No. 18-56

In the Supreme Court of the United States

TIM SHOOP, Warden,

Petitioner,

v.

DANNY HILL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

Counsel for Petitioner
Tim Shoop, Warden

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Well before *Moore v. Texas*, 137 S. Ct. 1039 (2017), or *Hall v. Florida*, 134 S. Ct. 1986 (2014), Ohio state courts rejected Danny Hill's *Atkins* claim based on the judgments of two experts. Pet. App. 366a-67a, 484a-86a; *see Atkins v. Virginia*, 536 U.S. 304 (2002). The Sixth Circuit, however, disagreed with these state courts and granted Hill relief from his capital sentence under the Antiterrorism and Effective Death Penalty Act (AEDPA). Repeatedly invoking the later *Hall* and *Moore* decisions, the Sixth Circuit held that the state courts unreasonably applied *Atkins* by overemphasizing Hill's adaptive strengths and relying on his behavior in prison. Pet. App. 15a-18a, 20a.

As the petition for certiorari explained (at 12-32), this Court should grant review and reverse the Sixth Circuit's decision. *First*, the Sixth Circuit's conclusion about what *Atkins*, *Hall*, and *Moore* "clearly establish[]" under 28 U.S.C. § 2254(d)(1) conflicts with this Court's AEDPA cases and with AEDPA cases from other circuit courts. *Second*, setting aside AEDPA, the Sixth Circuit's decision conflicts with *Moore* because the circuit court substituted its *lay* views about the intellectual-disability factors for the doctors' *expert* judgments. *Third*, the Sixth Circuit's grant of relief undercuts AEDPA in a case in which the statute's purpose reaches its apex—one involving a decades-old capital sentence for the brutal torture, rape, and murder of a 12-year-old boy.

Hill's responses confirm the need for review. He spends pages summarizing evidence that was before the state courts. Opp. 1-11. But neither this Court nor the Sixth Circuit is the initial trier of fact. Instead, AEDPA's demanding standards require great deference to the state courts' findings. And Hill's

summary overlooks the most significant evidence from the state proceedings—that two of the experts found that he was not intellectually disabled. Pet. App. 484a-86a. The expert testimony shows that Hill wrongly describes the state decisions as "contrary to the consensus of the mental health community." Opp. 11. More significantly, the state decisions were not contrary to *Atkins*, and Hill's arguments otherwise conflict with settled AEDPA precedent.

I. HILL CANNOT RECONCILE THE DECISION BELOW WITH THIS COURT'S AEDPA CASES

As the petition noted (at 13-22), the Sixth Circuit departed from this Court's interpretation of "clearly established" law under § 2254(d)(1) when it held that the Ohio state courts violated *Atkins*, *Hall*, and *Moore* both (1) by focusing on Hill's adaptive strengths, and (2) by relying on his behavior in the regulated prison environment. Pet. App. 20a. Hill's responses fail to reconcile this conflict.

Atkins. Hill starts with reasons why *Atkins* should be read to "clearly establish" the two specific rules on which the Sixth Circuit relied. He claims that the petition paradoxically asserts that *Atkins* itself was not clearly established at the time of the state courts' decisions. Opp. 12. Not so. All agree that *Atkins* clearly established that States may not execute the intellectually disabled. 536 U.S. at 321. But *Atkins* established *no more*, expressly leaving to the States the task of developing standards to identify those who fall within its holding. *Id.* at 317.

Hill responds that, while *Atkins* gave the States some flexibility to implement its holding, it required States "to hew closely to the medical community's clinical definitions" of intellectual disability because

it repeatedly referenced those definitions. Opp. 13. Yet these references are far too general to clearly establish the two specific rules on which the Sixth Circuit relied. The Court's cases hold that "'[t]he more general the rule . . . the more leeway [state] courts have'" to implement it. *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (citation omitted). At most, then, *Atkins*'s *general* references to the three-factor clinical definition of intellectual disability suggest that state courts should follow some version of that three-part test. *Cf. Atkins*, 536 U.S. at 317 n.22 (noting that the States' "statutory definitions of [intellectual disability] are not identical"). These references nowhere suggest that state courts must follow the two *specific* rules that the Sixth Circuit invoked when applying the second clinical factor on adaptive skills. Indeed, *Atkins* does not even mention those two specific rules.

