually decide to which parties you may go? YES NO

29. May you usually do what you want to during your spare time? YES NO

30. Are you prevented from doing most of the things you want to? YES NO

31. Do your folks often stop you from going around with your friends? YES NO

32. Do you have a chance to see many new things? YES NO

33. Are you given some spending money? YES NO

34. Do your folks stop you from taking short walks with your friends? YES NO

35. Are you punished for lots of little things? YES NO

36. Do some people try to rule you so much that you don't like it? YES NO

GO RIGHT ON TO THE NEXT COLUMN

Section 1 C (number right) 8

SECTION 1 D

37. Do pets and animals make friends with you easily? YES NO

38. Are you proud of your school? YES NO

39. Do your classmates think you cannot do well in school? YES NO

40. Are you as well and strong as most boys and girls? YES NO

41. Are your cousins, aunts, uncles, or grandparents as nice as those of most of your friends? YES NO

42. Are the members of your family usually good to you? YES NO

43. Do you often think that nobody likes you? YES NO

44. Do you feel that most of your classmates are glad that you are a member of the class? YES NO

45. Do you have just a few friends? YES NO

46. Do you often wish you had some other parents? YES NO

47. Is it hard to find friends who will keep your secrets? YES NO

48. Do the boys and girls usually invite you to their parties? YES NO

GO RIGHT ON TO THE NEXT PAGE

Section 1 D (number right) 6

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A-142

SECTION 1 E

49. Have people often been so unfair that you gave up? YES (NO)

50. Would you rather stay away from most parties? YES (NO)

51. Does it make you shy to have everyone look at you when you enter a room? (YES) NO

52. Are you often greatly discouraged about many things that are important to you? YES (NO)

53. Do your friends or your work often make you worry? YES (NO)

54. Is your work often so hard that you stop trying? YES (NO)

55. Are people often so unkind or unfair that it makes you feel bad? YES (NO)

56. Do your friends or classmates often say or do things that hurt your feelings? YES (NO)

57. Do people often try to cheat you or do mean things to you? YES (NO)

58. Are you often with people who have so little interest in you that you feel lonesome? YES NO

59. Are your studies or your life so dull that you often think about many other things? YES (NO)

60. Are people often mean or unfair to you? YES NO

GO RIGHT ON TO THE NEXT COLUMN

Section 1 E (number right) 11

SECTION 1 F

61. Do you often have dizzy spells? YES (NO)

62. Do you often have bad dreams? YES (NO)

63. Do you often bite your fingernails? (YES) (NO)

64. Do you seem to have more headaches than most children? YES NO

65. Is it hard for you to keep from being restless much of the time? (YES) NO

66. Do you often find you are not hungry at meal time? YES (NO)

67. Do you catch cold easily? (YES) NO

68. Do you often feel tired before noon? YES (NO)

69. Do you believe that you have more bad dreams than most of the boys and girls? YES (NO)

70. Do you often feel sick to your stomach? YES (NO)

71. Do you often have sneezing spells? YES (NO)

72. Do your eyes hurt often? YES (NO)

GO RIGHT ON TO THE NEXT PAGE

Section 1 F (number right) 8

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SECTION 2 A

73. Is it all right to cheat in a game when the umpire is not looking? YES (NO)

74. Is it all right to disobey teachers if you think they are not fair to you? YES (NO)

75. Should one return things to people who won't return things they borrow? YES NO

76. Is it all right to take things you need if you have no money? YES (NO)

77. Is it necessary to thank those who have helped you? YES NO

78. Do children need to obey their fathers or mothers even when their friends tell them not to? YES NO

79. If a person finds something, does he have a right to keep it or sell it? YES NO

80. Do boys and girls need to do what their teachers say is right? YES NO

81. Should boys and girls ask their parents for permission to do things? YES NO

82. Should children be nice to people they don't like? YES NO

83. Is it all right for children to cry or whine when their parents keep them home from a show? YES NO

84. When people get sick or are in trouble, is it usually their own fault? YES NO

GO RIGHT ON TO THE NEXT COLUMN

Section 2 A (number right) 3

SECTION 2 B

85. Do you let people know you are right no matter what they say? YES NO

86. Do you try games at parties even if you haven't played them before? YES NO

87. Do you help new pupils to talk to other children? YES NO

88. Does it make you feel angry when you lose in games at parties? YES NO

89. Do you usually help other boys and girls have a good time? YES NO

90. Is it hard for you to talk to people as soon as you meet them? YES NO

91. Do you usually act friendly to people you do not like? YES NO

92. Do you often change your plans in order to help people? YES NO

93. Do you usually forget the names of people you meet? YES NO

94. Do the boys and girls seem to think you are nice to them? YES NO

95. Do you usually keep from showing your temper when you are angry? YES NO

96. Do you talk to new children at school? YES NO

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GO RIGHT ON TO THE NEXT PAGE

Section 2 B (number right) 2

0

SECTION 2 C

97. Do you like to scare or push smaller boys and girls? YES NO

98. Have unfair people often said that you made trouble for them? YES NO

99. Do you often make friends or classmates do things they don't want to? YES NO

100. Is it hard to make people remember how well you can do things? YES NO

101. Do people often act so mean that you have to be nasty to them? YES NO

102. Do you often have to make a "fuss" or "act up" to get what you deserve? YES NO

103. Is anyone at school so mean that you tear, or cut, or break things? YES NO

104. Are people often so unfair that you lose your temper? YES NO

105. Is someone at home so mean that you often have to quarrel? YES NO

106. Do you sometimes need something so much that it is all right to take it? YES NO

107. Do classmates often quarrel with you? YES NO

108. Do people often ask you to do such hard or foolish things that you won't do them? YES NO

GO RIGHT ON TO THE NEXT COLUMN

Section 2 C (number right) 7

SECTION 2 D

109. Do your folks seem to think that you are just as good as they are? YES NO

110. Do you have a hard time because it seems that your folks hardly ever have enough money? YES NO

111. Are you unhappy because your folks do not care about the things you like? YES NO

112. When your folks make you mind are they usually nice to you about it? YES NO

113. Do your folks often claim that you are not as nice to them as you should be? YES NO

114. Do you like both of your parents about the same? YES NO

115. Do you feel that your folks fuss at you instead of helping you? YES NO

116. Do you sometimes feel like running away from home? YES NO

117. Do you try to keep boys and girls away from your home because it isn't as nice as theirs? YES NO

118. Does it seem to you that your folks at home often treat you mean? YES NO

119. Do you feel that no one at home loves you? YES NO

120. Do you feel that too many people at home try to boss you? YES NO

GO RIGHT ON TO THE NEXT PAGE

Section 2 D (number right) 8

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SECTION 2 E

121. Do you think that the boys and girls at school like you as well as they should? YES NO

122. Do you think that the children would be happier if the teacher were not so strict? YES NO

123. Is it fun to do nice things for some of the other boys or girls? YES NO

124. Is school work so hard that you are afraid you will fail? YES NO

125. Do your schoolmates seem to think that you are nice to them? YES NO

126. Does it seem to you that some of the teachers "have it in for" pupils? YES NO

127. Do many of the children get along with the teacher much better than you do? YES NO

128. Would you like to stay home from school a lot if it were right to do so? YES NO

129. Are most of the boys and girls at school so bad that you try to stay away from them? YES NO

130. Have you found that some of the teachers do not like to be with the boys and girls? YES NO

131. Do many of the other boys or girls claim that they play games more fairly than you do? YES NO

132. Are the boys and girls at school usually nice to you? YES NO

GO RIGHT ON TO THE NEXT COLUMN

Section 2 E (number right) 6

SECTION 2 F

133. Do you visit many of the interesting places near where you live? YES NO

134. Do you think there are too few interesting places near your home? YES NO

135. Do you sometimes do things to make the place in which you live look nicer? YES NO

136. Do you ever help clean up things near your home? YES NO

137. Do you take good care of your own pets or help with other people's pets? YES NO

138. Do you sometimes help other people? YES NO

139. Do you try to get your friends to obey the laws? YES NO

140. Do you help children keep away from places where they might get sick? YES NO

141. Do you dislike many of the people who live near your home? YES NO

142. Is it all right to do what you please if the police are not around? YES NO

143. Does it make you glad to see the people living near you get along fine? YES NO

144. Would you like to have things look better around your home? YES NO

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STOP NOW WAIT FOR FURTHER INSTRUCTIONS

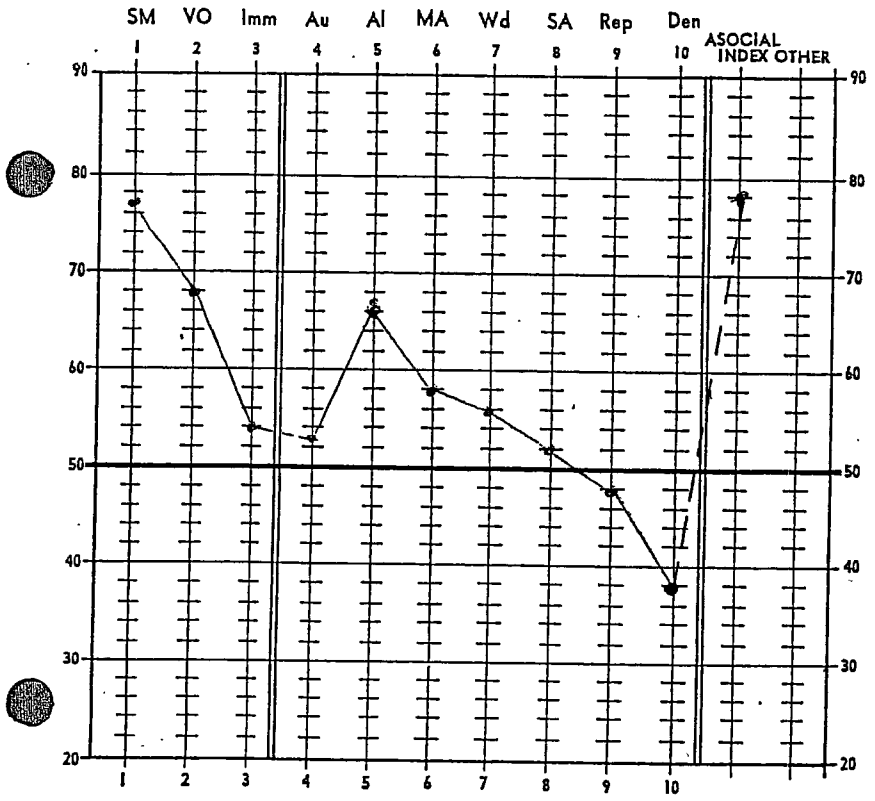
Section 2 F (number right) 4

JESNESS INVENTORY **PROFILE** SHEET

TCC 1

Name Griffin, Larry Sex: M ✓ F Age 12 Date Tested 1-30-71

Other Information Parkland Elem. 6th grade D.O.B. 3-30-58



	SM	VO	Imm	Au	Al	MA	Wd	SA	Rep	Den	ASOCIAL INDEX	SMX ~~OTHER~~
T-Score	77	68	54	53	66	58	56	52	48	38	78	
rw Score	37	29	17	10	17	21	14	15	3	6	30	24

Notes:

Classification:

Aa - 60

Cfc - 58 }

Na - 58 }

Ap - 52

Mp - 45

Nx - 42

Se - 40

Cfm - 38

Ci - 35

A-147

JESNESS INVENTORY ANSWER SHEET

NAME Lance Griffin SEX: M ✓ F AGE 12 DATE 1/30/71

SCHOOL D.E. and R.P.

~~LOCATION~~

~~FATHER'S OCCUPATION OR TRADE~~

Grade: 6

Birthdate: 30.1958

DIRECTIONS: Blacken in the boxes under T (True) or F (False) to show your response to each question in the booklet.

Be careful to see that the number you mark is the same as the number of the question you are answering.

