No. 18-56

IN THE SUPREME COURT OF THE UNITED STATES

TIM SHOOP, WARDEN,
PETITIONER,

V.

DANNY HILL,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITON FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari to review a unanimous panel's fact-bound decision that the Ohio courts unreasonably applied *Atkins v. Virginia*?

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INTRODUCTION

The court of appeals held correctly that Danny Hill's death sentence is unconstitutional under *Atkins v. Virginia*, 536 U.S. 304 (2002). This case is intensively fact-bound and – despite the Warden's protestations to the contrary – involves no split in the circuits. The unanimous panel did nothing more than faithfully apply this Court's decisions in reaching the unremarkable conclusion, given the weight of the evidence, that Danny Hill is a person with intellectual disability. Certiorari should be denied.

STATEMENT OF THE FACTS AND CASE

I. Danny Hill is Intellectually Disabled.

A. Danny Was First Identified As Intellectually Disabled In Elementary School.

Danny Hill ("Danny") was born on January 6, 1967. Vera Williams, Danny's mother, was also intellectually disabled. She could barely read or write. She dropped out of school after eighth grade because the other students teased her, presumably because she was slower intellectually. (Mitigation Tr., RE 31, PageID 3321-22). She was the mother of four sons, but she knew none of their birthdates. (*Id*. at PageID 3320, 3326). She stated that all four of her children were "slow" as identified by the schools. (*Id*. at PageID 3326). She did not know the year she married Mr. Williams, with whom she had lived for several years before they married. (*Id*. at PageID 3321). Danny did not have many friends and stayed at home most of the time. (*Id*. at PageID 3331).

In 1973, at age six, he entered kindergarten in the Warren City Public Schools. His teacher referred him for psychological evaluation because "Danny appears to be very immature in comparison to the other students." (Supplemental *Atkins* Appendix ("Supp. Appx."), RE 97-1,

Disc 1, Page 489-91 of 4517). Testing revealed that Danny's overall functioning was on the level of a 4 years 6-month-old child, with an IQ score of 70. He did not know his correct age (he thought he was nine) or his address; he could not count dots, read numbers, or show a certain number of fingers when asked; he could not match most letters of the alphabet. The final recommendation was, "Danny is a slower learning child [and] we will have to make his work as concrete as possible. Be very specific when you give Danny any directions as to what he is to do. Make use of concrete objects to manipulate rather than talking about abstract ideas." (*Id*.)

Based on the recommendation of the psychologist and the information from his teacher about his adaptive deficits, the school placed Danny in special education classes known as EMR (Educable Mentally Retarded) where he remained throughout his educational career. (Suppress Hrg. Tr., RE 29, PageID 3081-92).

When Danny was 8 years and 8 months old (and in the third grade), he was again referred to the school psychologist for testing. His IQ was measured at 62 and his academic skills ranged from mid-kindergarten to a beginning first-grade level. On a sight recognition test, Danny could not read any words. He was unable to read double digit numbers or complete any simple addition or subtraction problems. The school psychologist advised that Danny "will be limited in his ability to generalize, to transfer learning from one situation to another, to do abstract reasoning or to do much self evaluation." His overall functioning was at the level of a five-year-old child. (Supp. Appx., RE 97-1, Disc 1, Page 492-94 of 4517).

Danny was still in the special education class for the mildly mentally retarded during the 1979-80 school year, at the age 12 to 13 years. He was again evaluated because he was struggling academically, even with special education assistance, and exhibiting behavior problems at school. On January 31, 1980, another school psychologist conducted an evaluation; Danny's IQ had

dropped substantially to 49. (Supp. Appx. RE 97-1, Disc 1, Page 513-15 of 4517). The psychologist reported that Danny did not know his address or phone number. He was cooperative and "completed all tasks presented to him," but he displayed weaknesses in "not being able to recall everyday information, do abstract thinking, perform mental arithmetic, perceive a total social situation, perceive patterns, and to reproduce symbols using psychomotor speed and coordination." Danny also exhibited "a great deal of impulsivity." The psychologist explained:

> . . . Danny does not think before he acts or speaks. Giving few responses is typical of mentally retarded children. He seems to feel tension and anxiety in trying to handle his environment. The school environment is extremely frustrating to Danny. Basically, testing shows that he is an affectionate child, not overtly aggressive. The fighting he has been in in school is usually cases where he is led into it by others.

(*Id.* at PageID 515 of 4517). Based on the psychologist's recommendation, Danny was placed in the Behavior Improvement class, which was a class for emotionally and behaviorally disturbed students.

Retested on May 19, 1980, Danny's obtained IQ score was 48. (Supp. Appx. RE 97-1 Disc 1, Page 513-19 of 4517). The evaluating psychologist recommended that Danny be transferred to the Fairhaven School for the Mentally Retarded where the instruction could focus on basic tasks such as "teach address and phone number," "teach functional words in reading," and "teach telling time." Regarding Danny's academic skills, the psychologist reported, "First and second grade levels academically, extremely immature and dependent, responds like a five year old . . . needs constant supervision." Regarding adaptive behavior, Danny was "weak in communication and self-help general. Observations show weaknesses in socialization and fine-motor skills."

Additional testing at Fairhaven in 1982 established that Danny – then fifteen – had an IQ of 63. (*Id*. at PageID 511-12 of 4517). The psychologist reported that Danny was "insecure, immature, and inadequate needing much emotional support," and had "severe problems" at school

that year, and exhibited "weaknesses in the areas of communications, self-direction, socialization and occupation." While Danny attended Fairhaven, he was teased by other children who called him "retarded" and "dumb," which upset him. (Mitigation Tr., RE 31, PageID 3328).

