

CASE NO. 19-6567

CAPITAL CASE

IN THE UNITED STATES SUPREME COURT

DANNY LEE HILL,

Petitioner,

v.

STATE OF OHIO,

Respondent.

**REPLY TO STATE OF OHIO'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

STEPHEN C. NEWMAN

Federal Public Defender

Ohio Bar: 0051928

VICKI RUTH ADAMS WERNEKE

Assistant Federal Public Defender

Ohio Bar: 0088560

*COUNSEL OF RECORD

LORI BETH RIGA

Research and Writing Attorney

Ohio Bar: 0067272

Office of the Federal Public Defender

1660 West Second Street, Suite 750

Cleveland, Ohio 44113

(216) 522-4856

(216) 522-1951 (facsimile)

vicki_werneke@fd.org

lori_riga@fd.org

SARAH KOSTICK (0086925)

Attorney at Law

33 N. Stone Ave- 21st Floor

Tucson, AZ 85701

(520) 724-6953

Sarah.Kostick@pima.gov

Counsel for Petitioner Danny Lee Hill

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Petitioner Hill's Reply to the State's Brief in Opposition

Contrary to its repeated assertions, the State of Ohio's Brief in Opposition reinforces the claim that the bite mark evidence in Mr. Hill's case was central to the convictions and death sentence. The State's on-going denial of the bite mark's significance is disingenuous and deceptive, belied not just by the trial and appellate record but also by *its own briefing*.¹ Tellingly, the State does not refute the constitutional claim raised by Mr. Hill, relying instead on its misrepresentation of the facts to argue that Mr. Hill should be granted no relief. In this reply, Mr. Hill will address the most egregious of falsehoods noted in the State's Brief in Opposition.

I. The Bite Mark comparison evidence was relevant to the State's case, until it was proven to be unscientific.

From the opening statements in Mr. Hill's trial in 1986 through his direct appeal and his subsequent *Atkins* challenges in state and federal court, the bite mark evidence has been relied upon to establish Mr. Hill's active participation in the attack on Raymond Fife—indeed, it stood alone as the *only* evidence physically connecting Mr. Hill to the body of the victim. From the beginning, the State characterized the bite mark identification of Mr. Hill as scientific and authoritative. At trial, it compared the purported dental impression found on the victim's body to a fingerprint and a blueprint. Years later, courts continued to rely on the evidence to justify Mr. Hill's conviction. For instance, the state trial court's order denying Mr. Hill's *Atkins* claim cited to the bite mark evidence to support the conclusion he was guilty of the attack and murder. (*Hill*

¹ The State consistently confuses the manner in which it utilized its own improper evidence at trial by asserting that the bite mark did not kill Raymond Fife and therefore it is immaterial to the question of whether Mr. Hill aggravatedly murdered him. This assertion demonstrates just how fundamentally the state misunderstands evidence and the manner in which forensic evidence is used to connect individuals to crime scene, thus opening the door for them to argue, circumstantially, that said individual committed the crime.

v. Anderson, Case No. 96-CV-795 (N.D. Ohio), RE 97-1, Supp Atkins Appendix, page 3439 – 3440 of 4517, “Powerful forensic testimony was introduced . . . which linked Danny Lee Hill’s dental impressions to bite marks on the victim’s penis.”). Remarkably, the State *continues* to rely on the evidence in on-going federal litigation; in its recent post-argument supplemental brief filed with the Sixth Circuit Court of Appeals, the State once again asserted that Mr. Hill “bit [the victim’s] genitals,” even though the “science” underlying that identification has been discredited and abandoned. (Doc. 353, Page 5, 12/17/2019, *Hill v. Anderson*, Case No. 99-4317/14-3718).

