CASE NO. ______

CAPITAL CASE

IN THE UNITED STATES SUPREME COURT

DANNY LEE HILL,

Petitioner,

v.

TIM SHOOP, WARDEN,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME 1 of 3

TRUMBULL COUNTY
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KAREN INFANTE ALLEN
CLERK OF COURTS
TRUMBULL COUNTY

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

STATE OF OHIO,	)	**CASE NO. 85-CR-317**
	)	***Death Penalty Case***
Respondent	)	
-vs-	)	**JUDGE THOMAS P. CURRAN**
	)	**JUDGMENT ENTRY**
DANNY LEE HILL	)	
Petitioner	)	**(FINDINGS OF FACT AND CONCLUSIONS OF LAW)**
	)	**FINAL**

I. INTRODUCTION [1]

Danny Lee Hill has filed this successor petition for post conviction relief (PCR), contending that he is entitled to relief from the penalty of death on the ground that he is mentally retarded. For the reasons that follow, this court denies the petition.

On June 20, 2002, the Supreme Court of the United States ruled that execution of mentally retarded criminals violates the Eighth Amendment's proscription against cruel and unusual punishment. *Atkins v. Virginia,* 536 U.S. 304. In establishing a new constitutional

[1] An Index to this Opinion is on the last page.

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rule, the Supreme Court held that evolving standards of decency in America now reflect a consensus that death is not a suitable punishment for a mentally retarded criminal. The *Atkins* case directly overruled the Supreme Court's decision thirteen years earlier in *Penry v. Lynaugh*, (1989) 492 U.S. 392. The *Atkins* holding applies retroactively. [2]

Petitioner Hill was convicted of the 1985 capital murder of 12-year-old Raymond Fife of Warren, Ohio. In this current collateral attack on the capital penalty aspect of his capital conviction, Danny Lee Hill seeks a declaration that he is insulated from the death penalty by virtue of mental retardation. Articulating a new constitutional imperative, the United States Supreme Court left to the States the task of fashioning procedural rules and guidelines for the enforcement of the constitutional restriction.[3] In response to the U.S. Supreme Court's directive, the Ohio Supreme Court laid down a set of procedural guidelines and substantive standards for the resolution of mental retardation claims. *State v. Lott*, (2002) 97 Ohio St.3d 303. 2002-OHIO-6625.

[2] Although the Court in *Atkins* made no express pronouncement of retroactive application, several federal circuit courts have stated expressly that *Atkins* applies retroactively. In fact, the Sixth Circuit, discussing various precedents, has concluded that the *Atkins* rule applies retroactively. See *Hill v. Anderson*, 300 F.3d at 681, in which the Sixth Circuit, addressing Danny Lee Hill's federal habeas corpus action, remanded Hill's case to this court. The Sixth Circuit has noted that retroactivity applies to a rule that eliminates the State's power to execute the mentally retarded. Unlike strictly procedural rules, new rules of substantive criminal law are presumptively retroactive. Under the particular circumstances, the retroactivity is said to apply to cases under collateral review by virtue of the habeas corpus statute, 28 U.S.C. Section 2254. See *In re Holliday*, (2003 11th Cir.) 331 F.3d 1169.

[3] In the *Atkins case*, the issue of mental retardation was remanded to the Virginia state court to determine whether one Daryl Renard *Atkins* was so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus disfavoring the death penalty. In ordering a remand, the High Court observed that not all who claim to be mentally retarded would fall into the protected class of offenders. Unlike the State of Ohio, the Commonwealth of Virginia provides for jury trial on the issue of mental retardation. Atkins, himself, was unable to prevail on his claim of mental retardation, the jury's verdict of August 5, 2005 reciting that "WE, THE JURY, unanimously find that the Defendant has not proven by a preponderance of the evidence that he is Mentally Retarded."

II. GUIDELINES OF THE OHIO SUPREME COURT FOR THE CONDUCT OF AN *ATKINS* HEARING

In the case *sub judice,* this court has conducted an *Atkins* hearing under guidelines and standards established by the Ohio Supreme Court in *State v. Lott.* The salient features of an *Atkins* hearing in Ohio, in regard to death row prisoners (that is to say, defendants whose cases have **already been tried before** *Atkins* was decided) are as follows:

- Clinical definitions of mental retardation, as defined by the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA) provide the standard for evaluating an individual's claim of mental retardation. The term mental retardation, then, has a forensic definition, with scientific components.[4]

- Procedures for post conviction relief set forth in the Ohio Revised Code (Section 2953.21, et seq.) provide the statutory framework for the conduct of such hearings for defendants already facing the penalty of death.

- "[A] trial court's ruling on mental retardation should be conducted in a manner comparable to a ruling on competency... ."[5]

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[4] Both the AAMR and the 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. *Atkins* at footnote 3. *Lott* at 305.

[5] The analogy to competency issues implicitly invokes Chapter 2945 of the Revised Code for both classes of defendants—those already convicted and those yet to be tried. *Lott* refers to R.C. 2945.37(G) at para. 21 of the opinion. See also para. 25. For new cases, the hearing would be staged before the trial, raising numerous questions, notably: how one deals (if at all) with the underlying facts of the alleged crime. One solution might be to evaluate the facts anecdotally, in that the psychologist would evaluate incident reports—perhaps those about which there was no disagreement. But see *State v. Were*, 2005-Ohio-376, 2005 WL 267671 (1st Dist. Hamilton Cty.), in which the trial judge staged the Atkins hearing between the guilt phase and the penalty phase of the trial. Considering the time involved in developing school records, testing results, and the like, not to mention the matter of expert reports and expert witnesses, this was a remarkable achievement.

- Because *Atkins* recognizes a new constitutional right, the statutory procedures applicable to a second or successor petition (such as herein present) are suspended in favor of 'first petition' consideration, provided the PCR petition is filed within 180 days of December 11, 2002, the date of the *Lott* decision. [6]

- The burden of proof is upon the petitioner to establish mental retardation by a preponderance of the evidence.

- The trial judge, not a jury, shall decide whether the petitioner is mentally retarded. (This is by analogy to competency-to-stand-trial issues, where, in Ohio, the judge, not the jury, renders the decision.)

- The trial court shall adhere to the following procedures: hold a hearing, receive testimony and conduct its own de novo review of the evidence in determining the ultimate issue; rely on professional evaluations of the petitioner's mental status; appoint experts, if necessary; "make written findings and set forth its rationale for finding the defendant mentally retarded or not mentally retarded." *Lott*, supra, 97 Ohio St.3d at 306.

III. MENTAL RETARDATION—THE FORENSIC DEFINITION

The definitions of mental retardation are gleaned from the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA). These associations define mental retardation as follows:

1. Significantly subaverage intellectual functioning.

[6] This is a critical distinction. O.R.C. Section 2953.23 (A)(1)(b)(2) relating to second or successor petitions and retroactive application of newly recognized federal constitutional rights, establishes a "clear and convincing" threshold to trigger post conviction relief, whereas first petition consideration invokes a preponderance-of-the-evidence test. This divergence from the statutory mandate is the subject of Justice Cook's partial dissent in *Lott*, supra, 97 Ohio St.3d at 308.

2. Significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction; and

3. Onset before the age of 18.

As noted by the United States Supreme Court:

> The American Association of Mental Retardation (AAMR) defines mental retardation as follows: Mental retardation refers to substantial limitations in **present functioning.** It is characterized by significantly sub-average intellectual functioning, **existing concurrently** with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18. [Citing] Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).
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> The American Psychiatric Association's definition is similar: The essential feature of Mental Retardation is significantly sub-average general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self- care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). **The onset must occur before age 18 years** (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system. [Citing] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. Id. at 42-43.
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> The above cited in *Atkins v. Virginia*, 536 U.S. 304, footnote 3. (Emphasis in bold added.)