Thus, when *Atkins* is viewed from the proper level of generality, Ohio courts have more than faithfully implemented the decision. As Hill concedes (Opp. 14), the Ohio Supreme Court expressly adopted the three clinical factors that *Atkins* referenced. *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002). And it later held that state courts should rely on expert judgments about these clinical factors, not on anecdotal evidence about "how [an intellectually disabled] person would behave." *State v. White*, 885 N.E.2d 905, 915 (Ohio 2008). The specific state decisions in Hill's case, moreover, relied on the clinical judgments of a majority of the experts when finding that Hill did not satisfy the second clinical factor for an intellectual-disability diagnosis. Pet. App. 366a.

Hall. Hill next notes (Opp. 13) that *Hall* interpreted *Atkins* not to give States "unfettered discre-

tion" in adopting intellectual-disability definitions. *Hall*, 134 S. Ct. at 1998. He also quotes (Opp. 13) *Hall*'s statement that "[t]he clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*." *Hall*, 134 S. Ct. at 1999. But *Hall*'s general statements about *Atkins*—e.g., that *Atkins* referenced clinical definitions—do not help Hill for the same reason that *Atkins* does not help him. Those statements are too "general" to clearly establish what Hill needs to obtain relief under AEDPA. *See Sexton*, 138 S. Ct. at 2560.

Hill also overstates the extent to which *Hall* relied on *Atkins* when it reached its *specific* holding that States must consider the margins of error in IQ tests. If *Atkins alone* clearly established *Hall*'s holding, the Court could have simply cited *Atkins* to grant relief. But it went "'further.'" *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1311 (11th Cir. 2015) (quoting *Hall*, 134 S. Ct. at 1999). Aside from *Atkins*, *Hall* acknowledged that "[a] significant majority of States implement the protections of *Atkins* by taking [margins of error] into account," which provided "'objective indicia of society's standards.'" *Hall*, 134 S. Ct. at 1996 (citation omitted). And it relied on its own "independent judgment" that States should consider margins of error. *Id.* at 2000. *Hall*'s own reasoning thus proves that its specific holding was not clearly dictated by *Atkins*. Instead, *Hall* extended *Atkins*. So the Sixth Circuit's reliance on *Hall* was misplaced because AEDPA "does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 572 U.S. 415, 426 (2014).

Moore. Hill argues that *Moore* supports the Sixth Circuit's decision because it criticized the Texas courts for overemphasizing Moore's adaptive strengths. Opp. 14-16. But again, Hill identifies *nothing* in *Atkins* that foreshadowed *Moore*'s specific holding other than *Atkins*'s general references to clinical definitions. Just as those references are too "general" to clearly establish *Hall*'s specific holding about margins of error, they are too "general" to clearly establish *Moore*'s specific holding about adaptive strengths. *See Sexton*, 138 S. Ct. at 2560. Further, *Moore* criticized the state courts for engaging in the "arbitrary offsetting of deficits against unconnected strengths." 137 S. Ct. at 1050 n.8. Hill ignores the petition's showing (at 28) that the Ohio courts did no such thing in this case.

Hill also notes that *Moore* criticized the Texas courts' "*Briseno*" factors, which were "steeped in stereotype" about intellectual disabilities and allowed lay perceptions to trump clinical judgments. Opp. 16. The Ohio courts did nothing like that here. They relied on expert judgments—not lay perceptions—when finding that Hill did not satisfy the adaptive-skills factor. Pet. App. 366a-67a, 486a. The Ohio courts also noted that their reliance on experts reconciled their denial of relief with an earlier decision that had held that Ohio courts must rely on experts, not lay perceptions. Pet. App. 366a-68a (discussing *White*, 885 N.E.2d at 915). In that respect, as the petition explained (at 25-30), *Moore* supports the Ohio courts even outside AEDPA's constraints. If anything, the Sixth Circuit wrongly allowed its lay perceptions of the evidence about Hill's alleged intellectual disability to trump the experts' perceptions.