Closer to home, the State’s brief inadvertently highlights the essential and irreplaceable importance of the bite mark evidence to Mr. Hill’s conviction, putting the lie to any assertion that Mr. Hill would have been found guilty without it. On page 28 of their Brief in Opposition, the State quotes a lengthy passage from Mr. Hill’s direct appeal, in which the Ohio Eleventh District Court of Appeals characterized the “evidential table” supporting Mr. Hill’s participation in the attack:

The evidential table indicates the involvement of [Hill] in the slaying of the victim. [Hill]’s contention suggesting that he merely observed while co-defendant Timothy Combs tortured and assaulted the victim is overwhelmingly negated by his personal odontological “signature” on the penis of the victim.

Br. at 28. (quoting *State v. Hill*, 1989 WL 142761 * 33 (11th Dist Ohio Nov 27, 1989)). This “personal odontological ‘signature,’” now universally acknowledged to be more fiction than science, was *the only* evidence identified by the court supporting Mr. Hill’s active participation in the attack, and thus was the lynchpin upholding Mr. Hill’s conviction—as explained in Mr. Hill’s prior brief, Mr. Hill could not have been convicted and sentenced to death as a mere bystander.

The proper takeaway from the State’s self-contradiction is that the materiality of the bite mark evidence to the State’s case against Mr. Hill was so pervasive, and so central, that even the State cannot avoid highlighting its importance. Indeed, the assertion that the purported bite marks

on the victim came from Mr. Hill, and could only come from Mr. Hill, permeated every aspect of Mr. Hill's trial and appeal. We now know this identification to be scientifically baseless. As a result, and by logical extension, Mr. Hill's conviction was baseless, as well. A new trial was unquestionably warranted.

II. Mr. Hill did not manufacture the new evidence that bite mark comparison is unscientific.

Throughout this litigation, the State has argued that counsel for Mr. Hill “manufactured” or “created” this new evidence. Counsel for Mr. Hill are not scientists. Counsel did not conduct the scientific inquiry into whether bite mark comparison evidence is legitimate. More important, the trial court presiding over Mr. Hill's motion for new trial *rejected* the State's argument by finding that Mr. Hill was unavoidably prevented from bringing the claim sooner than it was.

It should go without saying that scientific evidence used to convict and sentence someone to death must be based upon sound foundational validity. Because bite mark identification is not scientifically reliable—as confirmed by a wide range of legal and scientific communities who have reviewed its methodologies and tested its accuracy—any convictions *based* on it must be carefully re-examined. Nonetheless, the State continues to argue for what even bite mark practitioners will not—that Mr. Hill could reliably and/or scientifically be identified as the individual responsible for the (purported) bite marks on the victim. In support, it references a review by Dr. Lowell Levine it commissioned in 2016—though it provides neither a copy of the report nor the kind of specific detail necessary to weigh its credibility. Given the content of the “report,” the State's reticence is understandable. It states:

It should be understood that the analysis of pattern injuries believed to be Human Bite Marks is based upon a **subjective interpretation of those patterns**. The comparison of those injuries with the dentition and an exemplar of the bite pattern that the dentition in question would cause **is an Art based upon Science**. The comparison of dental radiographs for identification of an individual is also based

upon an interpretation of the patterns of a “known” radio graph of the individual with the radiographic patterns of a radio graph of the individual in question. **In any situation involving interpretation of the evidence competent professionals can arrive at differing opinions.**

After review of all the material submitted I believe my trial testimony was honest, proper and correct and given to the best of my ability. My interpretation of the injuries is that they are consistent with bite marks based upon that review.

(See Supplemental Appendix) (emphasis added).² In essence, Dr. Levine characterizes bite mark comparison as inherently subjective, more “art” than science—a formula that may seem sufficiently reliable to the State and/or Dr. Levine but one that provides little comfort to those, like Mr. Hill, who have been condemned to death based on pseudo-expert’s “subjective artistry.”

By invoking Dr. Levine’s commentary, the State has once again contradicted its own arguments, demonstrating the scientific invalidity of the bite mark identification used to convict Mr. Hill and thus the invalidity of that conviction. The Ohio courts wrongly denied Mr. Hill this necessary scrutiny. Moreover, the fact that Mr. Hill has been sentenced to death based on this junk evidence offends the Eighth Amendment and its demand for heightened reliability in capital cases.