Danny was removed from Fairhaven because of his problematic behavior. He was placed in Brinkhaven, a group home for troubled youth, where Danny resided from July 1982 to February 1983. Danny was 15 years old when he entered Brinkhaven. (Mitigation Tr., RE 31, PageID 3389). Brinkhaven had its own school with individual tutoring. (*Id*. at PageID 3390). Brinkhaven worked extensively with Danny because of his inability to read or write when he entered there. Danny was assigned a tutor from the local school district to work with him individually and he improved. (*Id*. at PageID 3391). By the time he left, Danny was at the second or third grade level educationally, although he would have been in the ninth grade chronologically. (*Id*. at PageID 3393-94). Danny was removed from the program when the county lost funding. (*Id*. at PageID 3396).

While at Brinkhaven, the staff found Danny to be a follower. (Mitigation Tr., RE 31, PageID 3398, 3403). At times, other children would tease him as he was slower than the rest. (*Id*. at PageID 3398-99). Danny had to be told every day to comb his hair, brush his teeth and take a shower. (*Id*. at PageID 3400). Danny was able and willing to do chores, but he needed constant supervision when doing them to stay on task. "Danny needed more structure than what is given at home at that point. Danny needed 24 hour supervision." (*Id*. at PageID 3400). As one official later explained:

> Everything you wanted Danny to do, you explained it to him. If you wanted him – you know, you had to tell him every day: 'Danny, comb your hair, brush your teeth, take a shower.' Chores, you had to follow up to make sure they're done properly. You needed to supervise him while he was doing them a lot of times.

B. Danny Was Found To Be Intellectually Disabled As Part Of Court Evaluations.

The fall of 1983 found Danny in juvenile court facing several felony charges including assault, robbery, and carrying a concealed weapon. The State sought to have Danny's cases removed from juvenile court and tried as an adult. As part of these proceedings, Danny was evaluated by a court psychologist in January 1984, when he was 17. Danny's IQ was measured at 55. The psychologist also found Danny had significant deficits in adaptive functioning. Specifically, the psychologist noted deficient "verbal functioning," "poor judgment," "does not think of consequences, is highly suggestible." Because of his intellectual disability, the psychologist recommended that Danny be placed in a highly structured juvenile facility. (Supp. Appx. RE 97-1 Disc 1, Page 527-28, 728-831 of 4517). Otherwise, he felt Danny was "likely to be exploited" because of his "passivity and limited intellectual ability." He reported that Danny's "level of adaptive functioning is poor, [a]nd he needs a highly structured facility that can provide programming for mentally retarded youth." The probation department agreed and also recommended that Danny be retained in the juvenile justice system rather than be tried as an adult. (*Id*. at PageID 529 of 4517).

After this evaluation, Danny was charged with additional two counts of rape. Danny was adjudicated as a juvenile and he pled guilty to the various charges.

Danny was sent to the Training Center for Youth (TCY), a highly structured facility for incarcerated juveniles where Danny resided from April 1984 to April 1985. Several counselors from TCY testified at the mitigation trial about Danny's limitations and struggles while incarcerated there. Initially Danny was placed in the hostile group. The authorities thought that because of Danny's size and the rape convictions, he would be aggressive. However, the staff realized quickly that Danny was not hostile. Rather, Danny was mostly a loner who preferred to

be around the staff members. The staff eventually transferred Danny from the hostile group because the other boys were abusing him. (Mitigation Tr., RE 31, PageID 3432-35).

Danny was described by the counselors as "slow, very slow" and a follower whose "mouth got him into a bunch of trouble." (Mitigation Tr., RE 31, PageID 3408, 3418, 3437, 3440, 3479). Danny would go along with the crowd, but he would not be the one to initiate anything. (*Id*. at PageID 3437).

> Danny could not keep up with the kids in the group. He wasn't as hostile as the other kids were. He was – he's a follower. So, when the kids found out that Danny wasn't as hostile as they [were], they started picking on him and accusing him of doing things that they were doing. We found out [Danny] wasn't doing them. And so, they moved him to another group.

(*Id*. at PageID 3479).

Danny attended school in the basement area for the slow learning children because he could not function in the classroom for his age level. (Mitigation Tr., RE 31, PageID 3480-81). Danny was limited in his ability to remember as staff would tell him to do something one day, but would find he could not accomplish the same task the following day because of his inability to recall the instructions. Staff learned that when Danny was given a task, such as mopping the bathroom, someone had to follow him while he performed it for him to complete it. (*Id*. at PageID 3485-86).

When the Social Service Department decided it was time for Danny to leave TCY after he turned 18, the staff felt he was not ready and recommended against it. (*Id*. at PageID 3440). Danny could have been kept at TCY until he was 21, but he was released in April 1985.

The parole officers assigned to Danny after he was released described him as withdrawn and quiet. His records at TCY reflected that he could be easily led by others and that he was a follower. (Mitigation Tr., RE 31, PageID 3374, 3375, 3378). The parole officers knew that Danny needed a very structured environment, but a suitable program that fit his needs was not available.

Danny was not very verbal and he initiated nothing. Danny was the lowest intellectual functioning of anyone on their caseload. (*Id*. at PageID 3382-86).

C. Danny was identified as "mentally retarded" while on death row.

When Danny entered prison in 1986 after being convicted and sentenced to death, prison mental health professionals recognized that he was mentally retarded. (Supp. Appx. RE 97-1 Disc 1, Page 1789, 1815, 1817, 1819-20 of 4517). The prison staff noted he was illiterate and that other inmates wrote kites and letters for him. (*Id*. at PageID 1484-86, 1510-12, 1553, 1579, 1784, 1788, 1824 of 4517). One case manager even wrote a letter to Danny's mother for him. (*Id*. at Page 1510 of 4517). Danny had to ask repeatedly for the phone numbers for his mother and other family members. (*Id*. at PageID 1483-84, 1571, 1818 of 4517). Danny had problems with hygiene while incarcerated, including having to be told to shower. (*Id*. at PageID 1396, 1568, 1573, 1645-46 of 4517). Danny often asked for his account balance from the cashier's office and had frequent problems with his commissary account. (*Id*. at PageID 1484-86, 1556-57, 1560, 1565, 1568, 1571, 1574-77 of 4517). A 1999 work evaluation indicated Danny, "lacked the cleaning skills for a rangemen position, has to be told every step of the way." (*Id*. at PageID 1325 of 4517).