T — TRUE
F — FALSE

A-148

	T	F		T	F		T	F		T	F		T	F		T	F		T	F		T	F		T	F
1	■	□	16	■	□	31	□	■	46	■	□	61	■	□	76	■	□	91	■	□	106	□	■	121	■	□	136	□	■
2	□	■	17	□	■	32	■	□	47	■	□	62	□	■	77	■	□	92	■	□	107	■	□	122	□	■	137	■	□
3	■	□	18	■	□	33	■	□	48	□	■	63	■	□	78	■	□	93	■	□	108	□	■	123	■	□	138	□	■
4	□	■	19	□	■	34	■	□	49	■	□	64	■	□	79	■	□	94	■	□	109	■	□	124	■	□	139	■	□
5	■	□	20	■	□	35	■	□	50	■	□	65	■	□	80	□	■	95	□	■	110	□	■	125	□	■	140	□	■
6	■	□	21	□	■	36	■	□	51	■	□	66	■	□	81	■	□	96	■	□	111	■	□	126	■	□	141	■	□
7	■	□	22	■	□	37	□	■	52	□	■	67	■	□	82	□	■	97	□	■	112	■	□	127	□	■	142	□	■
8	■	□	23	□	■	38	□	■	53	■	□	68	□	■	83	□	■	98	□	■	113	■	□	128	■	□	143	■	□
9	□	■	24	■	□	39	■	□	54	■	□	69	□	■	84	■	□	99	■	□	114	□	■	129	□	■	144	□	■
10	□	■	25	□	■	40	□	■	55	■	□	70	■	□	85	□	■	100	□	■	115	■	□	130	■	□	145	■	□
11	□	■	26	■	□	41	□	■	56	■	□	71	□	■	86	□	■	101	■	□	116	□	■	131	□	■	146	■	□
12	■	□	27	□	■	42	□	■	57	■	□	72	□	■	87	■	□	102	■	□	117	■	□	132	■	□	147	□	■
13	■	□	28	■	□	43	■	□	58	■	□	73	□	■	88	□	■	103	□	■	118	■	□	133	□	■	148	■	□
14	■	□	29	■	□	44	■	□	59	■	□	74	■	□	89	□	■	104	■	□	119	□	■	134	■	□	149	■	□
15	□	■	30	■	□	45	□	■	60	■	□	75	□	■	90	■	□	105	□	■	120	■	□	135	□	■	150	□	■

	SM	SM	VO	Imm	Au	Al	MA	Wd	SA	Rep	Den	OTHER
Raw Score	37	24	29	17	10	17	21	14	15	3	6	

California Test of Personality

elementary • GRADES 4-5-6-7-8 • ~~form~~ 1 TCC

DEVISED BY LOUIS P. THORPE, WILLIS W. CLARK AND ERNEST W. TIEGS

Name: Griffin, Larry D. (Last, First, Middle) Grade: 6 (Boy) Girl 76C

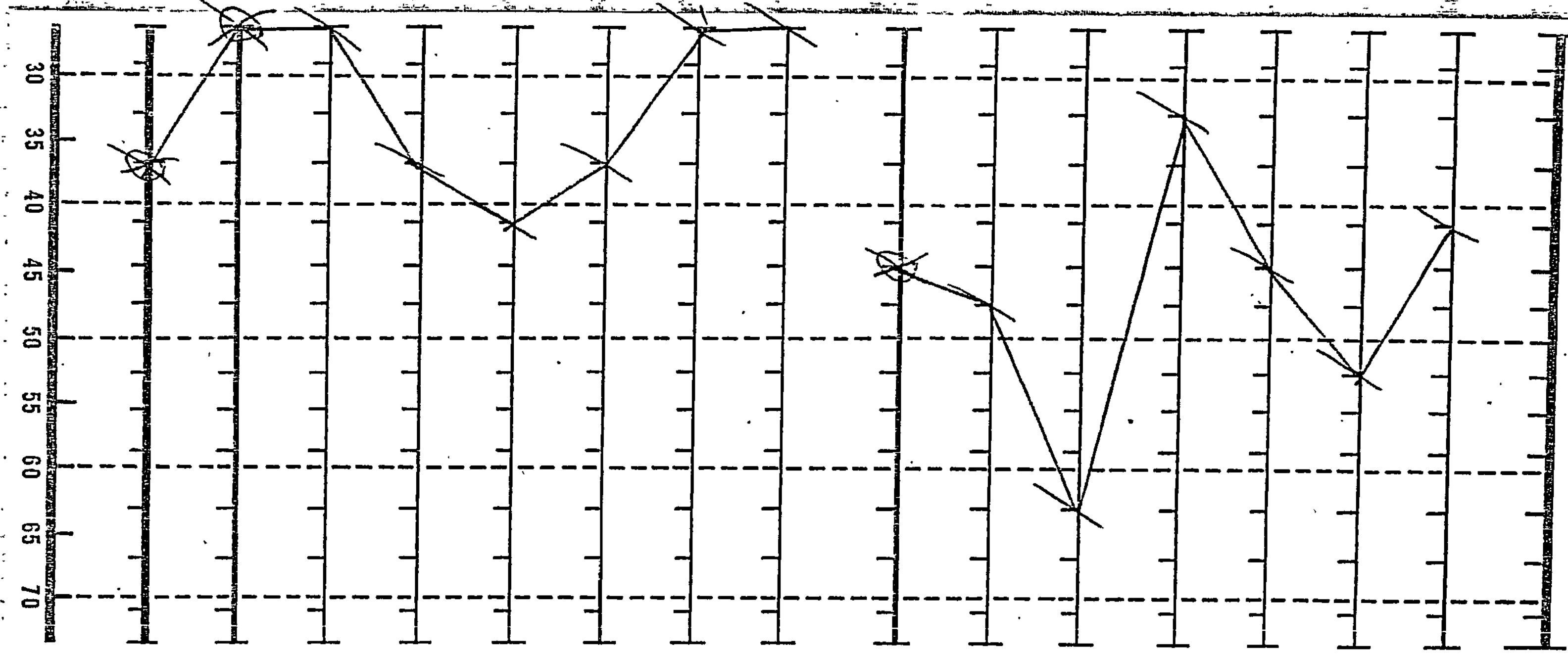
School: Parkland Elem. City: ______

Date of Test: 1-30-71 (Month, Day, Year)

Examiner: ______ (______) Pupil's Age: 12 Date of Birth: 3-30-58 (Month, Day, Year)

Test	Component	Possible Score	Pupil's Score	Percentile Rank	
1. PER. ADJ.	A. S-rel.	12	5	20	
	B. Per. Wth.	12	9	60	
	C. Per. Fdm.	12	8	30	2
	D. Belg.	12	6	5	4
	E. Wd. Td. (Fdm. from)	12	11	90	
	F. Ne. S. (Fdm. from)	12	8	40	1
	TOTAL (A-F)	72	47	30	
2. SOC. ADJ.	A. Soc. Sn.	12	5	1	4
	B. Soc. Sk.	12	0	-1	1
	C. A-s. Td. (Fdm. from)	12	7	10	4
	D. Fm. Rel.	12	8	20	3
	E. Sc. Rel.	12	5	10	2
	F. Cm. Rel.	12	4	1	2
	TOTAL (A-F)	72	29	1	
TOTAL ADJ.		144	76	10	

See Manual for Instructions.



A-149

Otis Quick-Scoring Mental Ability Tests: New Edition

BETA TEST: FORM EM

BETA
EM

by **Arthur S. Otis**

73 – Borderline

Do not open this booklet, or turn it over, until you are told to do so.
Fill these blanks, giving your name, age, birthday, etc. Write plainly.

Name..... (First name) ..... (Initial) ..... (Last name) .....Grade..6....Boy..✓....Girl.....

Date of birth.....Mar.....30.....'59.....How old are you now?..12.....
(Month) (Day) (Year)

Date....1-30.....19..71..School..Parkland.....~~City and state~~.....

Read these directions. Do what they tell you to do.

This is a test to see how well you can think. It contains questions of different kinds. Under each question there are four or five possible answers. You are to read each question and decide which of the answers below it is the right answer. Do not spend too much time on any one question. Here are three sample questions.

Sample a: Which one of the five things below is soft?
(1) glass (2) stone (3) cotton (4) iron (5) ice

The right answer, of course, is *cotton*. The word *cotton* is No. 3. Now look at the "Answer Spaces for Samples" at the right. In the five spaces after the Sample "a," a heavy mark has been made, filling the space under the 3. This is the way to answer the questions.

Try the next sample question yourself. Do not write the answer; just put a heavy mark in the space under the number corresponding to the right answer.

ANSWER SPACES FOR SAMPLES

	1	2	3	4	5
a			■		
	6	7	8	9	10
b					
	11	12	13	14	15
c					

Sample b: A robin is a kind of —
(6) plant (7) bird (8) worm (9) fish (10) flower

The answer is *bird*, which is answer 7; so you should answer Sample "b" by putting a heavy mark in the space under the 7. Try the Sample "c."

Sample c: Which one of the five numbers below is larger than 55?
(11) 53 (12) 48 (13) 29 (14) 57 (15) 16

The correct answer for Sample "c" is 57, which is No. 14; so you would answer Sample "c" by making a heavy black mark that fills the space under the number 14. Do this now.

Read each question carefully and decide which one of the answers is best. Notice what number your choice is. Then, on the answer sheet, make a heavy black mark in the space under that number. In marking your answers, always be sure that the question number on the answer sheet is the same as the question number in the test booklet. Erase completely any answer you wish to change, and be careful not to make stray marks of any kind on your answer sheet or on your test booklet. When you finish a page, go on to the next page. If you finish the entire test before the time is up, go back and check your answers. Work as rapidly and as accurately as you can.

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

795

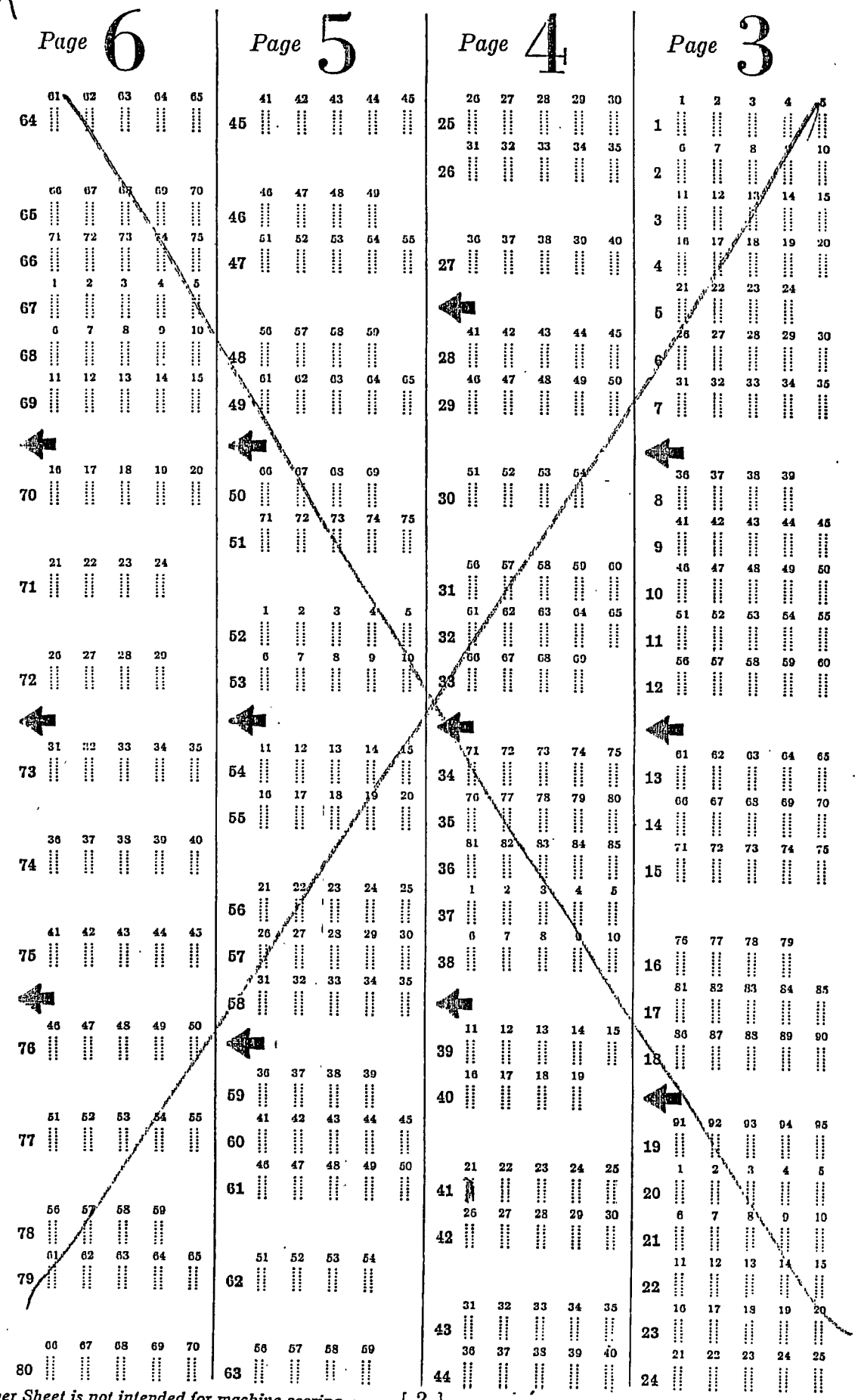
Do not turn this booklet until you are told to begin.