IV. PROCEDURAL HISTORY, MOTION PRACTICE AND MISCELLANEOUS EVENTS

Considerable motion practice has preceded the actual hearing on the merits of this Atkins claim. Much of the pre-hearing motion practice has been addressed in this court's

Judgment Entry of March 19, 2004, and a second Judgment Entry of November 8, 2004. It will be helpful to revisit some of these procedural rulings together with a number of miscellaneous events, because of their potential relevance to Petitioner's adaptive skills.

A. Procedural History of Recent Collateral Litigation

When *Atkins* was decided, Danny Lee Hill was in the midst of pursuing federal habeas corpus as a State prisoner. 28 U.S.C. Section 2254. The United States District Court (N.D. Ohio) denied the petition, from which a direct appeal was prosecuted to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit remanded the case to the federal district court, instructing the district court to dismiss the *Atkins* claim in favor of exhausting state remedies. Establishing a timeline for a state filing, the court of appeals made reference to a "mixed petition problem," concluding that the petitioner's 'mixed claims' warranted a stay of the federal petition, pending the exhaustion of state action of the *Atkins* claim.[7] In November of 2002, and pursuant to the order of the Sixth Circuit, Hill's attorneys timely filed various papers and petitions in the Court of Common Pleas of Trumbull County.[8] Because the United States Supreme Court left it to the States to develop procedures for the resolution of this capital jurisprudence issue, the parties awaited the decision in *State v. Lott*, 97 Ohio St.3d 303. *Lott*

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[7] The mixed petition problem relates to a collateral attack involving an issue raised for the first time in the federal proceeding (in this instance the unexhausted Atkins claim) mixed with a claim previously exhausted in state court. The exhausted claim in this case relates to the claim of a coerced confession. That issue remains in federal court suspense, pending the petitioner's exhaustion of his Atkins claim in state court. The federal court of appeals had the statutory option of dismissing the writ of habeas corpus entirely, but refused to do so, stating "Hill's confession raises a serious question." 300 F.3d at 682. The confession issue is not before this Court of Common Pleas.

[8] Within the time allotted by the 6th Circuit, the petitioner filed papers on November 6, 2002: "Petitioner Hill's Notice of Intent to Comply With Federal Court Holding..[etc.]... .;" and "Petitioner Hill's Motion for Appointment of Counsel..[etc.]... ." On November 27, 2002, the Ohio Public Defender filed "Petition to Vacate Danny Hill's Death Sentence Pursuant to *Atkins v. Virginia*."

was decided December 11, 2002. On January 17, 2003, Hill's attorneys filed an amended petition invoking both the *Atkins* and *Lott* cases, as well as Ohio Revised Code § 2953.21.[9]

From time to time during the first half of 2003, the Court of Common Pleas, (the Honorable Andrew D. Logan, Administrative Judge), conducted various scheduling conferences and issued a number of procedural rulings, withholding decisions on certain issues. In the meantime, in response to a motion for recusal, Judge Logan entered an order on June 19, 2003, announcing that all of the Judges of the Trumbull County Court of Common Pleas were recusing themselves in order to avoid even the appearance of impropriety that might arise from any relationships between the deceased murder victim's family and the judicial system of Trumbull County.[10] Following a status conference on August 13, 2003, the undersigned judge, commissioned to hear this case, ordered that all issues previously addressed be presented anew, inasmuch as the final procedures for conducting an *Atkins* hearing had not been settled.

B. Procedural History of the Underlying Case

Danny Lee Hill was tried before a three-judge panel in the Trumbull County Court of Common Pleas in January/February, 1986 for the torture and murder of Raymond Fife. Hill was found guilty of kidnapping, rape, aggravated arson, felonious sexual penetration, and aggravated murder with specifications. Following the mitigation phase of the trial, the court sentenced Hill to a term of years (10 to 25) for both aggravated arson and kidnapping; life

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[9] The Public Defender has expressed some doubt as to which post conviction relief statute should apply: R.C. §2953.21 or .23. For purposes of applying the burden of proof rule, the answer is clear that "preponderance of the evidence" is the applicable test, as opposed to the "clear and convincing evidence" test enunciated in §2953.23, relating to successive petitions generally. The logic is that *Atkins* recognizes a new constitutional protection; and, in any event, this is the rule laid down by the Ohio Supreme Court in *Lott.*

[10] Mrs. Miriam Fife, the mother of the murder victim is currently employed as the courtroom advocate for the Victim/Witness Division of the Trumbull County Prosecutor's Office. She therefore has reason to be in contact

imprisonment for rape and felonious sexual penetration; and the sentence of death for aggravated murder with specifications.

The Ohio Court of Appeals affirmed Hill's conviction.[11] (11th Dist. Case Nos. 3720, 3745, 1989 Ohio App.LEXIS 4462.) In turn, that judgment of the Court of Appeals was affirmed by the Ohio Supreme Court. *State v. Hill*, 64 Ohio St.3d 313 (1992). The Supreme Court of the United States denied *certiorari.* 507 U.S. 1007 (1992).

Following the exhaustion of direct appeals, Hill embarked on collateral petition and motion practice, first in state courts and then in federal courts. While challenging his conviction in collateral proceedings before the U.S. Court of Appeals in 2002, the U.S. Supreme Court decided *Atkins v. Virginia.*

C. The Petitioner's Motion Practice on his Atkins Claim

Of the various and sundry motions filed by the Petitioner, most have been resolved to his satisfaction. However, there are four in number that bear close attention. They are: first, a motion to void the death sentence under res judicata (the doctrine of issue preclusion); second, a motion to fix the time frame (and limit the evidence for the determination of MR) to the time-period for both the crime and the trial; third, the motion to convene a jury as the fact finder; and, fourth, the appointment by this court of a third expert to examine the Petitioner.

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with the judicial system of the county; she is in and about the courthouse frequently in connection with her official duties.

[11] The Ohio Constitution was to be later amended in 1994, thereby eliminating direct appeals to intermediate appellate courts in capital cases, in favor of appeals "as a matter of right" from the trial court directly to the Supreme Court of Ohio. Ohio Const. Article IV, Sec.2. This provision applies to capital crimes committed on and after January 1, 1995. The Ohio Court of Appeals, therefore, retains appellate jurisdiction of this case. It also retains jurisdiction of collateral attacks upon all criminal convictions, including those in capital cases where the offense date is after 1-1-95.

1. **Motion to void the death sentence**. The task before this court is to apply the substantive law of *Atkins*, within the framework of procedural due process outlined in *Lott*, in order to determine whether Danny Lee Hill is "mentally retarded" for purposes of escaping execution.[12] The petitioner's contention that his death sentence should be declared void is, in effect, a request for declaratory judgment that he is "mentally retarded." Because one of the issues in the underlying case related to the claim of mental retardation of the petitioner, and, further, since appellate review of his conviction and sentence alluded to the defense of mental retardation, the petitioner claims that mental retardation is a "proven fact." As such, the petitioner claims "that the State of Ohio is barred by the doctrine of collateral estoppel from any attempt to relitigate the proven fact" of his mental retardation. The history of this murder case does include references to Hill's claim of mental retardation, and the corresponding judicial commentary of his deficient mental aptitude; but that issue is in a context different from "mental retardation" of the *Atkins* variety. For purposes of analysis, **MR**, or mental retardation in quotes, will be descriptive of a condition in the context of Eighth Amendment/*Atkins* substantive constitutional law. The petitioner's earlier claims of mental retardation (during the pre-trial and trial phases of the underlying case) related to voluntariness of statements, waiver of counsel at an investigatory stage, and waiver of *Miranda* rights, all of this to have been later weighed against the backdrop of a specific finding by the Ohio Supreme Court that the "defendant's mental aptitude did not undercut" the voluntariness of his statements, or the intelligence of

[12] The term "mental retardation" is used in quotes to signify a term of art in the context of *Atkins v. Virginia* and the Eighth Amendment's proscription against cruel and unusual punishment. See *Lott*, 97 Ohio St.3d at 304.

his waivers. 64 Ohio St.3d at 318. It is true, also, that the Ohio Supreme Court, in addressing the statutory mitigating factors of R.C. §2929.04, stated: "[w]e find that defendant's mental retardation is a possible mitigating factor." 64 Ohio St.3d at 336. Referring to *Penry v. Lynaugh* (1989) 492 U.S. 392, the Ohio Supreme Court acknowledged the existence of various levels of mental retardation, and then went on to find "a very tenuous relationship between the acts he [Danny Lee Hill] committed and his level of mental retardation."[13] The Ohio Supreme Court concluded beyond a reasonable doubt that the possible mitigating factor of mental retardation was outweighed by the aggravating factors; and further that the death sentence was neither excessive nor disproportionate.