In November 2000, Danny was administered an IQ test by James Spindler, a licensed psychologist on contract with the prison. Danny's IQ was 71. (Supp. Appx. RE 97-1 Disc 1, Page 957-70 of 4517). Danny's prison records do not explain the purpose of testing Danny or even who ordered this IQ test.

II. Danny Hill's intellectual disability was undisputed prior to this Court's decision in *Atkins*.

Danny was eighteen years old when Raymond Fife was raped and murdered on September 10, 1985, in Warren, Ohio. Timothy Combs, seventeen, was also charged and later convicted in a separate trial as a principle offender in Fife's murder. *State v. Combs*, No. 1725, 1988 WL 129449

(Ohio Ct. App. Dec. 2, 1988). Danny's trial began on January 21, 1986, before a three-judge panel. Defense counsel moved to suppress Danny's statements to police based on his mental retardation and inability to read.[1] The trial court denied the motion, stating:

> 'Though this court believes that the defendant could not have effectively read the rights or waiver forms, the Court relies on the fact that at any time he was given a piece of paper to sign acknowledging receipt of the Miranda Warnings and waiving his rights, the paper was always read to him before he affixed any signatures. . . . Though defendant is retarded, he is not so seriously impaired as to have been incapable of voluntarily and knowingly given statements which the defendant now seeks to suppress.'

(Pet. App. 499).

In February 1986, in preparation for the mitigation trial, Danny was once again evaluated and found to have an IQ of 64. (Supp. Appx. RE 97-1 Disc 1, Page 919-22 of 4517). Three psychologists testified Danny was intellectually disabled. The State did not dispute this conclusion. The panel considered Danny's mental retardation as a mitigating factor, but determined the mitigating factors were outweighed by the aggravating circumstances.

[1] Danny gave an incriminating statement after being interrogated by police detectives, including his maternal uncle, Detective Morris Hill. Uncle Morris had previously helped Danny's mentally retarded mother by "physically disciplining" Danny for her. Even then, Danny only admitted to being present at the scene. He never admitted to doing any acts to harm the victim. The only "forensic" evidence connecting Danny to the crime was an alleged "bite mark" on the victim's penis. Since the trial, forensic dentists have found the mark was not even a human bite mark, and the scientific community has recognized that bite mark comparisons are not scientifically sound. *See,e.g.*,https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf. A Motion for New Trial was filed on Danny's behalf in state court, challenging his conviction based on the discredited bite mark comparison. Although the trial court denied the motion in June, 2016, the Ohio court of appeals currently is considering the impact of the discredited bite mark evidence on the trial. *State v. Hill*, Case No. 2016-T-0099. This was the most critical piece of evidence presented against Danny. It was the only evidence that placed him directly at the crime scene and the only physical evidence Danny had any contact with the victim.

Danny appealed his conviction and sentence to the Ohio Court of Appeals and the Ohio Supreme Court, both of which acknowledged his intellectual disability. The Court of Appeals stated:

> The record is replete with competent, credible evidence which states that appellant has a diminished mental capacity. He is essentially illiterate, displays poor word and concept recognition and, allegedly, has deficient motor skills. Appellant is characterized as being mildly to moderately retarded. There is some suggestion that appellant's 'mental age' is that of a seven to nine year old boy. Testimony places appellant's IQ between 55 and 71, which would cause him to be categorized as mildly to moderately retarded.

(Pet. App. 604). The court of appeals also noted that Danny presented "considerable evidence as to his passive nature. This evidence suggests that appellant is a 'follower,' easily led (because of his handicap) and influenced by any person with a dominant personality." (Pet. App. 609).

In 2002, this Court held that the Eighth Amendment bars the execution of people who are intellectually disabled, *Atkins v. Virginia*, 536 U.S. 304 (2002). Thereafter, the Ohio courts concluded that all prior judicial pronouncements of Danny's intellectual disability occurred in a different "context" – one that did not afford the State the same "incentive to vigorously litigate the issue of Hill's mental retardation" as it would have at an *Atkins* hearing. *State v. Hill*, 894 N.E.2d 108, 185 (Ohio Ct. App. 2008) (Pet. App. 351).

In 2004, the state post-conviction court held an evidentiary hearing at which the court concluded it was required to apply the "[c]linical definitions of mental retardation, as defined by the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA)."[2] (Pet. App. 384). It was undisputed that Danny's consistently low IQ scores

[2]The post-conviction court noted that "[b]oth the AAMR and APA definitions of mental retardation are merely referenced in a footnote in the *Atkins* decision, whereas the Ohio Supreme Court in *Lott* explicitly embraces these definitions as the legal standard." (Pet. App. 384, n.4).

throughout his lifetime establish that he satisfies the first prong of the definition for intellectual disability (significantly sub-average intellectual functioning). Regarding the second prong (deficits in adaptive behavior) the state court heard testimony from three primary experts (Dr. David Hammer, for the defense; Dr. Greg Olley, for the prosecution; and, Dr. Nancy Huntsman, for the court), but explicitly instructed the experts to focus their analyses on whether Danny could establish he was "*presently*" a person with intellectual disability – after he had spent over 20 years in prison.[3] As to this specific inquiry, Drs. Olley and Huntsman testified that, at the time of the hearing, there was insufficient evidence to conclude Danny demonstrated sufficient adaptive deficits, whereas Dr. Hammer testified that Danny is intellectually disabled and meets all three prongs of the definition for intellectual disability.