39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60

At 150

ANSWER SHEET

OTIS QUICK-SCORING—NEW EDITION: BETA EM



AGE 12 Years 10 Months

SCORE 43

IQ 73

796

NOTE. *This Answer Sheet is not intended for machine scoring.*

A-151

1 The opposite of weak is —
(1) poor (2) sick (3) tall (4) strong (5) young

2 Which of the five words below comes first in the dictionary?
(6) brown (7) black (8) blown (9) break (10) blend

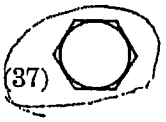
3 Which answer tells best what a teakettle is?
(11) a tool (12) a weapon (13) a utensil (14) a thing (15) a machine

4 An eggshell is to an egg the same as an orange skin is to —
(16) a lemon skin (17) an orange (18) an orange seed (19) a hen (20) a clams

5 Ruth is prettier than Sadie but not so pretty as Mabel. Therefore, Mabel is (?) Sadie.
(21) not so pretty as (22) just as pretty as (23) *cannot say which* (24) prettier t

6 The mayor is to a city as the governor is to —
(26) a nation (27) a president (28) a state (29) a council (30) an office

7 A stove is to heat as a refrigerator is to —
(31) a kitchen (32) cold (33) electricity (34) gas (35) food

8 Three of the four designs at the right are alike in some way. Which one is not like the other three?
(36)  (37)  (38)  (39) 

9 Northwest is to southeast as up is to —
(41) north (42) higher (43) northeast (44) down (45) under

10 The opposite of clockwise is —
(46) backward (47) counterclockwise (48) right (49) left (50) round

11 Which of the five words below comes first in the dictionary?
(51) times (52) stand (53) ruled (54) grand (55) quill

12 Which of the five persons below is most like a carpenter, a plumber, and a bricklayer?
(56) a postman (57) a lawyer (58) a truck driver (59) a doctor (60) a pai

13 Which of the following sentences tells best what an arm is?
(61) It goes in the coat sleeve. (62) You can put it around something.
(63) It carries the hand. (64) It is the part of the body attached to the shoulder.
(65) We have two of them.

14 Four of the following things are alike. Which one is different from the other four?
(66) a beet (67) a peach (68) a radish (69) an onion (70) a potato

15 What is to hearing as an eye is to sight?
(71) glasses (72) voices (73) a sound (74) an ear (75) an earphone

16 Three of the four designs at the right are alike in some way. Which one is not like the other three?
(76)  (77)  (78)  (79) 

17 Which of the five things below is most like the moon, a balloon, and a ball?
(81) sky (82) a cloud (83) a marble (84) an airplane (85) a toy

18 Fur is to a rabbit as feathers are to —
(86) a pillow (87) a bird (88) a hair (89) an animal (90) a nest

19 What is the most important reason for using screens at windows?
(91) They are easy to paint. (92) They improve the looks of the windows.
(93) They keep out flies but let in the breeze. (94) They keep out burglars.
(95) They are easier to keep clean than windows are.

20 Which of the five words below comes *last* in the dictionary?
(1) front (2) local (3) lemon (4) floor (5) knoll

21 The moon (?) around the earth. (Which of the following words completes the sentence best?)
(6) turns (7) goes (8) moves (9) revolves (10) spins

22 Printing is to a book as writing is to —
(11) talking (12) a letter (13) a pen (14) a friend (15) reading

23 Which of the five things below is most like a chimney, a roof, and a door?
(16) a chair (17) a bed (18) a stove (19) a window (20) a desk

24 The ground is to an automobile as water is to —
(21) a train (22) gasoline (23) the engine (24) a ship (25) a river

797

18

(*Go on to the next pag*

25 If grapefruit are 4 for a quarter, how much will two dozen cost?
(26) 23¢ (27) 60¢ (28) 96¢ (29) $1.50 (30) $1.00

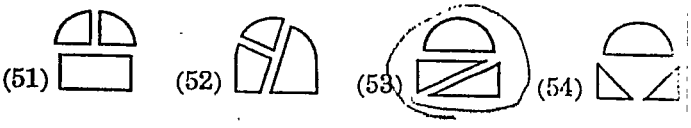
26 The author is to a book as the inventor is to a —
(31) machine (32) bookmark (33) discoverer (34) writer (35) magazine

27 Which of the following tells best what a kitchen is?
(36) a room in which to cook (37) a place to keep knives and forks
(38) a part of a house (39) a room with a table and chairs
(40) a room next to the dining room

28 If the following words were rearranged to make the best sentence, with what letter would the *last* word of the sentence begin?
wood made often of are floors
(41) a (42) m (43) w (44) f (45) o

29 Which of the five things below is most like tea, milk, and lemonade?
(46) water (47) vinegar (48) coffee (49) olive oil (50) mustard

30 Three of the four designs at the right are alike in some way. Which one is not like the other three?



31 Which of the sentences below tells best what a kitten is?
(56) It has whiskers. (57) It is a small animal that drinks milk.
(58) It is a playful animal. (59) It is afraid of dogs. (60) It is a young cat.

32 If the following were arranged in order, which one would be in the middle?
(61) pint (62) barrel (63) cup (64) quart (65) gallon

33 If Tom is brighter than Dick and Dick is just as bright as Harry, then Harry is (?) Tom.
(66) brighter than (67) not so bright as (68) just as bright as (69) *cannot say which*

34 Count each 4 that has a 2 next after it in this row.
2 4 1 4 2 3 5 4 6 2 4 7 5 2 4 4 2 3 9 4 3 2 8 7 8 4 2 2 4 5 5 2 2 4 2
How many are there?
(71) 1 (72) 2 (73) 3 (74) 4 (75) 5

35 The opposite of ignorance is —
(76) beauty (77) knowledge (78) goodness (79) honesty (80) truth

36 Four of the following words have something in common. Which one is not like the other four?
(81) cowardly (82) dishonest (83) poor (84) stingy (85) rude

37 A photograph is 3 inches wide and 5 inches long. If it is enlarged to be 12 inches wide, how long will it be?
(1) 8 in. (2) 20 in. (3) 14 in. (4) 15 in. (5) 60 in.

38 The opposite of spend is —
(6) give (7) earn (8) money (9) take (10) use

39 Which of the following sentences tells best what an airplane is?
(11) It flies. (12) It is something to travel in. (13) It is a flying conveyance.
(14) It has wings and a tail. (15) It is a mechanical bird.

40 A man drove 9 miles east from his home, and then drove 4 miles west. He was then (?) of his home.
(16) 5 miles east (17) 5 miles west (18) 13 miles east (19) 13 miles west

41 If the following words were rearranged to make the best sentence, with what letter would the *last* word of the sentence begin?
men deep the a trench dug long
(21) d (22) l (23) t (24) s (25) m

42 A pitcher is to cream as a bowl is to —
(26) baseball (27) a saucer (28) coffee (29) sugar (30) a dish

798

43 If the following words were rearranged to make the best sentence, the *last* word of the sentence would begin with what letter?
cook the pie a made apple deep
(31) c (32) p (33) a (34) d (35) m

44 A very strong feeling of affection is called —
(36) sympathy (37) pity (38) admiration (39) love (40) esteem

16

(Go on to the next page.)

45 A chair is most likely to have —
(41) rockers (42) upholstery (43) legs (44) a seat (45) arms.....

46 A boy has three dogs. Their names are Rover, Spot, and Fido. Rover is larger than Spot and Spot is larger than Fido. Therefore, Rover is (?) Fido.
(46) smaller than (47) larger than (48) the same size as (49) *cannot say* ı

47 Wood is to box as wire is to —
(51) iron (52) electricity (53) doorbell (54) screen (55) fire.....

48 There is a saying, "It is a long road that has no turning." It means —
(56) Most long roads are straight. (57) Things are bound to change sooner or la
(58) Most short roads have turns. (59) It is a bad idea to turn around on the ro

49 Which of the five things below is most like a sheet, a towel, and a handkerchief?
(61) a blanket (62) a coat (63) a napkin (64) a carpet (65) a mattress.

50 Three of the four designs at the right are alike in some way. Which one is not like the other three? (66) (67) (68) (69)

51 If the following were arranged in order, which one would be in the middle?
(71) foundation (72) walls (73) ceiling (74) roof (75) floor.....

52 Which one of these series contains a wrong number?
(1) 2–4–6–8–10 (2) 1–3–5–7–9 (3) 3–6–9–12–15 (4) 1–4–7–10–12
(5) 2–5–8–11–14.....

53 A pair of trousers always has —
(6) a belt (7) cuffs (8) pockets (9) a crease (10) seams.....

54 One number is wrong in the following series. What should that number be?
8 1 8 2 8 3 8 4 8 5 8 6 8 7 8 9
(11) 9 (12) 7 (13) 6 (14) 8 (15) 5.....

55 A machine that works rapidly and well is said to be —
(16) fluent (17) revolutionary (18) novel (19) automatic (20) efficient...

56 What letter in the following series appears a third time nearest the beginning?
A C E B D D E A B C B E C A D A B C D E
(21) A (22) C (23) D (24) E (25) B.....

57 The stomach is to food as the heart is to —
(26) a man (27) the lungs (28) blood (29) a pump (30) beating.....

58 In the alphabet, which letter follows the letter that comes next after Q?
(31) O (32) S (33) P (34) T (35) R.....

59 Most persons prefer automobiles to buses because —
(36) it is always cheaper to use an automobile. (37) the bus carries too many persons.
(38) an automobile gets you where you want to go when you want to go.
(39) automobiles are easier to park.....

60 The opposite of contract is —
(41) explode (42) detract (43) expend (44) die (45) expand.....

61 In a certain row of trees one tree is the fifth one from either end of the row. How many trees are there in the r
(46) 5 (47) 8 (48) 10 (49) 9 (50) 11.....

62 There is a saying, "Honesty is the best policy." It means —
(51) Honesty is more important than generosity.
(52) In the long run it pays to be honest. (53) Honest people become wealthy.
(54) You can never tell what a dishonest person will do.....

799

63 Three of the four designs at the right are alike in some way. Which one is not like the other three? (56) (57) (58) (59)

18

(Go on to the next pag

64 The one of two objects that is not so good as the other is said to be —
(61) unsuitable (62) lesser (63) single (64) inferior (65) unnecessary

65 If the following words were rearranged to make the best sentence, the *last* word of the sentence would begin with what letter?
fall clouds from the raindrops dark
(66) f (67) d (68) t (69) c (70) r

66 An object or institution that is not likely to move or change is said to be —
(71) fundamental (72) stable (73) temporary (74) solid (75) basic

67 Worst is to bad as (?) is to good.
(1) more (2) better (3) best (4) very good (5) excellent

68 If the following persons were arranged in order, which one would be in the middle?
(6) grandfather (7) grandson (8) brother (9) uncle (10) nephew

69 A man who buys and sells when there is considerable danger of loss is said to —
(11) transact (12) stipulate (13) contract (14) speculate (15) bargain

70 Which tells best what a refrigerator is?
(16) a piece of kitchen furniture (17) a place to store food
(18) an electrical device for the kitchen (19) a large white box
(20) a cabinet for keeping food cold

71 There is a saying, "A bird in the hand is worth two in the bush." It means — (21) Two birds are worth more than o
(22) Something you are sure of is twice as good as something doubtful.
(23) Your own bird is worth two that belong to others.
(24) It is hard to catch birds that are in bushes.

72 When the time by a clock was 14 minutes past 9, the hands were interchanged. The clock then said about —
(26) 14 minutes past 3 (27) 14 minutes of 10 (28) 14 minutes past 2
(29) 14 minutes of 3

73 One number is wrong in the following series. What should that number be?
1 9 2 8 3 9 4 8 5 9 6 8 7 9 8 9
(31) 9 (32) 7 (33) 8 (34) 6 (35) 5

74 The boy deserves (?) for his effort and perseverance.
(36) condemnation (37) censure (38) scholarship (39) commendation
(40) a medal

75 One number is wrong in the following series. What should that number be?
1 2 4 8 16 32 48 128
(41) 96 (42) 6 (43) 64 (44) 12 (45) 24

76 If I have a large box with 4 smaller boxes in it and 3 very small boxes in each small box, how many boxes do I have in all?
(46) 7 (47) 12 (48) 13 (49) 16 (50) 17

77 If each 3 in the following series were changed to a 2 and if each 1 were dropped out, the seventh 2 would be followe by what number? (Do not mark the paper.)
1 2 5 2 3 1 5 2 3 4 2 3 1 3 4 2 2 2 5
(51) 1 (52) 3 (53) 2 (54) 4 (55) 5

78 There is a saying, "An ounce of prevention is worth a pound of cure." It means —
(56) Prevention is a good cure. (57) Prevention and cure can be purchased by weigh
(58) It is much better to prevent something than to cure it.
(59) It is much better to cure something than to prevent it.

79 Which of the five words below is most like heavy, blue, and nice?
(61) weight (62) round (63) sky (64) color (65) weather

80 In a foreign language, *boli deta kipo* means *very good weather; boli cora* means *bad weather;* and *deta sedu* means *very ho*
What word means *good?*
(66) boli (67) deta (68) cora (69) kipo (70) sedu

800

15

A-153

Dennis E. Wagner, Ed.D. Licensed Psychologist

Psychological Examination Report

Name of Client: Larry Lamont White

Name of Examiner: Dennis E. Wagner, Ed.D.