In arguing for collateral estoppel, the petitioner is invoking what is now termed the doctrine of issue preclusion.

> The doctrine of **issue preclusion**, also known as collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different." Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd. (1998), 81 Ohio St.3d 392, 395, 692 N.E.2d 140; Norwood v. McDonald (1943), 142 Ohio St. 299, 27 O.O. 240, 52 N.E.2d 67, paragraph three of the syllabus. Consequently, collateral estoppel prevents parties from relitigating in a subsequent case facts and issues that were fully litigated in a previous case. State ex rel. Shemo v. Mayfield Hts. (2002), 95 Ohio St.3d 59, 64, 765 N.E.2d 345. (Emphasis added.)
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> State ex rel. Stacy v. Batavia Local School Dist. Bd. of Ed. (2002) 97 Ohio St. 3d 269

[13] This observation by the Ohio Supreme Court should not be viewed as an adoption of the so-called "nexus test," a test condemned by the U.S. Supreme Court. The nexus test required a showing that the underlying facts of the capital conviction be connected to (or be the product of) mental retardation, in order for the MR defense to be validated. On the other hand, the rejection of the nexus test would not prevent a fact-finder from considering the probative merit of the facts of the crime, whether those facts can best be understood in the context of (or as the product of) MR, or otherwise. The nexus test loses constitutional validity because it renders an MR diagnosis inoperative unless supported by the peculiar facts of the case. See further discussion, *infra*.

And see State v. Bey (1999), 85 Ohio St.3d 487, 491:

> Bey is collaterally estopped from relitigating the issue of whether the evidence admitted at the Mihas trial was admitted in error because this issue was already fully and finally litigated by the same parties involved in this case - the state and Bey. State v. Bryant-Bey, supra. See Thompson v. Wing (1994), 70 Ohio St.3d 176, 183, 637 N.E.2d 917, 923 ("Collateral estoppel **[issue preclusion]** prevents parties * * * from relitigating facts and issues in a subsequent suit that were fully litigated in a prior suit."); Scholler v. Scholler (1984), 10 Ohio St.3d 98, 10 OBR 426, 462 N.E.2d 158, paragraph three of the syllabus; see, also, Ashe v. Swenson (1970), 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469, 475, cited with approval in State v. Lovejoy (1997), 79 Ohio St.3d 440, 452-453, 683 N.E.2d 1112, 1121 (establishing that collateral estoppel is relevant in criminal cases). (The preceding parentheses are the Supreme Court's.)

Issue preclusion, if applicable here, could just as easily be argued in favor of the State; for in every context in which he was evaluated at trial and through the direct appellate process, the petitioner's acknowledged deficient mental aptitude did not profoundly interfere with the outcome of the ultimate judicial process. When viewed in this light, the petitioner would be reasonable in asserting that the issue of MR has not been litigated.

There are additional reasons that prevent the application of issue preclusion, not the least of which is that MR has constitutional dimensions and constitutional imperatives. The MR makeup, the precise definitional standard, the constitutional fundamentals—these are all in a context different from the myriad situations in which mental retardation then and even now drives the resolution of issues other than the Eighth Amendment.[14] In essence, then, MR has

[14] In remanding *Atkins* back to the Virginia Supreme Court, Justice Stevens noted that the Commonwealth of Virginia disputes the MR claim of that defendant. Justice Stevens added: "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." 536 U.S. at 317

been scientifically, psychologically, and artfully (in the legal sense) defined in a fresh light. Plainly, for Hill, at least, the MR issue is being litigated at this time for the first time. "*Atkins* established the **new standard** for mental retardation." (Emphasis added.) *Lott,* 97 Ohio St.3d at 306. [15] Here is what the 6th Circuit had to say in remanding Hill's habeas petition to the district court for referral to state court:

> The Supreme Court's decision to return Atkins's case to state courts suggests that we should return Hill's Eighth Amendment retardation claim to the state for further proceedings. Here, as in Atkins, the state of Ohio has not formally conceded that the petitioner is retarded. Though Ohio courts reviewing his case have concluded that Danny Hill is retarded, see, e.g., Hill, 595 N.E.2d at 901, and voluminous expert testimony supported this conclusion, J.A. at 3264-67, 3332-35, 3379-80, Hill's retardation claim has not been exhausted or conceded. Ohio should have the opportunity to develop its own procedures for determining whether a particular claimant is retarded and ineligible for death. We note that, when discussing retardation in Atkins, the Supreme Court cited with approval psychologists' and psychiatrists' **"clinical definitions of mental retardation,"** and presumably expected that states will adhere to these clinically accepted definitions when evaluating an individual's claim to be retarded. See 122 S.Ct. at 2245 n.3, 2250-2251. (Emphasis added in bold type.)
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> 300 F.3d at 682

And, in a different context (that relating to the issue of a coerced confession), the 6th Circuit, in the same opinion, had this to say about Hill being retarded.

> According to the record, Hill first came to the attention of police when he inquired about a reward offered for information on Raymond Fife's death. Questioned twice, he consistently denied any involvement in the killing. Then his uncle was assigned to the case. After being brought to the station again and left alone with his uncle for a few minutes, Danny Hill made an abrupt about-face and confessed to involvement in the crime. In evaluating these events, Danny Hill's previous interactions with his uncle are important: twice before, when Hill was in police custody, his uncle struck him when he refused to talk. Even accepting his uncle's version of events, in which Detective Hill simply told Danny Hill he

[15] Henceforth reference to *State v Lott* will be thus: *Lott* at [pg].

> believed he was involved in the killing, this episode raises a serious question of coercion. That any officer had struck a suspect is troubling; of special concern here is that Danny Hill was struck by an officer who was also a close family member.
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> A suspect's "mental condition is surely relevant to an individual's susceptibility to police coercion." Colorado v. Connelly, 479 U.S. 157, 165 (1986). State courts, including the Ohio Supreme Court, have clearly stated that Hill is retarded. See Hill, 595 N.E.2d at 901. The retarded have, "by definition . . . diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." Atkins, 122 S.Ct. at 2250. See also Morgan Cloud et al., Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects, 69 U. Chi. L. Rev. 495, 511-12 (2002) (noting that the retarded are "unusually susceptible to the perceived wishes of authority figures. . . ," have "a generalized desire to please . . . ," "are often unable to discern when they are in an adversarial situation . . . ," and "have difficulty distinguishing between the fact and the appearance of friendliness"); Welsh S. White, What is an Involuntary Confession Now?, 50 Rutgers L. Rev. 2001, 2044 (1998) (stating there is "ample support for [the] conclusion that mentally handicapped suspects are 'especially vulnerable to the pressures of accusatorial interrogation'.").
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> 300 F.3d at 682-683

The Ohio Supreme Court did address the confession in several different contexts, including the involvement of Petitioner's uncle. The Court concluded there were no constitutional impediments to admissibility. That issue is not before this court and would appear to be res judicata, at least in state court proceedings. Evidently, the Sixth Circuit will re-visit this issue. From the standpoint of an Atkins hearing, it must be noted that a diagnosis of MR does not exculpate a criminal from conviction and punishment. An MR diagnosis insulates against capital punishment. Justice Stevens rendered it abundantly clear in his introductory remarks to the *Atkins* case that MR is an escape hatch only from the capital penalty This court is not prepared to say whether "clinical definitions of mental retardation," are to be applied in resolving confession issues and other issues. What seems

clear, however, is that in the context of the 8th Amendment, the Supreme Court of the United States has suggested a forensic definition in determining the existence of mental retardation; further, that the 6th Circuit has concluded that Danny Lee Hill's mental retardation claim has not been exhausted and has not been conceded by the State.