Consistent with the clinical guidelines, all three experts agreed that evidence of adaptive functioning in the highly structured environment of a prison setting is of limited value. Dr. Olley described their task as "unusual" and "challenging"; "the standards of our profession make no explicit statement about how to evaluate a person who has been in prison for a long time." (Atkins Tr., RE 97-1, PageID 647 of 1992). He acknowledged that it was "impossible to assess all of Mr. Hill's adaptive behavior while he is in prison. . . ." (*Id*. at PageID 869) Dr. Huntsman testified that assessments of adaptive behavior under the AAMR guidelines are "just not relevant to [the prison] setting." (*Id*. at PageID 1130). Dr. Hammer explained that adaptive skills must be assessed based on a person's functioning within the community, whereas, at the time of the hearing, Danny was "obviously not functioning within the community and hasn't been functioning within the

[3] However, the post-conviction court also found it should consider the "totality of the evidence" (including school, institutional and prior court records). The state court of appeals did not address whether Danny's intellectual disability should be evaluated at the time of the *Atkins* hearing or at some earlier point.

community for 20 years." (Atkins Tr., RE 97-1, PageID 408 of 1992). Nevertheless, the state post-conviction court relied heavily on Danny's prison behavior – despite clinical consensus advising against doing so – in order to reach its conclusion that Danny was not intellectually disabled.[4] The state court also contravened the clinical guidelines in several other respects and based its decision on multiple unreasonable determinations of the facts in light of the evidence presented.

On federal habeas review, a unanimous panel of the Sixth Circuit determined that the state court decision was an unreasonable application of this Court's decision in *Atkins v. Virginia*.

REASONS THE WRIT SHOULD BE DENIED

I. Introduction

The Warden miscasts this Court's decision in *Atkins* as being too general to constitute clearly established federal law at the time Danny's *Atkins* claim was adjudicated by the state courts in 2008. He further contends that, because *Hall* and *Moore* were not yet decided, the panel could not rely on them in determining that the state court decision rejecting Danny's assertion of intellectual disability was an unreasonable application of *Atkins*. The Warden is incorrect. The court of appeals correctly found that the Ohio courts unreasonably applied clearly established federal law when it focused on Danny's adaptive strengths, criminal activity, and prison behavior, contrary to the consensus of the mental health community. 28 U.S.C. § 2254(d)(1). Moreover, the state court's decision rejecting Danny's *Atkins* claim is based on multiple unreasonable determinations of fact in light of the evidence presented at the post-conviction hearing. 28 U.S.C.

[4] *See, e.g.*, AM. ASS'N ON MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 85 (10th ed. 2002) [hereinafter AAMR 2002 Manual] ("Observations made outside the context of community environments typical of the individual's age, peers and culture warrant severely reduced weight."); Stevens, K.B and Price, J.R. *Adapative Behavior, Mental Retardation, and the Death Penalty*, Journal of Forensic Psychology Practice, 1, 1-29 (2006).

§ 2254(d)(2). Finally, there is no circuit split on the issues the circuit court of appeals adjudicated, and the Warden's attempt to manufacture one is unavailing.

II. The Court of Appeals Correctly Found that the State Court Opinion Was Clearly Contrary to *Atkins* and Progeny Under § 2254(d)(1).

A. *Atkins v. Virginia*, 536 U.S. 304 (2002), Was Clearly Established Federal Law at the Time of Danny's State Court Appeal, Mandating That Courts Utilize Clinical Standards in Determining Which Inmates Were Intellectually Disabled.

The Warden's petition contains a series of erroneous premises that – if embraced – would effectively eviscerate *Atkins* claims decided by federal courts on habeas review. First, the Warden contends that in 2008, when the Ohio court of appeals ruled on Danny's *Atkins* claim, "neither *Atkins* nor *Hall* nor *Moore* had been 'clearly established.'" Pet. At 16. This seeming impossibility as it relates to the 2002 *Atkins* opinion is true, the Warden asserts, because only holdings, as opposed to *dicta*, can constitute clearly established federal law under AEDPA. Because the *Atkins* holding merely imposed a categorical ban on the execution of the intellectually disabled, leaving the states to decide the specifics of its implementation, the *Atkins* holding is too general to be "clearly established," the Warden surmises. Any violation of a state law that implemented the *Atkins* holding, the Warden argues, does not violate *federal* law and thus precludes AEDPA relief. The Court should reject these erroneous assertions out of hand.

The Warden bases his argument on the premise that *Atkins* contained no guidance on how states should implement the Eighth Amendment bar on executing persons with intellectual disability noting that the Court specifically ceded to the states the task of discerning which offenders were subject to it. The Warden puts more weight on this language than it can reasonably bear. *Atkins* did task the states with formulating a means of implementing the categorical ban, but the Court also clearly instructed state and federal courts reviewing claims of intellectual disability

to hew closely to the medical community's clinical definitions of the condition. In *Hall v. Florida*, __ U.S. __ 134 S.Ct. 1986 (2014), this Court recognized as much when it observed: "The clinical definitions of intellectual disability . . . were a *fundamental premise* of *Atkins*." *Id.* at 1999 (emphasis added). While the *Hall* Court acknowledged that "States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectually ability should be measured and assessed," it cautioned that, "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection." *Id.* at 1998. "In the words of *Atkins*," the *Hall* Court observed, "those persons who meet the 'clinical definitions' of intellectual disability" are the individuals whom the Eighth Amendment must protect. *Hall*, 134 S.Ct. at 1999 (quoting *Atkins*, 536 U.S. at 318).

While the Warden alleges that *Atkins* is devoid of any specific mandate for states to follow the medical community's "clinical" guidance, the *Hall* Court clearly finds *Atkins* to do just that. "This Court reads *Atkins* to provide substantial guidance on the definition of intellectual disability." *Hall*, 134 S.Ct. at 1999. It recognized, even while the Warden does not here, that "*Atkins* itself not only cited clinical definitions for intellectual disability, but also noted that the States' standards, on which the Court based its own conclusion, conformed to those definitions." *Id*. The Court must reject the Warden's assertion that the *Atkins* holding was a "general" one so it did not clearly establish that the states were bound to utilize clinical guidelines when implementing a procedure by which to assess intellectual disability. *Hall* belies such an assertion.[5]

[5] This Court's decision in *Brumfield v. Cain*, __ U.S. __, 135 S.Ct. 2269 (2015), likewise undermines the Warden's arguments. In *Brumfield*, this Court granted a habeas petitioner *Atkins* relief, albeit under §2254(d)(2). In reviewing the habeas petitioner's *Atkins* claim, the *Brumfield* Court acknowledged that it must "look to [state case law] because it provides the framework in which . . . factual determinations were made, and makes clear that the state court's decision rejecting Brumfield's *Atkins* claim was premised on those determinations." *Id.* at 2277 n.3.