Dates of Examination: July 17, 2009

Introductory Variables

Larry White is a 51-year-old male currently incarcerated at Northpoint Training Center in Danville, Kentucky.

Referral Source and Related Information

Attorneys Michael Ferraraccio and Misty Clark referred Mr. White for psychological examination to establish intellectual functioning and a personality profile for use in mitigation. He is currently charged with Murder and Rape in a 1983 incident.

Circumstances of Examination

The current examination was attempted at Northpoint Training Center in Burgin, Kentucky. Mr. White refused to participate in the examination, saying he did not trust his attorneys. Available documentation from which a history was gleaned included:

- Referral to Diagnostic Services (1/25/71)
- Metropolitan Social Services Department/Diagnostic and Detention Center/letter from Sonia G. Hess, Psychological Services Department to Mr. White's parents (1/26/71)
- Psychological Services (2/3/71)
- Jefferson County Corrections Department/Medication Administration Record (8/15/88-4/29/89)
- Integrated Progress Notes (4/13/94-4/11/01)
- Commonwealth of Kentucky/Justice and Public Safety Cabinet/Department of Corrections
  - Health History Record (3/13/85)
  - Kentucky State Reformatory/Medication Administration Record (3/3/00-7/16/01)
  - Luther Luckett Correctional
    - All Vital Signs Report (9/6/06-2/26/09)
    - Medications (9/7/06-7/1/08)
    - All Lab Results Report (11/17/07)
    - Behavior/Mental Assessment (6/26/08)
  - Mental Health Screening Form (9/6/06)
  - Dental Classification Record (9/7/06)
  - Informed Consent Form (9/7/06)
  - Mental Health Appraisal/Clinician's Coversheet/Mini Mental Status Exam (9/11/06)
  - Roederer Correctional Complex
    - Mental Health Appraisal/Self-Report Form (9/7/06)
    - Informed Consent to Accept Psychological Services (9/11/06)
  - Northpoint Training Center
    - Informed Consent Form (10/4/06)
    - Self Administration of Medication Program (10/4/06)
- Diamond Pharmacy Services/Medication Administration Record (9/7/06-8/15/09)
- Past Medical History Questionnaire (5/22/89, 9/7/06)

General Appearance

Mr. White was neat in dress and grooming. No unusual physical characteristics, behavior, or mannerisms were noted.

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1226 South Third Street • Louisville, Kentucky 40208 • Phone: 502.560.6822 • dew1@aol.com

Historical Setting

Family of origin. As of 2006, Mr. White's father was deceased, his mother and two siblings alive. There is a family history of drinking or other drug problems.

Education and employment history. Mr. White completed the 10th grade and subsequently a GED. Prior to incarceration, he was employed as a plumber's helper and plumber.

Relationship history. As of 2006, Mr. White was single and had a 28-year-old child.

Medical history. In 1967 he was hit by a car and received head and face injuries. Mr. White has a history of high blood pressure and painful or swollen joints. In 1992 he was found to have diabetes and in 1997 he was found to have Hepatitis C. A physician had told him he had a heart murmur, he said.

Substance use and abuse. In 1985 he was noted to use alcohol, tobacco, barbiturates, LSD, heroin, marijuana, other opiates, mescalin, and inhalants. There is a history of involvement in Narcotics Anonymous before 2006. As of 2006, Mr. White said he felt that he used too much alcohol or other drugs and had tried to cut down or quit using alcohol or other drugs. He acknowledged having been arrested or having had legal problems because of his drug use, and having lost his temper or gotten into arguments or fights while drinking or using drugs. When he drank or used drugs, he said, he was more likely to do something he would not normally do. He felt bad or guilty about his drinking or drug use and thought he had had a drinking or other drug problem. Mr. White also acknowledged having gotten so high or sick from drugs that it caused an accident or put others in danger. He was referred to the Substance Abuse Program.

Mental health history. In 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. The evaluation found him to have identification with a highly sophisticated, delinquent culture. He was immature, turned off with school, and committed to delinquent values, though slight socialization had been internalized.

In 2006, Mr. White was treated for alcohol or drug use at New Beginnings in Louisville. Also in 2006, he was found to be well groomed, of average build and demeanor, average in eye contact and activity, and clear in speech. No delusions, self abuse, aggressive ideation, or hallucinations were noted. Thought was logical, mood euthymic, and behavior cooperative. There was no impairment of cognition reported. Intelligence was estimated to be average. In 2008 he was thought capable of functioning in the general correctional population without mental health services.

Legal history. At the age of 12, Mr. White was before the court for truancy and storehouse breaking (Grand Larceny). He has been in prison all but 4 years since he was 18 years old. There is a history of arrest or other legal problems because of drug use. In 1981 he was convicted of Sexual Abuse I and given a 1-year sentence. He is currently serving a 10-year sentence on Possession of a Handgun by a Convicted Felon.

Recommendations

As Mr. White becomes amenable to evaluation, in addition to an evaluation of his intellectual and personality functioning, a neuropsychological evaluation is recommended to screen for cognitive impairment that may have contributed to his criminality.

Respectfully submitted,

Dennis E. Wagner, Ed.D.
Licensed Psychologist

1710

1336 South Third Street • Louisville, Kentucky 40208 • Phone: 502.560.6622 • dewy1@aol.com

Ourt (2)
4-24
*SE 9-26-14

NO. 07-CR-4230

JEFFERSON CIRCUIT COURT
DIVISION TWO (2)
JUDGE JAMES M. SHAKE

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

FILED
2014 AUG 4 PM 5 43
JEFFERSON CIR/DIST CT.
CLERK 12

LARRY LAMONT WHITE

DEFENDANT

****

NOTICE

Please take notice that the defendant, through counsel, will make the following motion and tender the attached Order during the Court's regularly scheduled motion hour, on Monday, August 11, 2014, at 9:00 a.m., or as soon thereafter as counsel may be heard.

MOTION FOR NEW TRIAL AND JUDGMENT NOTWITHSTANDING THE VERDICT

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

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

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constitutional rights.

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

3. The trial court erred in allowing the jury to hear evidence of Mr. White's previous criminal conduct, including two previous murder convictions in the guilt/innocence phase of the trial. The court allowed the jury to hear this evidence pursuant to KRE 404(b) as evidence of *modus operandi,* or identity evidence. The effect on the jury hearing this evidence was unduly prejudicial to Mr. White and prevented him from receiving a fair trial in violation of his federal and state constitutional rights. This information should have been reserved for the sentencing portion of the trial, rather than during the guilt/innocence portion. "No reference shall be made to the prior offense until the sentencing phase of the trial, and this specifically includes reading of the indictment prior to or during the guilt phase." *Clay v. Commonwealth*, 818 S.W.2d 264, 265 (Ky. 1991). Failure to do so results in "unavoidable prejudice" to the defendant. *Commonwealth v.*

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Ramsey, 920 S.W.2d 526, 528 (Ky. 1996).

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

5. The trial court excused jurors who indicated that they had reservations about the imposition of the death penalty and retained jurors who said they would tend to vote for the death penalty rather than a term of years. This was indicative of the unfair nature of the trial that the defendant received. The defendant filed a written motion prior to jury selection requesting that

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the court not allow this to happen. It happened.

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

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

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

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

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

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

performed the autopsy on Ms. Armstrong.

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

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

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

15. The Court failed to give to the jury a missing evidence instruction. The defendant requested a missing evidence instruction based upon the lost food stamp manifest that Detective Wilson acknowledged he received and that was no longer available. Detective Wilson acknowledged that the information contained in the manifest would have been important and

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relevant to determine if other suspects may have been at the food stamp store with Ms. Armstrong on the day of her death. Additionally, the TARC bus schedule that was photographed at the scene but was not available at the trial of this matter. The failure of the Commonwealth to preserve this evidence constitutes a violation of the defendant's rights to exculpatory material. *Brady v. Maryland*, 373 U.S. 83, 87; 83 S.Ct. 1194, 1197; 10 L.Ed. 215 (1963); see also *Sweatt v. Commonwealth*, 550 S.W.2d 520 (Ky. 1977).

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

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

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mistrial should have been sustained.

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

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

20. The prosecutor's opening statement during the sentencing portion of the trial was improper because it referred to the murders of Deborah Miles and Yolanda Sweeney as "the defendant's other two deadly works of art." Again, these sort of references were inflammatory and improper and caused the jury to consider that evidence for more than the court authorized it to be used pursuant to KRE 404(b).

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

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and the mistrial that was requested by counsel should have been granted.

22. The prosecutor's references to the jury during the sentencing argument was improper because the prosecutor asked the jury to consider the evidence that the court had previously instructed them to consider solely for evidence of *modus operandi*, or identity, to fix their sentence. In this case, Mr. White was sentenced to death, not solely for the commission of the Pamela Armstrong murder but he was also resentenced for the murders of Deborah Miles and Yolanda Sweeney. In fact, the prosecutor's references to "genocide" and the prosecutor telling the jury that the defendant "deserved a gold medal for what he did" suggesting that the jury consider giving him a gold medal, rather than a silver or a bronze medal, suggested to the jury that they should and could punish Mr. White, not solely for the murder of Pamela Armstrong, but also for the other two murders that he had previously been convicted of and that he had already served his time for. These arguments were tantamount to the prosecution asking the jury "to send a message." This type of argument has been considered and frowned upon in *Brewer v. Commonwealth*, 206 S.W.3d 343, 351 (Ky. 2006).

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

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fundamentally unfair and required reversal.

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

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

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

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27. In the event this court were to determine that each of the individual grounds for a new trial and/or judgment of acquittal is not sufficient standing alone to warrant a new trial, the cumulative error that was created due to each of these specific grounds constitute a reason, in and of itself, sufficient to require the defendant receive a new trial. See *Funk v. Commonwealth*, 842 S.W.2d 476 (Ky. 1992).

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

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

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

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

> (1) An adult, or a minor under eighteen (18) years of age who may be tried as an adult, convicted of a crime and subject to sentencing is referred to in KRS 532.135 and

532.140 as a defendant.

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

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

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

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

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

Respectfully Submitted,

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BY _____

CERTIFICATE OF SERVICE

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

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

_____
MARK G. HALL

NO: 07-CR-4230

JEFFERSON CIRCUIT COURT

DIVISION TWO

COMMONWEALTH OF KENTUCKY

PLAINTIFF

V.

LARRY LAMONT WHITE

DEFENDANT

OPINION AND ORDER

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

The Defendant was tried by jury commencing on July 14, 2014 through July 28, 2014. He was found guilty of Murder and First Degree Rape in the death of Pamela Denise Armstrong. The jury recommended a twenty year sentence for First Degree Rape and Death on the charge of Murder. Sentencing is now scheduled for September 26, 2014.

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

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

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

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

competent to stand trial. As stated in *Windsor v. Commonwealth*, 413 SW 3d 568 (Ky. 2010), only where there are reasonable grounds to question a defendant's competency is a hearing required. This Court did not err.

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

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

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distinguishable. Clay involves a drug conviction and Ramsey involves a DUI 4th. While the evidence of prior convictions was not proper in the guilt phase of the trial, it was proper in the sentencing phase. However, this is not the situation in the case at bar, since prior conviction evidence in this case is admissible only for the purpose of showing modus operandi and the jury was so admonished.

4. The Court erred by failing to allow the defense to voir dire the prospective jurors regarding his prior convictions. The case of *Hayes v. Commonwealth*, 175 SW 3d 574 (Ky. 2005), cited by the Defendant involves two separate issues. The previous convictions used in *Hayes* were, similar to convictions herein, for the purpose of showing motive, intent or plan and not to show guilt by demonstrating that the Defendant acted in conformity with bad character. Moreover, in *Hayes*, the defense sought to voir dire the jury about the defendant's refusal to testify and not about the effect of the prior convictions. As submitted by the Commonwealth, the extent of voir dire is in the sound discretion of the trial court, see *Pollini v. Commonwealth*, 172 SW 3d 418 (Ky. 2005); *Woodall v. Commonwealth*, 63 SW 3d 104 (Ky. 2001).

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

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

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

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

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

10. The Court erred by failing to dismiss the Indictment on speedy trial grounds. The Commonwealth notes that the case of *Dunaway v. Commonwealth*, 60 SW 3d 563 (Ky.) sets forth the factors to be considered by a trial court in determining whether dismissal

based on failure to grant a speedy trial. These are: 1) the length of the delay; 2) the reason for the delay; 3) whether the right has been asserted; and 4) prejudice caused by the delay. The Commonwealth submits that all the delays herein have been the result of the Defendant's conduct in repeatedly terminating assigned counsel. This Court stands by the propriety of its previous ruling and incorporates those authorities relied upon in its previous Opinion.