Other errors and misrepresentations in the State’s brief are equally revealing. At best, they suggest the State has yet to educate itself adequately on essential, fundamental aspects of the evidence it relies upon, at worst a kind of reckless or willful indifference to the ultimate veracity of the evidence it offers. As just one example, the State continues to mischaracterize the evidence

² In his report, Dr. Levine neither mentions nor disputes the findings of the National Academy of Sciences (NAS) report, or the President’s Council of Advisors on Science and Technology (PCAST) report, finding that bite mark comparison has no scientific validity. As established in the PCAST report, “bitemark analysis does not meet the scientific standards for foundational validity, and is far from meeting such standards. To the contrary, available scientific evidence strongly suggests that examiners cannot consistently agree on whether an injury is a human bitemark and cannot identify the source of bitemark with reasonable accuracy.” (PCAST report at 87).

presented below regarding the differences between “closed” and “open” populations. Contrary to the State’s contention, a body left naked and exposed in a field does not constitute a “closed” population simply because the police narrow their focus to two suspects. If that were the case, almost *all* populations would eventually become “closed.” Good science serves to counteract bias. Mr. Hill’s conviction and incarceration, and the State’s contorted and erroneous arguments here, demonstrate what happens when we allow science to be manipulated to confirm (and conform to) prosecutorial bias.

III. This case is an example of grave miscarriage of justice that should be addressed and remedied by this Court.

Mr. Hill was convicted of committing a brutal fatal attack on a child and sentenced to death. The prosecution’s case without the bite mark does not provide sufficient proof to sustain the conviction for aggravated capital murder, and especially the death sentence. Although the State points to a handful of eye witnesses, their testimony at trial was rife with contradictions and only placed Mr. Hill in the general area of the victim, hundreds of yards from where the child was later found. The State offered no eyewitness testimony placing Mr. Hill in the company of the victim, let alone as a participant in the attack. Absent forensic evidence connecting Mr. Hill to the crime (the prosecution produced no blood, no hair, no fiber comparison, and no fingerprints) -- the State’s case against Mr. Hill rests almost entirely on his purported “confession.” But what the State considers a confession is, in fact, no such thing. Although subjected to a variety of confession-eliciting interrogation techniques, Mr. Hill’s long, contradictory statement—offered after

protracted interrogation, by a cognitively-challenged 18-year-old boy who had been denied legal representation³—in fact *denies* any involvement in the attack.

In sum, even if Mr. Hill’s statement was taken as an accurate reflection of what occurred, it provides insufficient basis—as a matter of Ohio law and the United States Constitution—upon which to support a conviction of capital murder and a sentence of death. This Court should grant certiorari to ensure Mr. Hill receives the thorough review he has long been owed and repeatedly been denied.

STEPEHN C. NEWMAN
Federal Public Defender
Ohio Bar: 0051928

Respectfully submitted,

/s/ Vicki Ruth Adams Werneke
VICKI RUTH ADAMS WERNEKE
Assistant Federal Public Defender
Ohio Bar: 0088560
*COUNSEL OF RECORD

LORI BETH RIGA
Research and Writing Attorney
Ohio Bar: 0066994
Office of the Federal Public Defender
1660 West Second Street, Suite 750
Cleveland, Ohio 44113
(216) 522-4856
(216) 522-1951 (facsimile)
vicki_werneke@fd.org
lori_riga@fd.org

SARAH KOSTICK
Ohio Bar: 0086925
Attorney at Law
33 N. Stone Ave- 21st Floor
Tucson, AZ 85701
(520) 724-6953
Sarah.Kostick@pima.gov

Counsel for Petitioner Danny Lee Hill

³ As the Sixth Circuit recognized just last year, Mr. Hill’s statement to the police was “neither voluntary nor knowing.” *Hill v. Anderson*, 881 F.3d 483, 507 (6th Cir. 2018), *rev’d on other grounds Shoop v. Hill*, 139 S.Ct. 504 (2019).