In addition, the Supreme Court of Ohio, in its principal decision giving effect to *Atkins*, recognized that *Atkins* requires state courts to rely on the mental health community's standards for assessing intellectual disability. In *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), the court adopted "the three-part test defining mental retardation, as cited in *Atkins*, [to] provide[] the trial court with the constitutional standard for reviewing the evidence." *Id.* at 306. While *Atkins* left to the states decisions such as in what type of proceeding or with what burden of proof an offender must demonstrate his or her intellectual disability claim, state courts, including the Supreme Court of Ohio, understood that *Atkins* instructed these courts to be guided by a clinical framework. *See also*, *State v. Hill*, 894 N.E.2d 108, 188 (Ohio Ct. App. 2008) ("Ohio's definition of mental retardation for purposes of the Eighth Amendment is based on the clinical definitions of mental retardation promulgated by the American Association on Mental Retardation and the American Psychiatric Association cited in *Atkins*.") (Pet. App. 357). The Ohio courts' understanding of the *Atkins* holding undercuts the Warden's assertions to the contrary.

B. The Circuit Court of Appeals Properly Granted Relief Based on a Violation of the *Atkins/Lott* Test.

Required by *Atkins/Lott*, and as described in *Hall*, the Ohio court of appeals was tasked with determining whether Danny suffered from "significant limitations in two or more adaptive skills . . ." per clinical guidelines. *Lott*, 779 N.E. at 1014. On habeas appeal, the panel observed that the Ohio court's decision suffered the same defects as the Texas court's decisions this Court overturned in *Moore v. Texas*, __ U.S. __, 137 S.Ct. 1039 (2017). The court found, "[i]n determining that 'Hill's adaptive skills are inconsistent with a mentally retarded individual,' the state trial court focused extensively on Hill's interview with a reporter, his demeanor in interacting

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Brumfield signifies that an *Atkins* claim can be appropriately addressed and resolved in a § 2254 federal habeas proceeding.

with law enforcement and the legal system, and the circumstances surrounding the Fife murder." *Hill v. Anderson*, 881 F.3d 483, 493 (6th Cir. 2018) (Pet. App. 20).

The panel then recounted the abundance of record evidence demonstrating Danny's adaptive skill *deficits*. It correctly determined that the Ohio courts had misapplied the *Atkins/Lott* test, by focusing on Danny's capabilities, rather than his limitations. The panel determined, "[t]he Ohio court's finding to the contrary does not comport with the clinical guidelines ratified by the Supreme Court for assessing adaptive deficits." *Hill*, 881 F.3d at 495 (Pet. App. 25). Reviewing the wealth of evidence regarding Danny's adaptive skill limitations in the state court record, the panel concluded: "When applying these facts to the clinical standards articulated by the Supreme Court in *Atkins* and by the Supreme Court of Ohio in *Lott*, they overwhelmingly indicate that Hill had significant limitations in at least two, and probably four, adaptive skill areas." *Id.* Thus, rather than creating new law as the Warden suggests, the panel here merely did what the state court (unreasonably) did not—it applied the correct clinical standards in existence at the time the state court adjudicated Danny's claim to the facts in the state court record. Because the court below engaged in a faithful adherence to this Court's core *Atkins* holding, certiorari should be denied.

C. The Panel's Reliance on *Hall* and *Moore* Was Not Erroneous As Both Decisions Merely Checked the State Courts When They Failed to Follow *Atkins*' Mandate to Abide by the Consensus of the Scientific Community.

In his Petition for Certiorari, the Warden inaccurately depicts the panel opinion as relying on *Moore v. Texas*, which was not decided when the Ohio courts ruled on Danny's *Atkins* claim. Contrary to the Warden's assertion, the panel did not hold that the state court unreasonably applied the specific standards in *Moore v. Texas*. Rather, the panel held that the state court's overemphasis on Danny's strengths, rather than his deficits, especially while incarcerated on death row, was

contrary to *Atkins*.[6] In doing so, the panel considered *Hall* and *Moore* because both cases further explicate *Atkins*' watershed ban on executing the intellectually disabled.

The Warden fails to consider the context in which this Court's decision in *Moore* was rendered. In the wake of *Atkins*, the Texas Court of Criminal Appeals embraced a set of factors (the *Briseno* factors) for Texas courts to use in assessing claims of intellectual disability in capital cases. These factors, steeped in stereotype, were not based on the science accepted by the psychological community, and thus this Court found the Texas factors were an unconstitutional gloss that unreasonably restricted *Atkins*' reach. The *Moore* Court admonished the Texas Courts for failing to follow *Atkins*' prescription to adhere closely to the medical/psychological community when formulating its *Atkins* claim criteria. Thus, in checking state court deviation from clinical consensus, *Moore* did no more (and no less) than preserve the *Atkins* holding.[7]

The panel did not find that the state court decision was unreasonable under *Hall* and *Moore*. Rather, it found the state court decision was unreasonable under *Atkins* and that *Hall* and *Moore* merely explained why.

D. This Court Has Relied On Cases Decided After the Relevant State Court Decisions When Those Cases Merely Explain the Clearly Established Federal Law.

The Court has analyzed habeas claims using Supreme Court cases decided after the relevant state court opinion. For example, in *Porter v. McCollum*, 558 U.S. 30 (2009), the Supreme Court

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6 There was a clear scientific mandate against relying on strengths, rather than adaptive deficits at the time of the state court decision. *See, e.g.,* AAMR 2002 Manual at 93.