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

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

13. The Court erred by overruling the Defendant's objection to the introduction of 1983 photographs of Pamela Armstrong's children. The Defendant asserts that it was not proper to introduce this type of evidence in the guilt phase. Victim humanization has long been recognized as a permissible basis for the introduction of such photos, see *Adkins v. Commonwealth*, 96 SW 3d 779 (Ky. 2003); *Love v. Commonwealth*, 55 SW 3d 816 (Ky. 2001). Also, as argued by the Commonwealth, these photos illustrate in a

graphic way the reason that Pamela Armstrong's children are unable to remember facts and circumstances surrounding the crime.

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

15. The Court erred by failing to give a missing evidence instruction as to the lost food stamp manifest and TARC schedule from the crime scene. The Defendant contends that these items could be exculpatory as described in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 215 (1963). *Sweatt v. Commonwealth*, 550 SW 2d 520 (Ky. 1977) is distinguishable in that it involved the identification of another as the assailant. Clearly, the case at bar is a closer call. Pursuant to *Couthard v. Comonwealth*, 230 SW 3d 572 (Ky. 2007), such an instruction is required only where the failure to preserve the evidence is intentional and the evidence was potentially exculpatory. Although the Defendant contends that the evidence could have been exculpatory, there is no allegation that either law enforcement or agents of the Commonwealth intentionally disposed of it or otherwise allowed it to disappear.

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16. The Court erred by preventing the Defendant from putting forth an "alternative perpetrator" defense by limiting his cross-examination of Detective Wilson regarding potential suspects and their criminal history. A criminal defendant has the right to present exculpatory evidence. However, the Court may infringe upon that right where the alternative theory is "unsupported, speculative or far-fetched." *Dickerson v. Commonwealth*, 174 SW 3d 45`1 (Ky. 2005). It is the Commonwealth's position that the door to such cross-examination was open, see *Moore v. Commonwealth*, 983 SW 2d 479 (Ky. 1998). The Court concludes that its ruling was proper, since there was no significant proof on the issue of an alternative perpetrator and additional questioning would have been a mere fishing expedition.

17. The Court erred by failing to direct a verdict of acquittal on the grounds that there was no direct evidence that he was involved in Pamela Armstrong's shooting. There was no way to determine when the semen (DNA) was deposited on her underwear. There was no evidence of forcible compulsion. There was no evidence presented regarding the murder weapon. This Court stands by the propriety of its previous ruling.

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

recollection that the convictions were used for any other purpose than to show a unique criminal signature.

19. The Court erred by permitting prosecutorial misconduct with regard to Roger Ellington's testimony. It is the Defendant's position that the Commonwealth used Ellington's testimony as a way to draw attention to the Defendant's decision *not to* testify. The Commonwealth indicates that it was at all times aware of its obligation to respect the Defendant's right to remain silent, see *Ordway v. Commonwealth*, 391 SW 3d 762 (Ky. 2013).

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

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

22. The Court erred by permitting the Commonwealth to urge the jurors to consider the previous murders beyond the limited scope (i.e. modus operandi) ordered by the Court,

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see *Brewer, supra.* The Court finds that the prosecution did not exceed proper boundaries.

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

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

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

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

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

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

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

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

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

3. The Defendant argues that the Commonwealth failed to prove Murder. The jury was properly instructed under Instruction No.1, that the Defendant "killed Pamela Armstrong by shooting her with a handgun; AND B. That in so doing, he caused the death of Pamela Armstrong intentionally." In *Potts v. Commonwealth*, 172 S.W.3d 345 (Ky. 2005) the Court cited *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), wherein the United States Supreme Court stated that, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." The Commonwealth set forth evidence on each of the elements set forth in the Court's instructions to the jury and therefore, there has been no error as to either the Rape or Murder verdicts.

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

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

6. The Defendant argues that the Court's instruction on Rape was deficient pursuant to KRS 510.040 (1) (a), see *Yates v. Commonwealth*, 430 SW 3d 883 (Ky. 2014). This Court's Instruction No. 2 in the guilt phase of the trial indicates that the jury "must believe from the evidence, beyond a reasonable doubt" that the Defendant "engaged in sexual intercourse with Pamela Armstrong; AND B. That he did so by forcible compulsion." It is the Defendant's position that "lack of consent" is an essential element of the crime, without which he may not stand convicted. However, those words only appear in the statute in the alternative and as applicable to those incapable of consent because of their status as helpless or younger than 12. Therefore, they would not apply to this fact situation.

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

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

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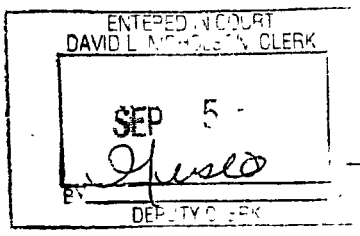
IT IS HEREBY ORDERED AND ADJUDGED that the Defendant's motion, by counsel, for a new trial and/or for judgment notwithstanding the verdict is DENIED.

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



JAMES M. SHAKE, JUDGE
JEFFERSON CIRCUIT COURT
DIVISION TWO

DATE:_____

Cc: Mark S. Baker
Mark Hall
Darren Wolff

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(2)

NO. 07-CR-4230

JEFFERSON CIRCUIT COURT
DIVISION TWO (2)
JUDGE JAMES M. SHAKE

COMMONWEALTH OF KENTUCKY

PLAINTIFF

v.

LARRY LAMONT WHITE

DEFENDANT

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

I. Factual Background

On January 31, 2006, Detective Larry Carroll and Sergeant Denny Butler of the LMPD Intelligence Unit discussed "the possibility of covertly obtaining the suspect's DNA standards for the purpose of conducting comparative DNA analysis with previously submitted evidence from this case." (Discovery Materials, p.13. (Attached as Exhibit A.)) As a result of this discussion, on February 21, 2006, Louisville Metro Police Detective (William) Hibbs, along with Detective (Aaron) Crowell, established surveillance on the defendant at his home located on 6700 Vandre Avenue in Louisville, Kentucky. During this surveillance, they observed a 1988 Lincoln Towncar (KY Registration 477-AKE) pull into Mr. White's driveway, they observed Mr. White exit his home and get into the passenger seat of the vehicle, and they observed the car drive away. The officers immediately pulled the Towncar over for an alleged "speeding violation."

> "A traffic stop was initiated on the aforementioned vehicle regarding a speeding violation. During this encounter, it was determined that the suspect was a passenger in the vehicle, and, was smoking a cigar. While standing beside the vehicle the cigar was placed onto the roof of the violator's vehicle. According to Det. Hibbs, the cigar fell onto the pavement, at which time the suspect did not attempt to retrieve it. Det. Hibbs discreetly retrieved the cigar and placed it in a brown paper bag prior to transporting it to the LMPD Homicide Office."

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(Discovery Materials at 14). This cigar was then turned over to Det. Carroll and sent to the laboratory to be tested.

Curiously, there is absolutely no mention in the discovery materials and the synopsis of the collection drafted by Detective Carroll of the name of the driver that was driving the vehicle at the time of the traffic stop. The synopsis does not mention what specific traffic violation the driver of the vehicle allegedly committed. The synopsis simply states a "speeding violation." Neither the synopsis nor the volumes of discovery provided by the Commonwealth mention whether or not the driver of the vehicle was actually given a traffic citation at the time of the stop for this alleged "speeding violation." Testimony provided by Sergeant Aaron Crowell and Detective William Hibbs during the hearing on this motion prove that no citation was issued to the driver of the Towncar for the alleged "speeding violation." Mr. White was immediately removed from the passenger side of the vehicle and frisked. The stated reason for this action was that Sergeant Crowell believed that Mr. White had an outstanding bench warrant for a court appearance that he had missed the day prior. The facts illustrate that this reason was fabricated.

The laboratory testing conducted on the cigar was used to prepare a DNA standard of Mr. White. This standard was then compared to samples taken during the collection of evidence of the Pamela Armstrong death. Mr. White's DNA apparently matched a sample and this information was placed in an affidavit for a search warrant wherein a search warrant was issued and Mr. White's DNA was collected and tested. Mr. White asserts that the traffic stop was illegal, that removing him from the passenger seat was illegal and, that the information contained in the search warrant affidavit was obtained based upon the illegal stop and collection of evidence. Therefore, all evidence of the cigar, and the results from the search warrant should be suppressed because it is evidence collected from the "*fruit of the poisonous tree.*"

II. Discussion

A. Standing

As a passenger in the vehicle, the defendant has standing to challenge the legality of the initial stop of the vehicle. *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 2408 (2007)("'If either the stopping of the car, the length of the passenger's detention thereafter, or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit.'" ((quoting 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.3(e), at 194-95 (4th ed. 2004 and Supp. 2007)).

In the instant case, the defendant was a passenger in the vehicle at the time of the traffic stop that occurred on February 21, 2006. He, therefore, has standing to bring the motion to challenge the legality of the stop. *Id.* at 2410 ([the defendant] "was seized from the moment [the driver's] car came to a halt on the side of the road," *Id.* at 2410. *See also Commonwealth v. Morgan,* 248 S.W.3d 538, 540 n. 1 (Ky.2008) ("As a preliminary matter, we note that even though Morgan was only a passenger in the car, she nonetheless has standing to challenge the legality of the initial stop of the vehicle."))

B. Legitimacy of the Traffic Stop

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 person or things to be seized.

U.S. Const. Fourth Amendment.

Similarly, the Kentucky General Assembly provided for this protection in § 10 of the Kentucky Constitution:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

The Supreme Court of Kentucky has ruled, "[t]he [exclusionary] rule extends to the direct as well as to the indirect products of official misconduct. Thus, evidence cannot be admitted against an accused if the evidence is derivative of the original illegality, i.e. is 'tainted' or the proverbial 'fruit of the poisonous tree.'" *Wilson v. Commonwealth*, 37 S.W.3d 745, 748 (Ky. 2001)(internal footnotes omitted). The Court has further emphasized that "[i]t is fundamental that all searches without a warrant are unreasonable unless it can be shown that they come within one of the exceptions to the rule that a search must be made pursuant to a valid warrant." *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 2002); *see also Owens*, 291 S.W.3d at 707. One such recognized exception is the "automobile exception," which permits an officer to search a legitimately stopped automobile where there is probable cause that contraband or evidence of a crime may be in a vehicle. *Morton v. Commonwealth*, 232 S.W.3d 566, 569 (Ky. App. 2007). The Commonwealth has the burden of proving that a warrantless search was justifiable under this exception. *Gray v. Commonwealth*, 28 S.W.3d 316, 318 (Ky. App. 2000).

A proper traffic stop must be supported by "articulable reasonable suspicion of criminal activity." *Chavies v. Commonwealth*, 354 S.W.3d 103, 108 (Ky. 2011). It must be supported by the same level of suspicion required to justify seizure of a person pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Id. *Terry* held that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 392

U.S. at 21, 88 S.Ct. at 1880. The standard is a safeguard against "intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches[.]" Id. at 22, S.Ct. at 1880. In *Bauder v. Commonwealth*, 299 S.W.3d 588, 591 (Ky. 2009) (internal citations omitted), our Supreme Court elaborated on this concept as follows:

> the stop of an automobile and the resulting detention of the driver are unreasonable, under the Fourth Amendment, absent a reasonable, articulable suspicion that the driver is unlicensed, or that the automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law.

An initial stop of a vehicle may be lawful and supported by probable cause if an officer actually witnessed the driver commit a traffic violation. *Ward v. Commonwealth*, 345 S.W.3d 252 (Ky. App. 2011). "[A]n officer who has probable cause to believe a civil traffic violation has occurred may stop a vehicle regardless of his or her subjective motivation in doing so." *Wilson v. Commonwealth*, 37 S.W.3d 745, 749 (Ky. 2001). Thus, an officer's subjective motivation does not invalidate a traffic stop provided it had a valid basis and that the stop was conducted within the bounds of the law. *See Wilson*, 37 S.W.3d at 749, Therefore, this Court must consider whether the stop had a valid basis, was the stop conducted within the bounds of the law, and was there a reasonable, articulable suspicion to support the stop. This Court must make this finding based on the reliability of the officers testimony. (Citation.)

Sergeant Aaron Crowell was called by the Commonwealth during the hearing of this matter and testified that his job was to covertly obtain Mr. White's DNA. Sergeant Crowell testified that that he believed he had the right to pull Larry White from the vehicle based upon his belief that a bench warrant may have been outstanding for Mr. White. Detective Crowell testified on direct-examination as follows:

> Q: What was your recollection of that court date that you had on this defendant on the day of or day before?

A: At the set time myself and the prosecutor were present, Mr. White nor an attorney were present on his behalf. So it was my understanding when I left the courthouse that day a circuit court warrant was being issued for Mr. White.

(Direct Examination of Sergeant Aaron Crowell, October 7, 2013, 11:34:30.)

Q: Do you have any first-hand knowledge of why the warrant did not go out?

A: From my understanding later in the day an attorney representing Mr. White did come to the courthouse and was able, I don't know what the process was, of whether the warrant was beginning to be issued or not, but the defense attorney's presence sufficed to get a new date so there was no warrant issued.