Porter. Hill lastly defends the Sixth Circuit's use of "Supreme Court cases decided after the relevant state court opinion." Opp. 16-17. He cites *Porter v. McCollum*, 558 U.S. 30 (2009), which relied on *Wiggins v. Smith*, 539 U.S. 510 (2003), to grant AEDPA relief for an ineffective-assistance claim under *Strickland v. Washington*, 466 U.S. 668 (1984). Because state courts had rejected Porter's ineffective-assistance claim before *Wiggins*, Hill reasons, *Porter*'s use of *Wiggins* to clarify *Strickland* is like the Sixth Circuit's use of *Moore* to clarify *Atkins*. But Hill overlooks that *Wiggins* was itself an *AEDPA case*, whereas *Moore* arose on *direct review*. As an AEDPA case, *Wiggins* merely showed what *Strickland* had clearly established within the meaning of § 2254(d)(1); it "made no new law in resolving" the ineffective-assistance claim. *See Wiggins*, 539 U.S. at 522 (describing another AEDPA case). *Moore* has no such narrow domain. Indeed, it "changed the course" of this Court's intellectual-disability jurisprudence. *Ybarra v. Filson*, 869 F.3d 1016, 1025 n.9 (9th Cir. 2017). It thus cannot be used to show what *Atkins* clearly established under § 2254(d)(1).

II. HILL FAILS TO RECONCILE THE CIRCUIT SPLIT

As the petition noted (at 22-25), other circuits disagree with the Sixth Circuit's conclusion that federal courts may use the "primary holdings in *Hall* and *Moore*" to grade state decisions that predate those two cases. Pet. App. 16a; *e.g.*, *Cain v. Chappell*, 870 F.3d 1003, 1024 n.9 (9th Cir. 2017); *Kilgore*, 805 F.3d at 1311; *Smith v. Duckworth*, 824 F.3d 1233, 1245 (10th Cir. 2016). Hill's responses do not undermine this split.

Hill distinguishes *Kilgore* on the ground that it addressed *Hall*, not *Moore*. Opp. 25. That does nothing to reconcile *Kilgore* with the decision below. The Eleventh Circuit found that *Hall*'s holding—that courts must take into account an IQ test's margin of error—"was not clearly established by *Atkins*." 805 F.3d at 1311. Instead, *Hall* "acknowledged that its holding was taking the Supreme Court's prior precedents 'further' and that the Court was using its 'independent judgment' to declare the Florida statute unconstitutional." *Id.* (citation omitted). Thus, while *Kilgore* involved the *same exact error* as *Hall*, the Eleventh Circuit still refused to rely on it. Here, by contrast, the Sixth Circuit held that "*Hall* . . . [was] compelled by *Atkins*." Pet. App. 16a. And while *Moore* came out after *Kilgore*, the Sixth Circuit found *Hall* to be the crucial link between *Atkins* and *Moore* that justified reliance on the latter. *Id.* at 18a. If *Atkins* did not clearly establish that courts must account for IQ tests' margins of error, it did not clearly establish that courts must not overemphasize adaptive strengths. Either *both* principles are clearly established law for purposes of AEDPA or *neither* is. This split is unavoidable.

Hill next calls *Cain*'s refusal to rely on *Moore* "clearly dicta" because the Ninth Circuit also held that it owed deference to the state court's decision to rely on the state experts. Opp. 25-26. Not so. In a footnote, the Ninth Circuit reached a legal holding that it could not treat *Moore* as clearly established law. 870 F.3d at 1024 & n.9. That holding affected the Ninth Circuit's later analysis on the "battle of the experts," which nowhere cited *Moore*'s standards when resolving that battle. *Id.* at 1024. The Sixth Circuit, by contrast, used *Moore* to upend a state

court's similar resolution of a battle of experts. Like the California court in *Cain*, the Ohio trial court here relied on experts who found that Hill was not intellectually disabled. Pet. App. 482a-86a. But here, unlike there, the Sixth Circuit invoked *Moore*'s standards to depart from the experts' views. *E.g.*, Pet. App. 15a-18a, 25a. Regardless, Hill ignores the Ninth Circuit's *Ybarra* decision. *Ybarra* stated that *Moore* "cannot show that the [state court] applied *Atkins* in a way that 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" 869 F.3d at 1025 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

Hill lastly says that *Smith* "focused on a different issue" than the one addressed by *Hall*—namely, the so-called Flynn effect for IQ tests. Opp. 26. But that case addressed *both* the Flynn effect *and Hall*'s margin-of-error question. 824 F.3d at 1245-46. For the latter, *Smith* did not merely state dictum when it concluded: "Because *Hall* was decided more than three years after the [the state court] ruled against Mr. Smith on this issue, *Hall* provides no basis for us to disturb the [state court's] decision." *Id.* at 1245. The Tenth Circuit's later finding that Smith's claim failed "even assuming" it could consider *Hall* was an alternative holding. *Id.*; *see United States v. Nichols*, 38 F. App'x 534, 538 (10th Cir. 2002).