2. **Motion to fix the time frame.** The Petitioner has sought to limit the hearing and the evidence to a particular time frame, that being the time-period of the crimes and of the trial itself. In fact, however, the Petitioner would include as evidence periods of time well before the crimes occurred. An additional inconsistency in Petitioner's time-frame-argument is his effort to suppress entirely the facts of the underlying crimes, even though he seeks to fix the inspection of his mental acuity to the time period of the capital murder. However, both the logic and the syntax of the cases in Ohio and elsewhere favor a totality-of-the-evidence test for an examination of the **current** condition of the prisoner. Nevertheless, by definition, a retrospective analysis of a psychological profile is necessary in order to conclude the diagnosis. This is so, because the manifestations of MR (or better phrased, its onset) must occur before age 18.

It would seem that time frame issues are best resolved on a case-by-case basis, by taking into account the available evidence under the particular facts of each case. For example, the capital defendant in the bellwether decision of *Atkins v. Virginia*, was convicted of abduction, armed robbery, and capital murder committed in August 1996. The high court issued its opinion in June 2002. The time span between the date of the crime and the date of the Supreme Court decision is relatively narrow, but even here the analysis must look further back for onset before age 18. The implication of *Atkins*—arguably the direct

holding—is "that death is not a suitable punishment for a mentally retarded criminal." 536 U.S. at 321; *viz*., for a criminal who is ***now*** mentally retarded, **since before age 18**. The national consensus, about which Justice Stevens wrote in *Atkins v. Virginia*, and which the high court translated into Eighth Amendment jurisprudence, relates to a "**range** of mentally retarded offenders." (Emphasis added.) 536 U.S. at 348. Justice Stevens was referring to offenders who meet the clinical definition of mental retardation—a precise definition satisfying three specific criteria. A capital offender who, for one reason or another, does not fall within that definition, is not **now** "so impaired as to fall within the range" of those about whom there is a national consensus. All of which is to say that the judicial inquiry is in the present tense, with a look back to onset before age 18. In issuing its decision, the Court in *Atkins* is incorporating clinical definitions to define the protected range.

On the other hand, Gregory Lott, of *State v. Lott*, committed aggravated murder in the late 1980s. The Ohio Supreme Court decided his *Atkins* claim case in 2002. The opinion is replete with syntax in the present tense. The issue is whether Lott ***is*** mentally retarded. Cases in other jurisdictions support the proposition that the correct inquiry is whether the petitioner *is or is not now mentally retarded.*[16] Given the manifestation rule, any dispute relating to time frame may be a distinction without a difference, for, whatever the available evidence may be, MR is defined in three critical parts, including a time frame before age 18. It seems to this court that the best way to explore any diagnosis of MR is by applying the totality-of-the-evidence test. Any diagnosis is the product of the *available* probative

[16] See *State ex rel. Edwards v Cain*, (Louisiana Sup Ct. 2003) 841 So.2d 768, 2003 WL 142041. *Clark v. State* (Alabama Ct. of Crim. Appeals 2003) 2003 WL 559401. See also *United States v. Webster*, 421 F. 3d 308 (5th Cir. 2005), implicitly following a totality-of-the-evidence test, including evaluating present anecdotal evidence.

evidence. Typically, this evidence is drawn from various time frames.[17] In the final analysis, two observations seem to support the totality-of-the-evidence test: first, it is for the forensic psychologists to determine whether they are able to draw conclusions from available evidence, and are able professionally to consider whether particular evidence is probative, based upon time lines and otherwise. In other words, it is for the experts to evaluate a transparent record, as opposed to an opaque one; and, second, in the absence of meaningful probative evidence of a head injury suffered after the age of 18, the forensic experts fairly well agree that MR, (that is, mental retardation forensically defined by its three parts) is not likely to change—up or down—with age. What the Petitioner has sought is a sanitized record, a record devoid of recent evidence and considerable parts of the past—a record both selective and restrictive.

3. <u>Motion to convene a jury as the Atkins fact-finder</u>. The petitioner claims entitlement to a jury on the issue of mental retardation. This court is being asked to reject outright the specific directive of the Ohio Supreme Court in *Lott.* The United States Supreme Court has left it to the several States to fashion remedies for resolving MR claims—those retrospectively, as in the instant case, and those for capital crime trials in the future. Under the ruling of the Ohio Supreme Court, neither situation allows for a jury trial in resolving the limited issue of mental retardation in the Eighth Amendment context. While it is correct that mental retardation may be a relevant issue in other contexts—some resolved by the judge (for example, in a suppression issue on the voluntariness of a confession), and some

[17] Sometimes, the courts refer to MR is the past tense, holding, for example, that a defendant was or was not mentally retarded. See, for example, *State v. Were*, 2005-Ohio-376 (Hamilton Cty, C.A.1). Yet even here, the courts consider evidence from a wide-ranging time frame, even up to the present.

resolved by the jury (for example, in the mitigation phase of a capital conviction)—the Supreme Court of Ohio has ruled that the procedures for post conviction relief outlined in R.C. §2953.21 *et seq*. provide a "suitable statutory framework for reviewing" MR claims. The Court has likened the *Atkins* inquiry to a ruling on competency, in which the judge, not the jury, decides the issue. *Lott* at 306. Thus, whether analogized to postconviction relief issues or competency claims—in neither event (under the Ohio statutes) is the petitioner entitled to a jury determination. Furthermore, under the prospective application of *Atkins* (*viz.*, for crimes committed post-*Atkins*) the issue of mental retardation is visited and re-visited in layers: first, as a judge-driven issue for MR in an Eighth Amendment setting; secondly, in regard to suppression issues (also for the judge); and thirdly for the jury in its consideration of mitigation. In each instance, a defendant is at liberty to cast mental retardation in a different light. When the topic of mental retardation is viewed in this tapestry as a whole, it becomes abundantly clear that the analogy of the competency issue to an *Atkins* claim makes perfectly good sense. Indeed, even Justice Thurgood Marshall is on record emphatically favoring judges over juries in deciding issues of competency—particularly, and especially as they involve issues of mental retardation.[18]

Recently, the United States Supreme Court, in a per curiam opinion, reversed and remanded a decision of the U.S. Court of Appeals for the 9th Circuit mandating a jury trial

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[18] See *White v. Estelle* (1983) 459 U.S. 1118, Justice Marshall dissenting from the Court's denial of certiorari to the 5th Circuit. The case involved a Texas State trial judge, who, pursuant to the Texas statutory scheme, impaneled a jury to determine the defendant's competency to stand trial on a charge of capital murder. The Justice stated: **"I have little doubt that a judge ordinarily is better qualified to resolve the constitutional question on the basis of whatever facts are found."** 459 U.S.at 1125. The defendant was evaluated in the context of borderline mental retardation. The jury found him competent to stand trial. The defendant was then tried and convicted by another jury. Justice Marshall also observed that a defendant's mental condition **"must be considered in the context of the totality of the circumstances."** *Id* at 1125 (Emphasis in bold).

on Atkins issues. Remarking that Arizona "had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition," the High Court held that the 9th Circuit "exceeded its limited authority on habeas review…." [19] Yet the Supreme Court left the door open to such a challenge in a proper procedural setting, presumably a proceeding on direct appeal, as opposed to Habeas Corpus. However, even the United States Congress, in its chapter dealing with federal capital prosecutions, provides for judge determination of MR, as opposed to that of a jury.[20]

Therefore, in accordance with the directives of the Ohio Supreme Court, this court has reviewed the Petitioner's Atkins claim within the framework of the Ohio statutes dealing with post conviction relief—without a jury.