(Direct Examination of Sergeant Aaron Crowell, October 7, 2014, 11:36:54.)

Upon cross-examination, Sergeant Crowell was questioned as to whether he was actually in court the day in question and Sergeant Crowell testified that he was. (Cross Examination of Sergeant Crowell, October 7, 2014.) Yet Sergeant Crowell's original testimony indicated that he was unsure of even when the circuit court hearing took place, whether it occurred the day prior or the day of the traffic stop.

Nonetheless, despite his assertions to the contrary, Sergeant Crowell was not in Court for Larry White's circuit court pretrial and his "belief" that a bench warrant had issued for Mr. White was used solely to assert probable cause to make the stop and remove Mr. White from the passenger seat of the Towncar. As illustrated in the videotaped proceedings that were conducted on February 20, 2006, which began at approximately 9:10 a.m., (the videotaped proceedings were entered into evidence for the purpose of this motion), Mr. White was present for his hearing and the Court did not issue a warrant for him. Sergeant Crowell testified that Mr. White's lawyer appeared later in the day and the warrant was not issued based on Mr. White's lawyer getting a new date. (Hearing testimony, *supra* at 11:36:54.) The Courtnet printout of the case proceedings indicate that the hearing was scheduled for February 20, 2006, at 9:00 a.m. (See attached courtnet printout set forth at Exhibit 1 to this Memorandum.) The videotaped hearing clearly shows that

Mr. White, his attorney, the prosecutor, the sheriff deputy and the judge were all present in court and that the hearing took place at approximately 9:10 a.m. (Right on time in circuit court standards.) In fact, the only party to the proceeding on February 20, 2006, that was not present was Sergeant Crowell. Consequently, his asserted reason for pulling Mr. White from the passenger side of the vehicle was clearly fabricated for the purpose of creating a reason for removing Larry White from the Towncar.

In addition to the obvious fabrication of the outstanding warrant issue, Sergeant Crowell also testified that the only way he was able to specifically determine whether the Judge issued a bench warrant for Mr. White was for him to make a call to NCIC; however, he testified that he could only do so if Mr. White was in his presence.

Q: So you are telling the Court that you cannot determine whether a person has a warrant outstanding unless the person is in your presence.

A: I said confirm the warrant.

Q: But you would know whether there was a warrant was outstanding.

A: Not always, sir.

Q: Not always.

A: If one's been entered and it hits courtnet, which now we have e-warrants and everything, at that point we did not. So if it's not in courtnet, and like I said this was within a day or so it may have even been the same day, the warrant would not have hit courtnet yet so the only way I could confirm the presence of that warrant was either a.) contact the judge directly and see if it had been issued or have that person present and run them through the radio system.

(Direct Examination of Sergeant Crowell, October 7, 2014, 11:44:30 – 11:45:40.)

Q: To summarize, you had the opportunity and the ability to determine whether there was a warrant prior to pulling Mr. White over. Correct?

A: I believe I've been clear on this. No sir. I could not 100% say whether he did or did not without him being personally in front of me and running him on the radio system.

(Cross Examination of Sergeant Crowell, October 7, 2013, 11:46:32 – 11:46:53.)

This testimony, however, was disputed by Detective Hibbs during his examination in this suppression hearing.

Q: My question though is really more general. In your four years, if you were assigned to do a task like you were assigned to do. Isn't it something that you would want to know whether the person you were going to surveille and investigate had a warrant outstanding.

A: Um hmm. Yes sir.

. . .

Q: . . . if you are assigned to go to someone's house to look up something, whatever it might be, as you sit here today during your experience you have the tools and the ability to determine whether that person has a warrant outstanding for them before you ever leave the station. Correct?

A: Yes we do.

(Direct Examination of Detective Hibbs , 12:27:00 – 12:28:12.)

Equally as important to the Court's analysis is the testimony provided by Sergeant Crowell and Detective Hibbs as to who actually called NCIC to check on whether a warrant was outstanding for Mr. White. Despite repeated attempts, there was no definitive testimony provided by the Officers that NCIC was actually called and checked during the stop. Sergeant Crowell testified:

Q: Did you go back to the car to see if there was a warrant issued for his arrest or did Detective Hibbs. Do you remember?

A: No sir. I do not.

(Cross Examination of Sergeant Crowell, October 7, 2013, 12:07:30.)

A: I don't think I've said anything of the kind sir. I didn't acknowledge that I either went to a vehicle to run him or I didn't. Nor did I say that I left him at any time. So.

Q: So, then, let's back up. What did you do? That's what I was trying to figure out. What did you do with Mr. White?

A: I think I've been very clear on that. Sir. I don't specifically recall. One of us ran him and the driver. One of us would've stayed with him. I don't recall which one it was. There would've been no reason to have to go back to the vehicle to do so. We have portable radios on us we could've done it standing right next to him.

(Cross Examination of Sergeant Crowell, October 7, 2013, 12:11:15 – 12:11:45.)

Detective Hibbs clearly asserted that he did not make the call to NCIC to check on the status of any warrants for Larry White.

Q: Ok. And that's your recollection as you sit here today. You were in the back by the rear of the vehicle Mr. White was the passenger in that you wouldn't have gone to the phone because you don't recall doing that?

A: If I'm dealing with somebody my hands are free. So I don't know whether Crowell was involved or was the one on the phone calling NCIC or on the radio with NCIC. I remember being at the rear of the vehicle with Mr. White.

(Direct Examination of Detective Hibbs, October 7, 2013 hearing, 12:34:45 – 12:35:08.)

In this case, the officer's testified that their sole reason for making the traffic stop was to obtain something that may contain Larry White's DNA – a reason that had absolutely nothing to do with a speeding violation. (See hearing of 10/7/2013, Direct Examination of Sergeant Crowell, at 11:33:30.)

Q: Who was the prosecutor that prosecuted Mr. White on that case that he missed court on? Do you know?

A: I don't recall.

Q: Regardless of who that person was, you would agree with me that you very well could have contacted the Commonwealth Attorney, spoken to that prosecutor to determine whether in fact a warrant was issued. Right?

A: Sir, whether there was a warrant issued or not our mission was the same. And we would've conducted the same activity.

(Cross Examination of Sergeant Crowell, October 7, 2014, 11:43:40.)

Q: Assuming that you knew that there was no warrant outstanding for Mr. White at that time, your job was still the same, you were to go surveille Mr. White and then

find some evidence of his DNA in some manner, some fashion, covertly, without his knowledge. Correct?

A: Correct.

(Cross Examination of Sergeant Crowell, October 7, 2014, 11:47:00.)

As indicated previously, the Commonwealth cannot produce, nor have they offered, any substantive evidence that supports the validity of the initial traffic stop at issue in this matter. In fact, the only mention of the stop and its purpose in the provided discovery acknowledges that the purpose of the stop was the covert collection of Mr. White's DNA. In the event the probable cause to make the stop was in fact the alleged traffic violation committed by the driver of the vehicle, the Court should consider the fact that absolutely no evidence was provided to Mr. White that supports this rather innocuous proposition, i.e. that the vehicle was speeding and violating a traffic law. *Query*, if, in fact, the vehicle was stopped for speeding wouldn't the detectives ensure that a citation was issued to the driver of the vehicle in order to secure the reasonableness and lawfulness of the initial stop for future review? Of course he would. But in this case the officer did not issue a citation and as a result the Commonwealth cannot provide one shred of evidence to support the validity of the initial stop. Consequently, the Court must rule as a matter of law that the stop was illegal in violation of the Defendant's constitutional rights.

The Evidence Collected from the Search Warrant Obtained by Detective Timothy Hightower should be suppressed as the information contained in the search warrant affidavit was obtained from the illegal traffic stop and the illegal detention of Larry White

The information that was placed in the search warrant affidavit was based upon illegally obtained evidence that was collected during the illegal traffic stop and illegal detention of Larry White and, therefore, should be suppressed as "*fruit of the poisonous tree.*" See *Wilson v. Commonwealth*, *supra.*

During the suppression hearing testimony provided by Detective Timothy Hightower, Detective Hightower, without equivocation, stated that prior to February 21, 2006, (the date the cigar was illegally obtained), he did not believe that he had enough evidence to put into a search warrant affidavit to support the issuance of a search warrant. Consequently, if the Court rules that the traffic stop and the removal and detention of Larry White was illegal, then the Court must suppress the search warrant and the evidence collected therefrom because the search warrant was obtained using illegally obtained information.

Conclusion

The Louisville Metro police officers knew that there was no valid basis for an independent magistrate to issue a search warrant based on the investigation that had previously been conducted and the information that the police had in their possession prior to the collection of the cigar during the traffic stop on February 21, 2006. Consequently, the officers had to resort to "covert" methods.

The Commonwealth's asserted reasons for the stop and the removal and detention of Larry White are unreliable and possibly fabricated. Prior to the hearing of this matter there was no reason given at all for removing Larry White from the car. The narrative from Detective Carroll provided in discovery simply stated that the vehicle was stopped for a "speeding violation" and while standing next to the vehicle the cigar was placed on the roof of the vehicle. The vagueness of the details initially provided coupled with the specific evidence presented that refutes the officers stated reasons, illustrate the inherent untrustworthiness of the collection of the cigar.

For these reasons, the Defendant's Motion to Suppress should be GRANTED and all evidence seized as a result of this stop, including the cigar used for DNA analysis and all evidence collected as a result of the resulting search warrant, should be EXCLUDED as fruit of the

poisonous tree. *See Epps v. Commonwealth*, 295 S.W.3d 807 (Ky. 2009)(Since evidence recovered was the product of an unconstitutional seizure, it should be suppressed.)

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of this motion was served upon the parties listed below on this the 7th day of July, 2014, by hand-delivery and by U.S. Mail, postage prepaid.

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

MARK G. HALL

NO: 07-CR-4230 JEFFERSON CIRCUIT COURT

DIVISION TWO

COMMONWEALTH OF KENTUCKY PLAINTIFF

V.

LARRY LAMONT WHITE DEFENDANT

OPINION AND ORDER

This matter comes before the Court on the Defendant's motion to suppress evidence seized following a traffic stop as well as of the evidence flowing from that stop as "fruit of the poisonous tree". An evidentiary hearing was held commencing on October 7, 2013. The Commonwealth has filed its response and the issues now stand submitted.

BRIEF SUMMARY

Aaron Crowell is a Sergeant in the Homicide Unit of LMPD. He testified that in February of 2006 he was newly assigned to the Criminal Intelligence Unit. At the request of Detective Larry Carroll of the cold case homicide unit, he was tasked to make contact with the Defendant for purpose of covertly obtaining his DNA. To that end, Crowell and Detective Hibbs conducted surveillance from about 100 yards away from the Defendant's last known address in the 6700 block of Vandre, in the Beulah Church/Smyrna Road area.

Crowell knew the Defendant from a previous arrest. That case was still open at the time of the surveillance. In fact, he had a court date on the case and thought that a warrant had been issued against the Defendant for failure to appear.

Crowell and Hibbs observed a vehicle pull into the driveway at the Defendant's residence. The Defendant got into the passenger side of the vehicle and the car proceeded down

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the road. They stopped the vehicle for alleged speeding. The detectives removed the Defendant from the vehicle and searched him for weapons. He had a cigar in his mouth and, when he was patted down, he placed it in the groove between the rear window and the trunk of the car. However, when the detectives learned that there was no warrant for him, he was released and allowed to proceed. No speeding citation was issued. As the car pulled away, the cigar rolled off of the car and into the street. Detective Hibbs recovered the cigar and placed it in an evidence bag. The two detectives took the bag to Detective Carroll, who prepared the investigative letter in the case based upon the information transmitted to him.

Detective Hibbs is now with the Forensics Unit. He stated that the Criminal Intelligence Unit is a multi-purpose unit that deals with specialty needs. Hibbs confirmed Crowell's testimony that in February of 2006, they were tasked with obtaining the Defendant's DNA. He stated that during their surveillance they observed the vehicle in which the Defendant was riding go down the street "pretty quick." They initiated a traffic stop, using the lights and siren. He recalls that they thought there was an active warrant on the Defendant. He approached the driver while Crowell approached the passenger, the Defendant. Hibbs remembers the Defendant removing the cigar from his mouth and placing it on the vehicle. He retrieved the cigar after it rolled off the car and hit the ground.

When the hearing on this motion resumed on June 6, 2014, Detective Timothy Hightower (Ret.) formerly of the Louisville Police Department's Homicide and Cold Case Units, testified. He became involved, as a member of the Cold Case Unit, in the investigation of the Murder of Pamela Armstrong. He reviewed the case files in the Yolanda Sweeney and Deborah Miles cases. Also involved in the investigation was Larry Carroll, Hightower's partner and his sergeant, Denny Butler.