7 After *Moore*, this Court granted certiorari and remanded for further consideration several cases pending on federal habeas review: *Weathers III v. Davis*, 138 S.Ct. 315 (2017); *Long v. Davis*, 138 S.Ct. 72 (2017); *Martinez v. Davis*, 137 S.Ct. 1432 (2017); *Henderson v. Davis*, 137 S.Ct. 1450 (2017). If *Moore v. Texas* is not applicable to cases pending on habeas review, then there would be no reason to remand these cases for further consideration.

reviewed a capital habeas claim of ineffective assistance of counsel during the penalty phase of trial. The Florida Supreme Court had denied Mr. Porter's state-post conviction appeal in 2001. *Porter v. State*, 788 So.2d 917 (Fla. 2001). On appeal from the Eleventh Circuit Court of Appeals, this Court granted Mr. Porter habeas relief, finding that trial counsel had failed to investigate several aspects of the mitigation case. In reviewing the Florida Supreme Court's application of Mr. Porter's ineffective assistance of counsel claim, this Court relied on the 2003 case *Wiggins v. Smith*, 539 U.S. 510 (2003), in determining that the Florida courts had unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), when it determined Mr. Porter proved counsel's failures prejudiced the outcome of the proceeding.

It found, "[h]ad Porter's counsel been effective, the judge and jury would have learned of the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535. The *Porter* Court then held the Florida Supreme Court had unreasonably applied *Strickland*, holding, "Had the judge and jury been able to place Porter's life history 'on the mitigating side of the scale,' and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury—and the sentencing judge—'would have struck a different balance,' *Wiggins, supra*, at 537, and it is unreasonable to conclude otherwise." *Porter*, 558 U.S. at 42. It is clear from this example that federal habeas courts can use later Supreme Court precedent, such as utilized here, when adjudicating a federal habeas claim whose relevant state court decision pre-dates the Supreme Court precedent when that precedent merely expounds on an earlier, seminal case. That analysis is precisely what the panel did here. The Warden's decrying the panel's use of *Moore* in formulating its decision is unfounded as this Court has utilized that precise method.

III. The Ohio State Court Decision Involved Multiple Unreasonable Factual Determinations Thus Also Satisfying § 2254(d)(2).

This Court should also deny certiorari because the Ohio court's decision finding Danny failed to prove his intellectual disability is based on multiple unreasonable determinations of fact in light of the evidence presented, and therefore 28 U.S.C. § 2254(d)(2) is satisfied. Danny specifically raised this argument before the Circuit, but the lower court did not reach it finding instead that the state court decision was unreasonable under section (d)(1). Because the state court's factual findings were unreasonable, the resulting decision was both an unreasonable application of *Atkins* under § 2254(d)(1) *and* based on an unreasonable determination of the facts under § 2254(d)(2). Moreover, unlike § 2254(d)(1), section (d)(2) has no clearly established federal law requirement. The state court's factual findings were unreasonable in the following ways:

A. The State Court Incorrectly Blamed Danny for the Lack of Standardized Adaptive Behavior Measurements.

In the last reasoned decision by the state courts, the Ohio Court of Appeals noted that no standardized measurement of Danny's adaptive behavior was available – a situation that the court claimed "was the result of [Danny's] failure to cooperate with the experts retained to evaluate him." *State v. Hill*, 894 N.E.2d 108, 191 (Ohio Ct. App. 2008) (Pet. App. 364). The Warden likewise devotes substantial ink to his claim that the experts were "forced" to rely on what the state court termed "a thin reed" of anecdotal evidence because Danny failed to cooperate with testing in 2004.

At the instruction of the trial court, all three experts collectively evaluated Danny on April 26, 2004 to April 28, 2004. On the first day of this idiosyncratic evaluation, Dr. Huntsman

administered the WAIS-III and the TOMM with Drs. Hammer and Olley present.[8] The testing was videotaped. (Supp. Appx. RE 97-1 Disc 1, Judgment Entry, Page 425-27 of 4517). The person running the video camera was James Teeple, from the prosecutor's office.[9] Dr. Olley attempted to administer the SIB-R, a standardized test for adaptive functioning. The test could not be completed because Danny became upset and started crying and "continued to weep for five to ten minutes." (Supp. Appx. RE 97-1 Disc 1, Atkins Tr. Page 757 of 1992). Dr. Hammer attempted to administer the ABAS, another adaptive functioning test the next day. The three experts also interviewed Danny separately on later occasions. Although the experts believed that Danny failed to put forth his best effort on the IQ test, they nevertheless concluded that his IQ was in the mid-60s – a fact which was undisputed – and the first prong of the *Atkins/Lott* test was met. The Warden conceded below and in the Petition that Danny clearly meets prong one of the criteria for intellectual disability.

The formalized testing for adaptive functioning could not be completed in 2004 because Danny became upset and "weep[ed] for five to ten minutes," prompting the experts to abandon the testing. (Atkins Tr., RE 97-1, Page 757 of 1992). Further, at the time of the evaluation in 2004, there were no reliable informants who knew Danny before age 18 made available to the experts who could report, an essential component of the tests.[10] (Supp. Appx. RE 97-1, Atkins Tr. Page

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[8]This was not a clinically appropriate setting by which to accomplish the testing. AAMR 2002 Manual at 66 ("Testing should be conducted on an individual basis and be carried out in strict guidance of accepted professional practice.").

[9] Teeple was one of the detectives involved in the initial interrogation of Danny in 1985 and had videotaped that statement. None of the experts knew of Teeple's connection to Danny and how his presence during the testing was a major distraction.

[10] There were some Vineland Social Maturity Scale scores in Danny's school records, but the results were not contrary to a finding of intellectual disability, as the Warden claims. Petition for Writ of Certiorari at 28. Rather, all three experts felt the Vineland scores were unreliable for a

431 of 1992). Even had Danny been able to cooperate fully with the adaptive functioning assessment, the clinical literature (then and now) *requires* that a proper assessment of adaptive behavior look to collateral sources (such as records and prior professional evaluations) rather than rely on information obtained solely from the person being evaluated. *See, e.g.*, AAMR User's Guide 19 (Shalock et al., 2007). The district court reached the same conclusion: "[e]ven if Hill had cooperated with the experts' testimony, under AAMR standards, the tests should not have been dispositive anyway, since Hill was being used as his own informant regarding his functioning. The AAMR advises [against this.] . . . The experts and court, therefore, would have had to review evidence from other sources in any event." (RE 164 000). *Hill v. Anderson*, No. 4:96CV0795, 2014 WL 2890416, * 24 n.14 (N.D. Ohio June 25, 2014) (Pet. App. 134).