4. Motion to Limit the Appointment of Experts. During the pre-hearing stages of this case, the Petitioner argued that the trial court should not "intrude upon the adversarial process by appointing its own expert. The context within which the petitioner's argument is framed is inaccurate in two respects: First, the Ohio Supreme Court, responding to the directives of the United States Supreme Court, established the procedures for trial court hearings on *Atkins* claims. In doing so, our State high court observed, "the trial court's ruling on mental retardation should be conducted in a manner comparable to a ruling on competency (i.e., the judge not the jury, decides the issue.)" *Lott* at 306. But, there is more

[19] See Schirio v. Smith, __U.S.__, 2005 WL 2614879.

[20] Chapter 228, Death Sentence, 18 U.S.C. 3591 through 3598, especially 3596(c). For an application of the statute, see United States v. Webster, 421 F.3d 308 (5th Cir. 2005). Notably these statutes pre-date Atkins by several years.

to this observation than the issue of judge versus jury. The Ohio Supreme Court established substantive standards and procedural guidelines "in determining whether convicted defendants facing the death penalty are mentally retarded." *Id.*, at 306. It did so "in the absence of a statutory framework to determine mental retardation." By comparing the process favorably to rulings on competency, the Ohio Supreme Court invoked the statutory process contained in Chapter 2945 of the Ohio Revised Code. Some of these statutory provisions include mental retardation in the pre-*Atkins* context, which is to say in other than Eighth Amendment settings.[21] But to say that trial judges are intruding into the adversary process by appointing examiners is to miss the role of the court in overseeing resolution of the full array of pre-trial mental health issues in criminal jurisprudence—including issues of competency, sanity, mental retardation, and even "battered woman syndrome." Ordinarily it is the court and the court alone, which appoints examiners, irrespective of the number of examiners.[22] This is explicit in the statutory scheme of R.C. §§2945.37; .371; and .38. Thus, the argument that the court is intruding into the adversary process, when it appoints a third examiner, has no more traction than when the court appoints only one examiner. Second, when the trial court appoints an examiner under the statutory scheme, the

[21] *Atkins* has not eliminated mental retardation in settings other than Eighth Amendment jurisprudence. *Atkins* has merely added another a new constitutional dimension. Some of these issues of mental retardation are to be resolved by judges; for example: on issues of voluntariness of confessions and Miranda warnings, as well as in consent situations in warrantless search cases—all of these in the pre-trial motion-to-suppress-stage, in which the mental retardation issue increases the judicial scrutiny of both intelligent waiver and/or intimidation issues. Included in this pre-trial stage, henceforth in future cases would be the motion practice of the *Atkins* variety. Other issues of mental retardation may come into play for the jury during the during both guilt and penalty phases of capital jurisprudence. See R.C. §2929.04, criteria for imposing death or imprisonment for a capital offense. Eventually, appellate guidance will assist the trial court in its application of the full range of mental retardation issues.

[22] The situation is rare when a defendant is able to afford his or her own examiner. And the State is ordinarily powerless to examine the mental health of a defendant, in the absence of a court order that the defendant submit to an examination.

psychiatrist or psychologist, as the case may be, is not necessarily the court's witness. R.C.§ 2945.371 (as amended 2-20-2002) contemplates a variety of situations occurring in which one, two, **three or more examiners** are appointed by the court[23]. In the experience of this court, the more typical situation occurs when the trial court appoints only one expert, whose opinion is generally accepted and whose written report is stipulated and accepted as record-evidence by both the State and the defendant. But not all situations are typical, as the State has enumerated in its brief.[24] For the more serious charges of homicide and attempted homicide the appointment of multiple examiners is not out of the ordinary and rarely opposed. Notably R.C. 2945.371, prior to the amendments of 2-20-2002, provided for "one or more, but not more than three evaluations of the defendant's mental condition." This is now changed to "one or more," without reference to a cap. The inference is obvious: more than three examiners may be appointed, although at some point the matter of discretion comes into play. This statutory scheme does not change the nature of the proceeding from adversarial to inquisitional.

This court has rejected the characterization that a third expert is "the court's own inquisitional agent." See "Petitioner's Motion Regarding Procedural and Substantive

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[23] "Examiner" is a term of art defined as a psychiatrist or licensed clinical psychologist; except that "[f]or purposes of a separate mental retardation evaluation," [as opposed to issues of competency and sanity] the law requires a licensed clinical psychologist. R.C. §2945.37(A)(2)(b).

[24] In response this court's request for additional briefs on this issue, the State pointed to several instances in which three or even more than three mental health professionals have testified on competency/sanity issues. See, e.g., *State v. Carter* (2000), 89 Ohio St3d 593, a capital case tried in Trumbull County, involving three examiners. Also, four examiners were employed in *State v. Jeffrey Hill* (1995) 73 Ohio St.3d 433, 446-47, sentenced to death for the aggravated murder of his mother in Hamilton County. Other examples were cited in Cuyahoga County. See "State's Brief Regarding the Number and Source of Mental Health Examiners," filed December 12, 2003. Also, see *State v. Yusef DeJarnette*, CR 428306, a stipulated verdict of not guilty by reason of insanity on 12-02-2003, on a four count attempted aggravated murder case in which three examiners were appointed by the trial judge.

Matters ...[etc] at p.23. Having established that the appointment of three mental health experts is not only permissible, but also fairly common in homicide cases, the question was whether this court should exercise its discretion and appoint a third examiner. Several reasons favored the appointment of a third examiner—an independent one that would abide no allegiance to either side (whether in fact or by appearance). First, *Atkins* hearings are cases of first impression—involving as they do a new constitutional right. Secondly, MR in its classic sense is a term of art—a tripartite test, different from, though related to, mental retardation in its historical/legal sense. Mental retardation has its ranges. Not all who claim to be mentally retarded are said to be protected by Eighth Amendment jurisprudence. Thirdly, because this is a death penalty case, a diligent approach is important to the State and to the Petitioner. In the final analysis, whether a death row defendant should be spared the capital penalty is a decision for the court, subject to review by the higher courts. In view of the magnitude of the judicial burden, the appointment of a third expert was deemed to be appropriate. But, in order to avoid the appearance of any impropriety in the selection process, this court designated Gerald L Heinbaugh, Executive Director of the Forensic Psychiatric Center of Northeast Ohio Inc. (FPCNO) of Youngstown to select the third examiner, a psychologist who satisfied the legal definition set forth in R.C. §2945.37(A)(2)(b).

Mr. Heinbaugh was instructed to insure that the psychologist selected have had no dealings whatsoever with the victim's family. He selected Dr. Nancy Huntsman as the third expert. As it developed, this court agreed to compensate an additional expert to testify in behalf of the Petitioner—Dr. Sparrow, a distinguished academician. Dr. Sparrow was

called in rebuttal, prompting the State, in surrebuttal, to re-call Dr. Olley and to call Dr. Hancock.

D. Miscellaneous Events Surrounding the Atkins Hearing

The staging of this Atkins hearing to a conclusion for Petitioner Danny Lee Hill has been a rocky road of disruptions, and unpredictable events. Yet, a complete record has been generated, together with the testimony of an impressive array of forensic experts both for and against the proposition that the Petitioner is mentally retarded.

Over the years, beginning with the original trial of his case, in early 1986, Danny Lee Hill has been afforded many different attorneys. The full panoply of counsel has been recited in a judgment entry of this court dated November 8, 2004. Eventually, Hill filed a federal habeas corpus action in the Northern District of Ohio with the assistance of yet another appointed counsel, who withdrew when the district court denied the petition on its merits. With the dismissal of federal habeas corpus by the district judge in the Northern District of Ohio, the Ohio Public Defender in Columbus (OPD) entered an appearance in order to prosecute an appeal to the United States Court of Appeals for the 6th Circuit in Cincinnati. Two OPD attorneys began working on the appeal but withdrew for what is said to be an "impasse" with Hill. The 6th Circuit appointed Cincinnati private counsel from the firm of Dinsmore & Shoal. In the meantime, the Supreme Court decided the *Atkins* case, prompting the 6th Circuit to remand the petition to the district court, in turn, with instructions to refer the matter to state court on the *Atkins* claim. Because the 6th Circuit set a deadline for the filing of the Atkins

claim in state court, the attorneys from Dinsmore and Shoal (Mark A. Vander Laan, Esquire) filed preliminary notice papers with the Clerk of the Trumbull County Court of Common Pleas on November 6, 2002, asking the court to appoint new counsel for Hill. Gregory Meyers, of the Columbus office of OPD eventually entered an appearance. Meyers devotes 100% of his professional career to capital jurisprudence. He is a senior attorney at OPD with various supervisory titles, and he is fully certified. He is a prodigious practitioner.