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Detective Hightower stated that the only new information available to him at the time that he prepared his affidavit in support of a search warrant for a buccal swab from the Defendant was the DNA profile obtained as set forth above. He knew that the profile had been acquired during a traffic stop. However, he did not know how the Intelligence Unit got involved in the collection of the Defendant's DNA. He indicated that, at or around that time, the Unit received a grant in order to test Cold Case DNA.

In order to prepare his own affidavit, Detective Hightower reviewed all three murder cases. He listed the similarities between the murders. They all occurred in a one month period within seven blocks of one another. All three women were shot in the back of the head with a 38 calibre bullet. All three had their clothes pulled down. However, the original ballistics report indicated that the three bullets were not fired from the same weapon. Detective Hightower admitted that, prior to February of 2006, he did not believe that there was enough evidence to get a search warrant.

On July 10, 2007, after the warrant was issued, he went out to the prison to obtain buccal swabs from the Defendant. However, the Defendant refused to cooperate in providing the samples. Detective Hightower sought and was granted another warrant which directed the Department of Corrections to obtain the swabs, by force if necessary.

OPINION

It is the Defendant's position that, since the only new information used by Detective Hightower to support the search warrant for buccal swabs was the DNA profile obtained from the cigar, the suppression of the stop that led to the recovery of the cigar results in the invalidation of the warrant, and, therefore, the resulting DNA match.

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In *Lloyd v. Commonwealth*, 324 SW 3d 384 (Ky. 2010), Lloyd was charged with stealing oxycontin from a drug store a gunpoint. A description of a vehicle seen fleeing scene was sent out to officers. Officer Taylor responded to assist another officer, who had just pulled over a vehicle matching the description that had been circulated. The driver appeared "nervous," but he gave the officers permission to search the trunk, where Lloyd was found hiding, with a gun and the stolen drugs. Lloyd's moved to suppress the search of the trunk on the grounds that there was no cause for the initial stop. After hearing testimony that the officer who made the stop indicated that the vehicle was going at a high rate of speed, the trial court denied the motion. On appeal, the Kentucky Supreme Court, relying on *Wilson v. Commonwealth*, 37 SW 3d 745 (Ky. 2001), held that, "It is well-settled that "an officer who has probable cause to believe a ...traffic violation has occurred may stop a vehicle regardless of [the officer's] subjective motivation in doing so."

In the case at bar, Detective Hibbs testified that the vehicle in which the Defendant was a passenger was going "pretty quick." Although there was no radar to record the exact speed and although no citation was issued, the officer's observation of what he thought was excessive speed was sufficient probable cause for them to make the stop. Further, even if Sergeant Crowell's "subjective" belief that the Defendant had a bench warrant was erroneous, it does not change the officers' observation of the driver's speeding offense. It was on the basis of *this* fact that the vehicle was pulled over and not merely on the basis of the need to obtain a sample from the Defendant. Further, as argued by the Commonwealth, even if the Court had held that the search was improper, the DNA match would have "inevitably" been made, since the Defendant's DNA was entered into CODIS in 2008 in connection with another offense, see *Hughes v.*

Commonwealth, 87 S.W.3d 850, 853 (Ky. 2002); see also *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

ORDER

IT IS HEREBY ORDERED AND ADJUDGED that the Defendant's motion to suppress is **DENIED.**

ENTERED IN COURT
DAVID L. NICHOLSON CLERK
JUL 11 2014
BY _____
DEPUTY CLERK

JAMES M. SHAKE, JUDGE
JEFFERSON CIRCUIT COURT
DIVISION TWO

DATE: _____

Cc: Mark Baker
Mark Hall
Darren Wolff

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KENTUCKY SUPREME COURT
File No. 2014-SC-000725

LARRY LAMONT WHITE APPELLANT

v.

COMMONWEALTH OF KENTUCKY APPELLEE

MOTION FOR LEAVE TO CITE SUPPLEMENTAL AUTHORITY

Comes Appellant Larry Lamont White, by counsel, pursuant to CR 76.16(5) and requests leave to cite supplemental authority in support of his appeal.

1. Appellant filed his reply brief in this appeal on September 16, 2016. One month later this Court rendered a final, modified opinion in *Karu White v. Commonwealth*, 2016 WL 2604759 (Ky. 2016) (October 20, 2016) holding that a determination of ID must meet the dictates of *Hall v. Florida*, —— U.S. ——, 134 S.Ct. 1986 (2014) (holding that requiring a fixed IQ score of 70 or below to qualify a person as ID violates the 8th Amendment).

2. The present record reflects that when Appellant was 12 years old he received an IQ score of 76 (on the WISC) and 73 (on the Otis).[1] *White* holds that *Hall* applies in Kentucky, that an IQ score over 70 does not preclude a finding of ID, that *Hall* is retroactive, and that despite Karu White's refusal to cooperate with KCPC in the past, he must be allowed under *Hall* to establish his claim of ID. The instant appeal raises similar questions, whether— despite Appellant's IQ scores over 70—*Hall* requires further exploration and a hearing on Appellant's ID issue, and whether Appellant waived his ID by his refusal to cooperate with KCPC, or by the untimeliness if his motion under *Hall*.

[1] Brief for Appellant Issue 31; see also Appellant's psychological testing records which reflect both the WISC score of 76 and the Otis score of 73, attached to Brief for Appellant, Tab 8. Counsel argued for an ID hearing at VR 9/8/14, 11:32:39 – 11:41:03. Trial court opinion denying JNOV (including denial of hearing on ID) appears at TR 816-829. See specifically the court's order at TR 826 at #28, citing lack of timeliness and failure to show more than "borderline" intelligence as reasons for denying relief under *Hall*.

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3. In *White* this Court officially adopted the *Hall* standard and ordered a remand for further proceedings to allow Karu White to change his mind and submit to a KCPC evaluation (which presumably would then require a hearing on his ID claim and application—at least—of the five-point margin of error to his IQ scores, as mandated in *Hall*).

4. In this appeal Appellant is arguing (Issue #31) that despite his borderline IQ scores of 76 and 73, his refusal to cooperate, and the timing of his motion on ID, further investigation and a hearing are required under *Hall*. The opinion in *White* is essential to his ID claim.

WHEREFORE, Appellant respectfully asks the Court to consider the *White* opinion in determining whether Appellant's IQ scores, his past refusal to cooperate with mental health professionals, or the belated nature of his ID claim preclude his claim of ID, or whether under *Hall* this case should be remanded for further investigation and a hearing.

Respectfully submitted,

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Notice and Certificate of Service

This notice and motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on this the 21st day of November, 2016. I hereby certify that a copy of the foregoing motion has sent to the Hon. Jeffrey Cross and the Hon. Emily B. Lucas, Assistant Attorneys General, Commonwealth of Kentucky, Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40602-2000, on this the 21st day of November, 2016.

Susan J. Balliet

RENDERED: JUNE 14, 2018
TO BE PUBLISHED

Supreme Court of Kentucky

2017-SC-000171-MR

ROBERT KEITH WOODALL — APPELLANT

V.

ON APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL III, JUDGE
NO. 97-CR-00053

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY CHIEF JUSTICE MINTON

REVERSING AND REMANDING

Robert Keith Woodall was convicted and sentenced to death nearly twenty years ago for the kidnapping, rape, and murder of a teenage girl. Today we consider Woodall's appeal from the trial court's denial of his recent post-conviction motion requesting that the trial court declare him to be intellectually disabled, which would preclude the imposition of the death penalty.

Upon consideration of the United States Supreme Court's precedent precluding the imposition of the death penalty upon intellectually disabled persons, we hold that Kentucky Revised Statute (KRS) 532.130(2), a statute with an outdated test for ascertaining intellectually disability, is unconstitutional under the Eighth Amendment to the United States Constitution Accordingly, we reverse the trial court's denial of Woodall's motion

and remand this case to the trial court to conduct a hearing, make findings, and issue a ruling on the issue of Woodall's potential intellectual disability following this Court's and the U.S. Supreme Court's guidelines on such a determination, especially as espoused in *Moore v. Texas*.[1]

I. BACKGROUND.

Woodall pleaded guilty to murder, rape, and kidnapping and a jury recommended a sentence of death, which the trial court adopted. Extensive collateral-attack litigation followed. Eventually, Woodall filed a Kentucky Rules of Civil Procedure ("CR") 60.02 and 60.03 motion, alleging that he is intellectually disabled and that the imposition of the death penalty upon him is unconstitutional.[2] Woodall also sought expert funding in that motion. The Commonwealth responded, and the trial court granted Woodall's motion for expert funding.

Woodall then replied with an expert's contemporaneous opinion that Woodall is intellectually disabled. After another response from the Commonwealth and reply from Woodall, the trial court denied Woodall's motion without conducting a hearing, upholding Woodall's death sentence. Woodall then appealed the trial court's denial of his motion to this Court, seeking either (1) a reversing of the trial court's decision and a hearing to plead his case for intellectual disability or (2) a final determination by this Court that he is

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[1] 137 S.Ct. 1039 (2017).

[2] The United States Supreme Court in *Atkins v. Virginia* held that the execution of a person suffering from an intellectual disability is unconstitutional, because it violates the Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution. 536 U.S. 304, 321 (2002).

intellectually disabled, which would preclude the imposition of the death penalty.

II. ANALYSIS.

The Eighth Amendment of the United States Constitution[3] prohibits the execution of a person who has an intellectual disability.[4] The U.S. Supreme Court expounded on this rule in *Hall v. Florida*, where it held unconstitutional Florida's strict and rigid determination as to whether an individual has an intellectual disability.[5] Specifically, Florida's highest court in *Cherry v. State* "held that a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited."[6] The U. S. Supreme Court held that a rigid and bright-line rule like Florida's was unconstitutional.[7]

The U.S. Supreme Court in *Hall* specifically mentioned Kentucky law: "Only the Kentucky and Virginia Legislatures have adopted a fixed score cutoff identical to Florida's."[8] The Court in *Hall* cited to KRS 532.130(2),[9] which states:

> A defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior

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[3] Specifically, the Cruel and Unusual Punishment Clause, has been incorporated into state law by the Fourteenth Amendment. *Miller v. Alabama*, 567 U.S. 460, 503 (2012).

[4] *Hall v. Florida*, 134 S.Ct. 1986, 1990 (2014); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

[5] 134 S.Ct. at 2001.

[6] 959 So.2d 702, 712-13 (Fla. 2007); *Hall*, 134 S.Ct. at 1994.

[7] *Hall*, 134 S.Ct. at 1994.

[8] *Id.* at 1996.

[9] *Id.*

> and manifested during the developmental period is referred to in KRS 532.135 and 532.140[10] 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.

This Court in *Bowling v. Commonwealth*, decided before the benefit of *Hall*, interpreted KRS 532.130(2), finding that "[t]he General Assembly's adoption of a *bright-line maximum IQ of 70 as the ceiling for mental retardation* 'generally conform[s]' to the clinical definitions approved in *Atkins*, thus does not implicate the Eighth Amendment's proscription against 'cruel and unusual' punishment.... [W]e decline to rewrite this unambiguous statute."[11]

This Court in *White v. Commonwealth*, considering the U.S. Supreme Court's decision in *Hall*, expounded on this issue, holding that "trial courts in Kentucky must consider an IQ test's margin of error. And if the IQ score range produced by such consideration implicates KRS 532.130, KRS 532.140, and other relevant statutory provisions, the trial court must consider additional evidence of intellectual disability."[12] This Court left no doubt that "once an evaluation has been ordered for the purpose of determining intellectual disability, then the evaluation must meet the dictates of *Hall*...."[13]

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[10] KRS 532.140(1) states in relevant part, "[N]o offender who has been determined to be an offender with a serious intellectual disability...shall be subject to execution."

[11] 163 S.W.3d 361, 376 (Ky. 2005) (emphasis added).

[12] 500 S.W.3d 208, 214 (Ky. 2016).

[13] *Id.* at 216.

We heard White's situation again in a later case in his proceedings.[14] There, we stated the trial court's process for determining an intellectual disability:

> In order for a defendant to meet Kentucky's statutory definition of "serious intellectual disability," and thus evade the death penalty, he or she must meet the following criteria pursuant to KRS 532.135: (1) the defendant' intellectual functioning must be "significantly subaverage"—defined by statute as having an intelligence quotient of 70 or less; and (2) the defendant must demonstrate substantial deficits in adaptive behavior, which manifested during the developmental period.
>
> *Procedurally, trial courts require a showing of an IQ value of 70 or below before conducting a hearing regarding the second criteria of diminished adaptive behavior.*[15]

The *White* companion cases show a restriction in Kentucky on the 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. While trial courts are required to adjust a defendant's IQ score for the standard error of measurement,[16] the bright-line 70-IQ-score finding still appears to be the strict and rigid hurdle that a defendant must surmount before the trial court considers any other evidence.

Recently, the U.S. Supreme Court decided the case of *Moore v. Texas*,[17] giving better, but not much clearer, guidance as to how courts should evaluate this issue. "In *Hall v. Florida*, we held that a *State cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above*

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[14] *White v. Commonwealth*, 2014-SC-000725-MR, 2017 WL 8315842 (Ky. Aug. 24, 2017).