B. The State Court Grossly Misrepresented the Record and Ignored Overwhelming Evidence of Danny's Significant Deficits in Adaptive Behavior.

The state appellate court erroneously asserted that the record constituted a "thin reed" on which to make conclusions about Danny's functioning. *State v. Hill*, 894 N.E.2d at 191 (Pet. App. 363). As outlined in the statement of facts, the record available for the state court's review constituted thousands of pages of prior evaluations and diagnoses by multiple professionals documenting Danny's significantly sub-average intellectual functioning and significant deficits in adaptive behavior throughout his life, prior to age eighteen. The overwhelming majority of that information was collected and reported by "both private-, and public-sector psychiatrists, psychologists, social workers, and educators to support their professional opinions. This is precisely the type of information that experts are supposed to rely on in the absence of reliable test scores." (RE 164, PageID 956) (Pet. App. 133). The state court's false characterization of the

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number of reasons, that had nothing to do with Danny, and opined that the test was "not an accurate reflection of anyone's adaptive functioning." Pet. App. 465, n.77.

available evidence as "thin" stems from the trial court's decision to restrict the experts' evaluations to Danny's "present" functioning, in a prison setting, despite their protestations that such a task was "impossible" and clinically "not relevant." As the district court noted:

> [T]he true "thin reed" in this case was the information that was available concerning Hill's adaptive functioning at the time he filed his *Atkins* claim, the focus of the evaluation.

(RE 164, PageID 957) (Pet. App. 134).

The state court then pointed to four categories of evidence: (1) Danny's public school records; (2) his alleged role in the crime; (3) his prison behavior; and, (4) the trial court's lay observations of Danny in court. Out of the abundance of evidence clearly establishing Danny's long-standing identification as a person with intellectual disability throughout his school history, the state court noted only that although there were some "references" to Danny as being easily led, he had also committed criminal acts. Moreover, the state court asserted that Danny "knew how to read and write" and was described by at least one teacher as "'a bright, perceptive boy with high reasoning ability.'" *State v. Hill*, 894 N.E.2d at 192 (Pet. App. 364). The state court's characterization of Danny's school history is unreasonably inaccurate. The record does not merely contain a few "references" to Danny as easily influenced – as the state court attempted to suggest – but, rather, repeatedly and consistently notes Danny's virtual defining characteristic as "a follower" as observed by nearly everyone who ever interacted with him. The state court's single reference to a statement made by one special education teacher (out of thousands of pages of records) is likewise grossly misleading. The teacher who made this comment wrote it on Danny's IEP form when he was fourteen years old. This same teacher documented that he was reading at a first-grade level and performing math at a third-grade level that he needed to develop necessary self-help skills such as "showers regularly, uses deodrant." (Supp. Appx RE 97-1 Disc 1, Page 578

of 4517). The state court's claim that Danny's school records show anything other than a clear, consistent picture of intellectual disability is not only wrong, it is (objectively) unreasonably wrong.

The state court's reliance on alleged criminal behavior and prison behavior is contrary to current clinical guidelines as well as those in existence at the time of the state court decision. *See, e.g.,* AAMR User's Guide 22 (Shalock et al., 2007); R.J. Bonnie & K. Gustafson, *The challenge of implementing Atkins v. Virginia: How legislatures and courts can promote accurate assessments and adjudications of mental retardation in death penalty cases*. 41 UNIV. OF RICHMOND L. REV.811-860 (2007). Even if that were not the case, however, the state court made unreasonable determinations of fact regarding the evidence of Danny's prison behavior. The state trial court credited the testimony of the prison staff regarding Danny's adaptive skills in comparison with the "average" death row inmate. (Supp. Appx. RE 97-1 Disc 1, Page 3476, 3480 of 4517). First, the state court's finding was unreasonable because the prison staff did not actually provide such testimony. The trial court sustained *Atkins* counsel's objections whenever the prosecution asked the prison officials to compare Danny to other inmates. The judge would not allow the prison officials to offer their opinions, only their observations. (Supp. Appx. RE 97-1 Disc 1, Tr. Page 1248-49, 1255, 1366, 1373-74 of 1992). Therefore, there was no reliable opinion testimony regarding Danny's adaptive skill functions while in prison.

Further, the record developed during the *Atkins* hearing belies the state courts' findings. If the state trial court had actually reviewed the prison records, it would have gleaned:

- The prison long recognized Danny is illiterate.
- The prison long ago recognized Danny is mentally retarded.
- Danny has had problems with his hygiene.

- Danny asked frequently for his account balance with the cashier's office and had frequent problems with his account.
- The prison knew that other inmates wrote for him and in one case the case manager had to write a letter to his mother for him.
- Danny often had to ask for his mother's and other family members' telephone numbers.

The prison officials did not testify Danny was an average death row inmate. Even if they had, any such finding is beside the point. The relevant question is how Danny functions compared to the wider general population, not the death row population.