With the beginning of the new year of 2003, the attorney-client situation for Danny Lee Hill seemed to be settled with Public Defender Meyers fully in charge.[25] In the meantime, Judge Andrew Logan was attending to procedural housekeeping issues surrounding *Atkins* hearings, and Meyers, for his client, was authoring extensive motion practice.

In early May, 2003, the attorney-client situation again came into question with the filing by Meyers of two pleadings: the first, a so-called "Notification of Petitioner's Desire for New Counsel;" and the second, a "Motion to Remove the Ohio Public Defender and Appoint Counsel From the Private Bar." Also, Danny Lee Hill, *pro se*, sent a letter to Judge Logan, requesting the dismissal of Gregory Meyers in favor of two local private attorneys: Roger Bauer, Esquire and Maridee Costanzo. At the time, both were certified capital jurisprudence attorneys—Costanzo, 1st chair, and Bauer, 2d chair.

At a hearing in open court on May 22, 2003, at which the Petitioner Danny Hill was present, Judge Logan announced that he had received correspondence directly from the Petitioner, requesting the dismissal of Gregory Meyers in favor of Bauer and Costanzo. The

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[25] Judge Logan entered an order in January excusing local public defenders James Lewis and Lewis's assistant Anthony V. Consoldane, Esquire. Lewis was one the attorneys who represented Danny Lee Hill before the three-judge panel that convicted him. Lewis is now the Director of the Trumbull County Public Defender's Office. This is a branch office of the Ohio Public Defender.

court treated Hill's letter as a motion; and the hearing was held to resolve the issues raised by the Petitioner's request. Critical in the view of Judge Logan was the overarching issue of cashiering one of Ohio's leading experts in capital jurisprudence, in favor of two local lawyers, who had neither the time nor the resources to match the full-time senior state public defender.[26]

Judge Logan conducted a thorough inquiry into the issue of attorney representation. The record of the proceedings indicates that the Petitioner's "*pro se*" document was prepared—in the Petitioner's own words—by "death row legal services." As explained by Attorney Meyers: "[D]eath row services is just jailhouse lawyers literally. Tr. of 5-22-03 at 5.

The Petitioner acknowledged that Meyers has *never* previously represented him at any stage of the case pre-*Atkins*. Meyers was a fresh hand in these proceedings. He is by job description and otherwise independent of the local office of OPD and a superior officer to any assistant public defender with any past connection to Hill. On the other hand, both Attorney Bauer and Attorney Costanzo did have connections with the Trumbull County Public Defender's Office as independent contractors—a connection which should have been troubling to Hill, given his wariness of the local OPD.[27] Attorney Bauer, for himself and his spouse, Attorney Costanzo, agreed to serve as pro bono counsel ***only with the understanding that Attorney Meyers remain on this file as lead counsel.*** This was satisfactory to Hill, who executed a waiver entitled:

"Petitioner Hill's Waiver Of
Any Potential Conflict With Representation
By Attorneys Affiliated with the
Office of The Ohio Public Defender"

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[26]Meyers devotes 100% of his professional practice to capital jurisprudence; and he has done so for many years. On the other hand, Costanzo and Bauer are busy general trial lawyers in private practice—both civil and criminal.

[27] The petitioner is adverse and antagonistic toward his uncle, Morris Hill, an investigator for the local office of OPD. See footnote 4, *infra*.

This document was filed with the Clerk of Courts of Trumbull County on May 22, 2003. Everyone understood that the laboring oar on this file was to be pulled by Meyers. In fact, the entrée of Costanzo and Bauer was contingent on Meyers remaining as lead counsel. In spite of the waivers, thoughtfully, carefully, and deliberately given by the Petitioner and his attorneys,[28] Bauer filed a perfunctory motion to withdraw five months later in October 2003. He sought leave of court to withdraw as counsel for the Petitioner **"for the reason that a conflict of interest exists that will be explained at a later date."** At a hearing staged on November 17, 2003, (which had been scheduled for other purposes) this court conducted its own inquiry on the issue of Roger Bauer's Motion to Withdraw. This court called on Mr. Bauer "to show his hand."[29] Because Mr. Bauer was reluctant to state the reasons supporting a conflict of interest, the court offered to hear his explanation *in camera*, provided that the State and Public DefenderMeyers were in agreement with such a procedure. Both the county prosecutor and the State public defender consented to the procedure; and they both expressed satisfaction with the court's decision to excuse Bauer. Costanzo was not present at the hearing.

During the *in camera* session, Bauer described two situations warranting his departure from the case—both of which were eventually disclosed in open court by the Petitioner himself as well as his attorney Gregory Meyers. The first topic to be disclosed was an unsworn

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[28] Attorney Costanzo did not attend the hearing of May 22, 2003, the date of the waiver affidavit. Thus, she did not countersign the affidavit. She did, however, attend later hearings. Reportedly, she also spoke with Hill on May 22 via cell phone whileMeyers and Bauer were present with Hill and she and Hill agreed to the arrangement. Tr. of 4-15-04, at 12.

[29] See United States v. Illes, (6th Cir.) 906 F.2d 1122, holding that a criminal case defendant dissatisfied with his counsel must in the least offer a reason for dissatisfaction, An attorney seeking permission to withdraw should do the same, so long as the explanation does not offend the confidential nature of the relationship.

"Affidavit" to the Federal Bureau of Investigation in which the Petitioner has accused both his Uncle Morris and the Trumbull County Prosecutor of criminal mischief and misconduct. Bauer advised, *in camera*, that he had developed a friendship with Morris Hill and had become uncomfortable with representing Danny Lee Hill. Evidently, Bauer had only recently come to realize that Danny was making an issue of Morris Hill. For whatever reason, Bauer was evidently ignorant of the confession issue involving Morris Hill, identified by the U.S. Sixth Circuit in its opinion in the federal habeas corpus case. Given the history of Danny's antagonism toward the local office of OPD, especially because his Uncle Morris is now an investigator for that office, Bauer's discomfort, itself, warranted his removal. Furthermore, Bauer's actual involvement in the instant case, beyond his initial recusal motion practice, was *de minimus*. But Bauer's disclosure of his friendship with Morris Hill paled in comparison to the next disclosure. Bauer related that he had recently developed a personal relationship with Connie Jenkins, a rape victim of Danny Lee Hill and a witness for the prosecution in Hill's capital murder trial. Given that disclosure, this court advised Bauer that he was excused from the case. The court would not know the true circumstance of Bauer's entrée into this case until later. That would come during what was a routine status conference scheduled for April 15, 2004.

The hearing of April 15, 2004 was originally scheduled as a housekeeping session to discuss procedures for implementing this court's prior orders surrounding IQ testing and related evidence-gathering on the issue of mental retardation. Instead, the issue of attorney representation once again took center stage.[30] Although Costanzo was expected to attend the

[30] Attorney Bauer was excused from the file in November of 2003, following the *in camera* disclosures.

hearing, she was engaged in a protracted federal criminal RICO trial in Toledo where she was temporarily lodging. Her perfunctory motion to withdraw from the case *sub judice* was actually prepared byMeyers, who also reported that he (Myers) had reached an "intractable impasse" with his client. During the hearing, Meyers disclosed both a remarkable and an incredulous situation in which the *raison d'etre* for Bauer and Costanzo "was to undertake a [separate] path of litigation of Mr. Hill's desire that I [Myers] told them I would not [undertake]. (Tr. of 4-15-04 at 12.). Hill understood that this separate litigation was to explore his "actual innocence." (Tr. of 4-15-04 at 32.) Thus, Hill became upset with Bauer and Costanzo for their failure to pursue a separate legal attack on Hill's conviction.[31]

But there is more to the story. Hill became aware that Bauer was "having an affair with this woman, Connie Jenkins, who was a [rape victim] witness in my case." (Tr.of 4-15-04 at 32.) Hill learned this from an inmate "when I went over to the county jail." Hill stated that the family of the victim of his murder case "used this woman, Connie Jenkins, to get Roger Bauers [sic] off my case. And he fell for it."