In sum, Hill cannot even identify one additional case that has held that federal courts may rely on *Hall* or *Moore* when evaluating state decisions issued before those precedents. But several courts have stated the opposite. That conflict warrants review.

III. HILL'S ALTERNATIVE GROUND FOR RELIEF OFFERS NO BASIS TO DENY REVIEW

Hill next seeks refuge in an argument that even the Sixth Circuit did not adopt—that the state courts made unreasonable factual findings. Opp. 18-24 (citing 28 U.S.C. § 2254(d)(2)). Yet those findings were at least "debatable," and so they are now immune from second guessing by federal courts. *Wood v. Allen*, 558 U.S. 290, 303 (2010). Under AEDPA, "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Id.* at 301. Put another way, even if "'[r]easonable minds reviewing the record might disagree'" about the fact finding, "'that does not suffice to supersede'" the state court's ruling. *Id.* (citation omitted).

Here, Hill offers two supposed "unreasonable" determinations of fact. Opp. 18-24. Neither meets AEDPA's demanding standard, and one is not really a fact finding anyway. Thus, Hill's alternative defense of the Sixth Circuit's judgment provides no basis for denying review.

Hill's Malingering. Hill argues that the state appellate court unreasonably "blamed" him for the lack of objective data about his adaptive skills when it recognized that Hill did not cooperate with the experts. Opp. 18-20. This argument does not so much seek to establish a factual error as it offers a justification for his malingering. *E.g.*, Opp. 19 & n.9. Indeed, *all* three experts agreed that Hill malingered, so the state court's conclusion cannot be described as unreasonable. Atk. Tr. 754; *see id.* at 264-65, 754-762, 1005-07. The experts' unanimous conclusion that Hill tried to avoid objective measures of his

adaptive skills was itself based on objective evidence of tests that measure malingering. *See, e.g.*, *id.* at 1005 (Hill "was able to answer fairly difficult questions"—"particularly in the vocabulary [section]"—"while missing very simple questions"). Hill's malingering deprived the experts of potentially important evidence. That is not fairly debatable.

This unanimous factual finding, moreover, undermines Hill's reliance on *Moore*. Unlike in *Moore*, the experts here were forced to rely on anecdotal evidence precisely because Hill did not allow them to use more objective tests. Pet. App. 454a. *Moore* says nothing about the propriety of doing so.

Entire Record. Hill also believes that the Ohio courts "grossly misrepresented the record" when discussing the anecdotal evidence of his adaptive skills. Opp. 20. This provides no basis for relief.

Hill spends pages rehashing evidence that was presented in the state courts. Opp. 20-23. But the Sixth Circuit was not simply a second trier of fact. And Hill barely mentions the most significant evidence against him—that experts who reviewed this *same anecdotal evidence* found Hill not to be intellectually disabled. Pet. App. 486a; *see also id.* 454a (noting that the "court is obligated to rely upon the professional evaluations" of the experts); *cf.* Atk. Tr. 665, 1175. If the Ohio courts' conclusions about Hill's adaptive deficits were wrong, the two experts who reached the same conclusions—including one expert who had previously testified nine out of nine times for an intellectual-disability finding—must also be wrong. Pet. App. 184a-85a.

At bottom, Hill's argument effectively contends that the Ohio trial court should have contradicted

these experts based on the court's own lay observations of this evidence. Yet, in the same section of his brief, Hill explains that "not even experts in intellectual disability" can diagnose the disability by "casually observing" someone. Opp. 23. That is exactly what Hill implies the court should have done. In a field where experts matter, Hill's refusal to squarely confront the experts' conclusions speaks loudly.

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Hill does not dispute that, as the petition lastly noted (at 30-32), the Court has repeatedly exercised its discretionary jurisdiction to correct courts that mistakenly grant relief to capital defendants under AEDPA. "[T]he provisions of AEDPA apply with full force even when reviewing a conviction and sentence imposing the death penalty." *White v. Wheeler*, 136 S. Ct. 456, 462 (2015) (citing cases). This case warrants the Court's discretionary intervention no less than those other cases.

CONCLUSION

The Court should grant the petition for certiorari and reverse.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

Counsel for Petitioner
Tim Shoop, Warden

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