[15] *Id.* at *17 (emphasis added).

[16] *Id.*; *White*, 500 S.W.3d at 214.

[17] 137 S.Ct. 1039 (2017).

70."[18] "As we instructed in *Hall*, adjudication of intellectual disability should be 'informed by the views of medical experts.' That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus."[19] "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.'"[20]

"*Hall* invalidated Florida's strict IQ cutoff because the cutoff took 'an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence.'"[21] "*[W]e do not end the intellectual-disability inquiry, one way or the other, based on [the defendant's] IQ score.*"[22] "The medical community's current standards supply one constraint on States' leeway" in establishing the standards for determining whether a criminal defendant has an intellectual disability.[23]

Admittedly, the U.S. Supreme Court has not provided crystal-clear guidance as to what exactly constitutes a constitutional violation regarding the determination of whether a defendant is intellectually disabled to preclude the imposition of the death penalty. It is also true that the U.S. Supreme Court seems to suggest that a defendant's IQ score, after adjusting for statistical

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[18] *Moore*, 137 S.Ct. at 1048 (citing *Hall*, 134 S.Ct. at 2000-01) (emphasis added).

[19] *Moore*, 137 S.Ct. at 1044 (citing *Hall*, 134 S.Ct. at 2000).

[20] *Moore*, 137 S.Ct. at 1048 (citing *Hall*, 134 S.Ct. at 2000).

[21] *Moore*, 137 S.Ct. at 1050 (citing *Hall*, 134 S.C.t at 1995).

[22] *Moore*, 137 S.Ct. at 1050.

[23] *Id.* at 1053.

error, acts as the preliminary inquiry that could foreclose consideration of other evidence of intellectual disability, depending on the score.[24]

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

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[24] "Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning." *Moore*, 137 S.Ct. at 1049 (citing *Hall*, 134 S.Ct. at 2001). "...[I]n line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Moore*, 137 S.Ct. at 1049.

[25] *See State v. Gates*, 410 P.3d 433, 435 (Ariz. 2018) (citing *Moore* for its "holding that states do not have unfettered discretion to reject medical community standards in defining [intellectual disability]"); 9 Ky. Prac. Crim. Prac. & Proc. § 31:32 (5th ed.) (citing *Moore*: "state appellate court 'failed adequately to inform itself of the "*medical community's diagnostic framework*"' and thus abused the discretion it has in enforcing the restrictions on executing the intellectually disabled, noted in *Atkins* and *Hall*"); 9 Minn. Prac., Criminal Law & Procedure § 36:18 (4th ed.) ("For purposes of the death penalty, *medical and psychiatric evidence should be considered in determining mental status, rather than simply an arbitrary numerical I.Q. score* for [intellectual disability].") (citing *Hall* and *Moore*); 15 Colo. Prac., Criminal Practice & Procedure § 20.21 (2d ed.) (citing *Moore*: "the Eighth Amendment requires that the method a state uses to assess a defendant's intellectual disability *must rely on current standards in the medical community*"); Ga. Criminal Trial Practice § 26:6 (2017-2018 ed.) (citing *Moore*: "states do not have 'unfettered discretion' in application of *Atkins*," rather, *states are "constrained by [the] medical community's current standards"*); Law of Sentencing § 6:2 (citing *Moore*: "Intellectual disability that precludes a death sentence *should rest on a consensus of the community's expert medical opinion undiminished by judicial formulae.*"); 28 Mo. Prac., Mo. Criminal Practice Handbook § 38:8 (citing *Moore* for its "holding that the determination of...intellectual *disability must be governed by 'current medical consensus,' and suggesting that the State's failure to confirm its disability determination to published professional standards will almost certainly invalidate a death sentence.*"); 32 Mo. Prac., Missouri Criminal Law § 57:3 (3d ed.) ("As noted hereinafter, the Missouri statute governing the issue of mental retardation may be inadequate to exempt all persons deemed 'intellectually disabled' under *Atkins*' categorical rule, which has been amplified to emphasize that *the courts' determination*

As stated above, the U.S. Supreme Court has made some statements, identified in footnote 25 of this opinion, to suggest that a defendant's IQ score, after adjusting for statistical error, forecloses further analysis as to a defendant's potential intellectual disability. We note the Ninth Circuit's discussion of this issue:

> In *Hall*, the Court emphasized that, in death penalty cases where a defendant's intellectual functioning is a close question, the defendant "must be able to present additional evidence of intellectual disability...." In fact, in these situations, the court must not "view a single factor as dispositive" given the complexity of intellectual disability assessments. Therefore, a court...must consider all indications of a defendant's intellectual disability and may not discard relevant evidence.[26]
>
> *Hall* reminds us that "the death penalty is the gravest sentence our society may impose," and that imposing this "harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." Given these stakes, *Hall* warns that we must not make judgments in haste as to whether a person has an intellectual disability, but rather must consider all the "substantial and weighty evidence" in cases that present close questions. Put differently, we cannot risk making the protections of *Atkins* a nullity by executing a person with an intellectual disability without giving him the "fair opportunity to show the Constitution prohibits [his or her] execution."[27]

The Ninth Circuit appears to suggest that courts should initially inquire into a defendant's IQ score, and, if low enough, that mandates further analysis of prevailing medical standards as to a defendant's potential intellectual disability. But just like the tone of the U.S. Supreme Court, the tone of the Ninth Circuit suggests that IQ score cannot be the sole factor in determining

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of the issue is largely a question of expert consensus."). We note that numerous other secondary sources also support our conclusion.

[26] *Smith v. Ryan*, 813 F.3d 1175, 1181 (9th Cir. 2016) (internal citations omitted).

[27] *Id.* at 1191.

whether a defendant has an intellectual disability that precludes a death sentence.

Guided by the U.S. Supreme Court's reasoning in *Moore*, we are constrained to conclude that KRS 532.130(2) is simply outdated. And while a mechanical use of this statute's bright-line rule promotes straightforward application and facilitates appellate review, it only provides the appropriate baseline information needed for judging intellectual disability. Lacking the additional consideration of prevailing medical standards, KRS 532.130(2) potentially and unconstitutionally exposes intellectually disabled defendants to execution.

We now conclude and hold that any rule of law that states that a criminal defendant automatically cannot be ruled intellectually disabled and precluded from execution simply because he or she has an IQ of 71 or above, even after adjustment for statistical error, is unconstitutional. Courts in this Commonwealth must follow the guidelines established by the U.S. Supreme Court in *Moore*, which predicate a finding of intellectual disability by applying prevailing medical standards.[28] Because prevailing medical standards change as new medical discoveries are made, routine application of a bright-line test alone to determine death-penalty-disqualifying intellectual disability is an exercise in futility.

In an attempt to provide guidance to courts confronting this issue, we shall attempt to fashion a rule. The U.S. Supreme Court in *Moore* favorably

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[28] It is important to note that the defendant still bears the burden of proving intellectual disability by a preponderance of the evidence. *Bowling*, 163 S.W.3d at 381-82 (internal citations omitted).

viewed what appears to be the "generally accepted, uncontroversial intellectual-disability diagnostic definition," akin to a totality of the circumstances test, and what KRS 532.130(2) seemingly reflects, "which identifies three core elements: (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."[29] But where KRS 532.130(2) does not go far enough is in recognizing that, in addition to ascertaining intellectual disability using this test, prevailing medical standards should always take precedence in a court's determination.[30]

In this case, the Commonwealth concedes the need for a hearing in the trial court to determine if Woodall has a disqualifying intellectual disability. Woodall agrees, but further argues that this Court has all the information needed to adjudge Woodall intellectually disabled.

While it may be true that Woodall has presented evidence to this Court in support of his argument that he is intellectually disabled and should be rendered ineligible for the death penalty, we think the proper remedy is to afford both Woodall and the Commonwealth an evidentiary hearing at the trial court level. Remand for a hearing is particularly warranted because this Court

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[29] *Moore*, 137 S.Ct. at 1045 (internal citations omitted); *see also supra*, n. 26.

[30] For example, in these types of cases, experts frequently testify as to the impact of the "Flynn Effect," which is apparently a recently discovered phenomenon that impacts a defendant's IQ score. These are the types of considerations, if proven to be prevailing medical standards, that should guide courts in determining whether an individual is constitutionally ineligible for the death penalty due to intellectual disability.

has now declared unconstitutional KRS 532.130(2) and has established a new groundwork for a court's determination of this issue. So both parties should have the opportunity at the trial court level to present their respective arguments under the new standard we have articulated today.

III. CONCLUSION.

For the reasons discussed above, we reverse the ruling of the trial court and remand this case to the trial court to conduct a hearing consistent with this opinion.

Minton, C.J., Hughes, Keller, VanMeter, Venters, and Wright, JJ., sitting. Minton, C.J.; Hughes, Keller, VanMeter, and Venters concur. Wright, J., concurs in part and dissents in part by separate opinion. Cunningham, J., not sitting.

WRIGHT, J., CONCURRING IN PART AND DISSENTING IN PART: While I agree with the majority that this case needs to be remanded to the trial court for a hearing regarding Woodall's alleged intellectual disability, I respectfully dissent to its holding that KRS 532.130(2) is unconstitutional. The issues addressed by the majority opinion are good and reasonable resolutions as to future scientific or medical developments. However, the statute the majority overturns as unconstitutional currently complies with the DSM-5 (*Diagnostic and Statistical Manual of Mental Disorders* [DSM-5] published by the American Psychiatric Association) which is an established diagnostic standard. The prevailing medical consensus at any given time is subject to debate and would be difficult for trial courts to determine; however, the established diagnostic standards as set forth in the DSM-5 are undoubtedly accepted. It is simply too

speculative to declare the statute unconstitutional due to the fact it may not comply with *future* medical or scientific discoveries. Therefore, I dissent.

I agree with the majority that flexibility to accommodate scientific development and changes is desirable. However, I do not believe there is a necessity to declare the statute unconstitutional on these grounds. The majority says the statute is unconstitutional regarding the death penalty because it uses a specific numerical floor for a defendant's IQ. However, since the statute complies with the DSM-5 guidelines, I would not go to the extreme measure of striking it.

Here, the score of 70 provides a floor for determining intellectual capacity for execution. Any defendant whose IQ falls below that floor is not subject to execution. However, the trial court still has a place in making the determination of intellectual disability for a defendant whose IQ scores above 70. Here, a psychiatrist testified Woodall was intellectually disabled. This testimony was enough to establish a prima facie showing, requiring the trial court to conduct a hearing and take proof from Woodall as to his disability.

Once a defendant establishes a prima facie case that he is ineligible for the death penalty due to an intellectual disability, then the trial court must conduct a full hearing to resolve the issue. Since this is a defense, it must be raised and proven by the defendant. A defendant would have to fully cooperate with an examination by the Commonwealth's expert in order that an adequate hearing could be conducted before the defendant could rely upon the defense. *White v. Commonwealth*, 500 S.W.3d 208, 210 (Ky. 2016) At the hearing, if the defendant has established a prima facie case that he is intellectually disabled and if he has fully cooperated with the Commonwealth's expert's examination

then the burden of proof shifts to the Commonwealth to prove Woodall's capacity to be executed. "It is now elementary that the burden is on the government in a criminal case to prove every element of the charged offense beyond a reasonable doubt and that the failure to do so is an error of Constitutional magnitude." *Miller v. Commonwealth*, 77 S.W.3d 566, 576 (Ky. 2002).

Each element of a criminal case must be proven beyond a reasonable doubt and there can be factors that vary the score. The trial court must consider all the variables in determining if the defendant is intellectually disabled. An example of such a factor that may affect the outcome is the margin of error, which this court ruled in *White* must be considered. Scientific evidence establishes that the current margin of error for the examination is 5 points above or below 70. Based upon the margin of error, an individual with a score of 66 might not be intellectually disabled, while someone with a score of 75 might be so disabled. Therefore, proof beyond a reasonable doubt requires a score of 76 to establish proof that a defendant is not intellectually disabled. This is the current established margin of error for the test. However, as testing improves the margin might decrease or additional scientific evidence might enlarge it. A trial court must consider the variable of the margin of error and any other variables that may prove or disprove intellectual disability beyond a reasonable doubt.

The statute complies with the current diagnostic standards, and trial courts must take other proof as to intellectual disability to determine whether a prima facie case is established. After a prima facie case is presented, the trial

court must hold a hearing to determine beyond a reasonable doubt that a defendant is eligible for the death penalty.

The majority needlessly declares the statute at question unconstitutional, as the hearing outlined above resolves the issues with the statute that form the basis for the majority declaring it unconstitutional. Therefore, I do not believe this Court should take the extreme measure of declaring the statute unconstitutional. Woodall's constitutional rights are safeguarded by the hearing that will be conducted on remand without striking a statute enacted by the General Assembly.

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