At this same hearing, Hill related that a fellow death row inmate suggested that Hill retain Costanzo and Bauer to prove Hill's actual innocence. Thus, in the spring of 2003, Hill embarked on a plan to discharge Meyers in favor of Bauer and Costanzo. The reason was to

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[31] Whether such an attack could be pursued at this time under post conviction relief or federal habeas corpus is not before this court. But two observations are in order: first, innocence is not typically an issue in an Atkins hearing. Rather, the central issue is whether a death row prisoner is forensically mentally retarded and thus constitutionally ineligible for the punishment of death. Thus, the desired tactic would be explored, if at all, in a separate collateral attack; and second, the United Stated Court of Appeals for the 6th Circuit has placed Hill's federal habeas corpus in suspense, pending resolution of the Atkins claim in state court. That federal court of appeals has expressed concern about the confession issue. Whether the claim of innocence can be added to the pending federal action is not before this court of common pleas. In any event, the entrée of Bauer and Costanzo in the instant action, if secretly to file a separate action, was both inappropriate and legally unnecessary.

explore and litigate Danny Lee Hill's claim of innocence—essentially to place the Atkins hearing in a secondary position.

In the spring of 2003, Judge Logan could not know what was behind the series of efforts beginning with the plan to discharge Meyers and ending (temporarily) with the addition of Bauer and Costanzo. Nor, for that matter, could Danny Lee Hill. It was not until the spring of 2004, when a fellow death-row inmate—said by Hill to have had a falling out with Costanzo—delivered to Hill a certain letter from Costanzo. The letter is addressed to Jason Getsy, a death row inmate at Mansfield.[32] The letter contains references to the Nineteenth Century German philosopher Friedrich Nietzsche and a 1960s LSD guru, Carlos Castenada. Costanzo expressed regret over her inability "to send you any more Nazi stuff," a reference said to be deeply troubling to Danny Lee Hill, once he became aware of the letter's entire contents. In the midst of this missive, and wholly out of context in her description and reference to "just little pathetic individuals," Costanzo offered the following:

> If Danny Hill puts his foot down and writes a letter that says I want this woman, he's gonna [sic] get this woman. And Danny Lee Hill should send me a copy of the letter, so that if [Judge] Logan tries to squirm and weasel his way around, I can shove it [deleted ....]. So why don't you go over to his cell and have ol' Danny boy write a letter to Judge Logan. All it says is "I demand that Roger Bauer and Maridee Costanzo be appointed to me" and then make sure you send a copy of the letter to me.

The letter explains the entrée of both Bauer and Costanzo. The Petitioner expressed satisfaction, **at the time** with the departure of both Costanzo and Bauer. His reasons:

[32]Getsy was convicted in Trumbull County of both aggravated murder and attempted aggravated murder in a botched murder-for-hire episode, in which the intended victim's mother was murdered as an eye witness to the break-in and shooting of her son.. See *State v. Getsy*, (1998) 84 Ohio St.3d 180.

- Bauer had struck up a relationship with a rape-victim-witness from Hill's original trial.
- Hill was offended by Costanzo's interest in Nazis; and
- Neither Bauer nor Costanzo had embarked on Hill's "innocence project."

When, in the spring of 2004, the attorney-client situation began to unravel, OPD in Columbus, on the one hand, and the Office of the Trumbull County Prosecutor, on the other hand, had been coordinating mutual testing and other housekeeping measures incident to a full blown Atkins hearing. In the absence of an articulated reason for excusing Meyers, this court simply could not honor the desires of Hill. To allow the discharge of Meyers would leave the Petitioner without counsel—essentially to delay the Atkins effort for at least another year at the trial level and perhaps even to compromise the selection of the experts. The Petitioner had been unable to explain his dissatisfaction with Meyers, beyond the bare claim: "He lied to me." The court inferred that the root of the disaffection was Meyers' refusal to participate in the "innocence project." It is also correct to note that Meyers, himself, has asked to be relieved. However, the court inferred that the request was in compliance with his client's wishes.[33] As an officer of the court, Meyers demonstrated both a focused and a vigorous approach in pursuit of the claim. And through eight days of hearings during the month of October 2004, the Petitioner openly cooperated with his two attorneys: Meyers and his OPD colleague Robert K. Lowe, Esquire.

Under the totality of circumstances, notwithstanding the bizarre cavalcade of events beginning the discharge of Meyers was considered unwarranted and unnecessary:

[33] At one point in the recent proceedings, there was a public disclosure that the Petitioner has just now lodged formal complaints against one or more attorneys with the Disciplinary Counsel.

> To discharge a court-appointed attorney, the defendant must show a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel." State v. Coleman (1988), 37 Ohio St.3d 286, 525 N.E.2d 792, paragraph four of the syllabus. The term of art "actual conflict" refers not to a personality conflict but to a conflict of interest. Strickland v. Washington (1984), 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674, 696. The Sixth Amendment does not guarantee "rapport" or a "**meaningful relationship**" between client and counsel. Morris v. Slappy (1983), 461 U.S. 1, 13-14, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610, 621. (Emphasis added.)
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> *State v. Henness* (1997), 79 Ohio St.3d 53.

The Petitioner, in the course of his many court appearances, was afforded considerable deference in the appointment of counsel. The Petitioner originally expressed a dislike and disdain for counsel from the local office of OPD. Yet, when it suited his own perceived interests, he was more than content to waive any objection to the appointment of Bauer and Costanzo, both affiliated with the local office as independent contractors. On he other hand, his personal differences with OPD at the seat of government in Columbus did not warrant the release of OPD's Senior Trial Counsel Gregory Meyers. The hostility and tension between attorney and client have come and gone, but only rarely have they been patently apparent. Nor has it interfered with counsel's due diligence. This court finds that the on-again-off-again conflict never eroded to the point of rendering the legal services ineffective. As noted in *Henness*, the issue of one's right to effective assistance of counsel can be judged by examining the attorney's due diligence. In that context, Meyers and Lowe have been vigorous. The demands of the Petitioner must be balanced against a rule of reason, taking into account the nature of the case and the rights of the parties. In this case, the moving party is the Petitioner

himself. But in a higher sense, this court is conducting the proceedings at the explicit order of the United States Court of Appeals for the 6th Circuit, and the implicit order of the Ohio Supreme Court, which laid out the ground rules for conducting such a hearing. Against these mandates, this court could not give deference to an unarticulated demand for the discharge of an attorney who is pursuing his duty skillfully and diligently.

It is important to note that there was neither an actual conflict of interest, nor an appearance of a conflict of interest, in regard to the representation of Danny Lee Hill by Gregory Meyers. Factors mandating disqualification would include an actual conflict, such as a prior representation against the same defendant. This is known as primary disqualification. On the other hand, imputed disqualification (also known as vicarious disqualification), can exist when a member of the same law firm has had a prior relationship with an opposing party—thus creating a rebuttable presumption of 'shared confidences.' Such a presumption can be rebutted by facts and circumstances, including the size and structure of the law firm, and the existence of a Chinese wall. See *Kala v. Aluminum Smelting & Refining Company, Inc.* (1998) 81 Ohio St3d 1. But the fact that the OPD office has represented Danny Lee Hill unsuccessfully in the past creates a potential conflict only in a limited sense—such as ineffective assistance of trial and/or appellate counsel. Typically, such issues are tied to waiver and res judicata in PCR petitions. See, for example, *State v. Lentz*, (1994) 70 Ohio St.3d 527. But ineffective assistance of counsel is not an issue in this case.