Finally, the state court relied on the trial court's own observations of Danny in court during which the trial court "did not perceive anything about Hill's conduct or demeanor suggesting that he suffers from mental retardation." *State v. Hill*, 894 N.E.2d at 193 (Pet. App. 366). This finding was unreasonable because it is well-established in the medical community that no one – not even experts in intellectual disability – can tell whether a person suffers from mild intellectual disability by merely looking at, talking to, or casually observing him or her. It is simply unreasonable for the state court to have concluded otherwise.[11]

All three experts agreed that Danny had significant deficits in functional academics, prior to the age of eighteen. (Supp. App. RE 97-1 Disc 1, Atkins Tr., Pages 23, 69 (Hammer); 783 (Olley); 1112 (Huntsman)). The case therefore boiled down to whether Danny had at least one other significant deficit, manifested during the developmental period. The state court's conclusion that no other significant deficits exist is indefensible in the face of overwhelming evidence, including Danny's school placement in programs for the mentally retarded and a school designed solely to educate students with intellectual disabilities. The record is replete with evidence

[11]*See* AAMR 2002 Manual 51 ("The assessment of intellectual functioning is a task that requires specialized professional training.").

regarding Danny's poor personal hygiene, his immature and inappropriate behavior, his inability to make friends, his lagging intellectual development, his identification as a person who is passive, highly suggestible and easily led and exploited by others, his inability to complete basic chores and tasks without substantial supervision, and his need for a highly structured environment. At a minimum, this record establishes significant deficits in social skills, communication, self-direction, self-care and health and safety. The panel observed this plethora of evidence that the state court ignored, acknowledging the above adaptive skill deficits and opined these records were not subject to the "malingering" accusations that the state courts used to discount them:

> The records cover the time frame from 1973 to 1984, six months before the murder for which Hill was sentenced to death, and 20 to 30 years before the Supreme Court decided *Atkins*. Hill could not have been faking intellectual disability to avoid the death penalty.

Hill, 881 F.3d at 500 (Pet. App. 36).

Danny had a great deal of personal attention from educators who attempted to find and keep him in an environment where he could develop to his fullest potential. These educators created no shortage of records- testing results, progress reports, IEPs - which establish Danny's intellectual disability at a young age. The panel remarked on the state trial court's blatant disregard of the abundant state court record, relying instead on its own un-scientific, personal observations:

> Rather than address the abundant evidence in the record of Hill's adaptive deficits as a child and teenager, the state trial court focused on his ability to engage in "a one-man crime spree at the age of 17" and his ability to "hold his own during police interrogation of the Fife murder."

*Id.*at 501 (Pet. App. 37). It found that the trial court's approach "inappropriately focused on perceived adaptive strengths [and] ignored clinicians' warnings not to conflate criminal behavior with adaptive functioning . . . ." *Id.* In sum, the panel chastised the Ohio courts similar to this Court's reproach of the Texas courts in *Moore* for failing to follow the clinical guidelines that

Atkins extolled. The Court should not reverse the Circuit's findings based on the fact-specific determinations of this case.

IV. There is No Split in the Circuits Worthy of this Court's Review

While finding that the Ohio court of appeals' rejection of Danny's intellectual disability claim was objectively unreasonable, the panel below stated this Court's decision in *Moore v. Texas, supra* was an example of what was "previously established by" *Atkins v. Virginia*. *Hill*, 881 F.3d at 49 (Pet. App. 16). Seizing on this language, the Warden, citing three cases, asserts this Court should grant certiorari to resolve a split in the circuits regarding whether *Moore* is "clearly established federal law" within the purview of 28 U.S.C. §2254(d). (Pet. at 22-25). The cases cited by the Warden establish no circuit split warranting this Court's intervention.

One of the three decisions relied upon by the Warden, *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1311 (11th Cir. 2015), was decided before *Moore* and deals only with the (somewhat) related question whether this Court's decision in *Hall v Florida, supra,* rejecting Florida's strict 70 IQ cut-off as inconsistent with *Atkins* and the clinical consensus definition of intellectual disability, was "clearly established" and/or was a retroactive new rule. The Eleventh Circuit panel answered both questions in the negative. The other two cases cited by the Warden provide even thinner evidence of a developed circuit split. In *Cain v Chappell,* 870 F.3d 1003, 1024 n.9, (9th Cir. 2017), a Ninth Circuit panel affirmed a district court decision concluding that the California Supreme Court's rejection of petitioner's *Atkins* claim, in which the state court resolved a "battle of experts" in the State's favor, was not sufficiently unreasonable to warrant granting the writ of habeas corpus. In a footnote, the panel also stated that because *Moore* was both not an AEDPA case and was decided after the California Supreme Court's decision, it was not clearly established at the time of the state court decision. *Id*. However, this was clearly dicta

because the panel had already determined that deference was owed the California Supreme Court's decision deeming the State's expert more credible. The third case relied upon by the Warden, *Smith v Duckworth*, 824 F.3d 1233 (10th Cir. 2016), provides the least evidence of a split in the circuits as the panel there was focused on a different issue, i.e., whether the habeas petitioner could rely on the "Flynn effect" to adjust his IQ scores downward to meet the first of the intellectual disability (and *Atkins*') criterion. The panel concluded that the answer was no. *Smith* does not even mention this Court's decision in *Moore*, and its only relevance to the issue presented by the Warden is the panel's statement, which like the language in *Cain* is clearly dicta, that because *Hall* was decided "three years after the [state court decision]. . . it provides no basis for us to disturb the [state court's] decision. *Id.* at 1245.[12] The three decisions relied upon by the Warden fail to establish a split in the circuits warranting this Court's plenary review.[13]

[12] The language is dicta because the panel also concluded that "even if" *Hall* (not *Moore*) was clearly established for 2254(d) purposes, the petitioner would still lose because *Hall* addressed only the standard error measurement and not aging/obsolete norms (the Flynn effect).

[13] Nor do decisions not cited by the Warden, *e.g., In Re Cathey*, 857 F. 3d 221 (5th Cir. 2017) and *Williams v. Kelley*, 858 F.3d 464 (8th Cir. 2017), both of which addressed the different issue of whether *Moore* is a retroactive new rule of criminal procedure, create a cognizable split in the circuits.

V. Conclusion

The Circuit Court of Appeals applied the appropriate standards for § 2254 cases. This case does not warrant extraordinary action of the grant of a writ of certiorari. This case involves no novel legal issues, nor any split of decisions among the circuit courts of appeal. This Court should deny the Warden's petition for writ of certiorari.

Respectfully submitted,

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