Furthermore, OPD is an arm of the Ohio Public Defender Commission, a State funded agency. (See Chapter 120 of the Ohio Revised Code.) Vicarious disqualification of

government agencies or departments is to be avoided, since the ability of the government to function would be unreasonably impaired. Thus, the mere appearance of an impropriety is insufficient to disqualify an entire office. *State v. Vidu*, 1998 Ohio App. LEXIS 3390 (8th District). Rules are different in comparing a private law firm to the public defender. *Lentz, supra*, at 530. Cf., *Kala, supra*.

This is an *Atkins* hearing, requiring the litigation of a newly recognized 8th Amendment protection applied retroactively. This is a fresh issue. Gregory Meyers is a senior officer of OPD, with no prior contacts with the Petitioner. No one connected with OPD either locally or in Columbus, has ever been in conflict with the Petitioner. The absence of a "meaningful relationship" between Meyers and the Petitioner is insufficient to permit the termination of the attorney-client relationship. Furthermore, the Petitioner's relationship with his attorneys Meyers and Lowe improved demonstrably, and the parties demonstrated a cooperative professional relationship. It was only at the very last, during the end-stage of the proceeding that the Petitioner boycotted the proceedings. This was during the final argument stage of the hearing. Yes, there were some incidental events, typically prompted by the Petitioner's dissatisfaction with his temporary housing at the penitentiary in Youngstown. And, even though this court permitted Attorney Bauer to withdraw and discharged Costanzo—both at the request of the Petitioner—this was not the end of Costanzo's meddling into the affairs of Danny Lee Hill.

A Howland Police Officer arrested attorney Maridee Costanzo during the early morning hours of March 19, 2005, while she was a passenger in a vehicle operated by a convicted felon.

Costanzo was arrested and eventually indicted by the grand jury of Trumbull County on multiple weapons charges, together with obstruction of justice. This incident led to a federal investigation, culminating in her arrest on an interstate murder scheme. 18 U.S.C. 1958(a): _Use of interstate facilities in the commission of murder-for-hire._ According to the allegations, Maridee Costanzo entered into a contract for the murder of her husband, Attorney Roger Bauer, for the sum of four thousand dollars, of which eleven hundred dollars was actually delivered to the FBI informant. The conversations surrounding these transactions were wire recorded, and Costanzo was eventually to be sentenced to a substantial term of years in a federal penitentiary. [34]

As news of these events was unfolding, drawing considerable media attention, Petitioner Danny Lee Hill expressed agitation during a hearing on March 24, 2005, indicating his awareness of Costanzo's legal difficulties. He explained that Costanzo was supposed to be present on March 23 to testify in his behalf, as a witness, and that her failure to attend was preventing him from explaining details leading to the entrée of Meyers, Costanzo and Bauer as his attorneys—why he (Danny Lee Hill) consented to having Meyers on board, and how Meyers had been violating Danny Lee Hill's constitutional rights. According to the Petitioner, he had recently received at least one letter from Costanzo, though she had been removed from the case many months ago.

[34] Costanzo was sentenced to a term of 96 months, plus 3 years of supervised release in a judgment entry filed 8-9-2005 in U.S. District Court (N.D. OH. Case No. 4:05CR00279-001). On 2-23-2005, she was sentenced on State charges in the Trumbull County Court of Common Pleas to a term of three years on a constellation of weapons and obstruction of justice charges concurrent with the federal sentence. (05-CR-289)

Thus, at various times during the hearing dates, spread over many months, the Petitioner has had an up and down relationship with his attorneys Meyers and Lowe. In this respect, the history of his dissatisfaction with his numerous attorneys over some twenty years has been consistent. Nevertheless, the Petitioner's up and down relationship with Meyers has not deterred Meyers from representing Danny Lee Hill zealously within the bounds of the law.

V. THE EXPERTS ON MENTAL RETARDATION

A. Dr. David Hammer.

At the expense of the State this court appointed Petitioner Hill's choice of Dr. David Hammer as an expert witness on the central issue of mental retardation. Dr. Hammer is the Director of Psychology Services of the Nisonger Center, an institution affiliated with The Ohio State University. He is also a professor at the University. A state licensed clinical psychologist, Dr. Hammer received his Ph.D. from the University of Georgia in 1981 and came to Ohio a few years later. Dr. Hammer's credentials as an expert in mental retardation are impressive. He is a longtime professor at Ohio State University, the recipient of numerous grants, and the author of some 50 or more articles or publications. Dr. Hammer has qualified on prior occasions as an expert witness, including cases involving capital jurisprudence.

B. Dr. J. Gregory Olley

The State selected as its expert Dr. J. Gregory Olley, Associate Director for the Clinical Center for the Study of Development and Learning at the University of North Carolina at Chapel Hill. Dr. Olley is also Clinical Professor in the Department of Allied Health Sciences at the University. He is a licensed psychologist, a Fellow of the American Association on Mental Retardation and a Director of the State Chapter of AAMR. Dr. Olley has testified in many capital cases in North Carolina, Illinois, and Louisiana. Like Dr. Hammer, Dr. Olley's appearance as an expert on MR in capital jurisprudence cases has been in behalf of death row defendants.[35] His credentials are impressive.

C. Dr. Nancy Huntsman

This court directed the Forensic Psychiatric Center of Northeast Ohio to select the third expert. The expert selected was Nancy Huntsman, Ph.D., a state licensed clinical psychologist, who received her doctorate in developmental psychology from the University of Michigan. She also taught at University of North Dakota; and then sought retraining at Kent State University, where she changed her emphasis from academia to clinical pursuits. Dr. Huntsman specializes in court-ordered evaluations. She has performed some 250 evaluations over her career. Virtually all of her professional endeavors are directed at forensic psychology for various local government agencies—the City of Cleveland, the General Division and the Domestic Relations Division of the Cuyahoga County Court of Common Pleas, and for other state courts in

Northeast Ohio. She is experienced in testing for IQs, did post graduate studies on mentally retarded issues, and has extensive experience in criminal jurisprudence. Her credentials are impressive.

D. Dr. Sara S. Sparrow

The Petitioner called Professor Sara S. Sparrow, Ph.D. of Yale University as a rebuttal witness. Holding a Connecticut license since 1971, Dr. Sparrow has for many years been affiliated with Yale. She rose through the ranks of academia to the position of full professor and for 25 years she was chair of the Child Study Center of Yale Medical School. Dr. Sparrow is currently Professor Emerita of Yale. She continues to be active in her profession—currently serving as President of Division 33 of the American Psychological Association.[36] She has published extensively in journals and has delivered numerous papers. A specialist in psychometrics,[37] Dr. Sparrow was one of three authors who revised the Vineland Social Maturity Scale in 1984, when Petitioner was 17 years old, and renamed it the Vineland Adaptive Behavior Scale.[38] Her credentials are impressive.

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[35] Atkins Hearing Tr Vol. II, p. 499-507.
[36] Division 33 relates to mental retardation and developmental disabilities.
[37] **Psychometrics** is defined as that "branch of psychology that deals with the design, administration and interpretation of quantitative tests for the measurement of psychological variables such as intelligence, aptitude, and personality traits. Also called **psychometry.**" The American Heritage Dictionary of the English Language, (4th ed. 2000).
[38] E.A. Doll published the original Vineland in 1935 for the measurement of social competence. The scale was named for the City in New Jersey.

E. Dr. Timothy Hancock

The State called Timothy Hancock, Ph.D., as a witness in surrebuttal. Dr. Hancock is currently Executive Director of Parrish Street Clinic. He is also senior partner and founder of Psychometrics Research Associates, a research and test design firm located in Durham. A graduate of the University of Virginia, he received his doctorate in clinical psychology in 2000 from the University of North Carolina, Chapel Hill. He is a specialist in psychometrics, which he defines as "basically the art and science of mental measurement and test design."[39] He also defines psychometrics as "quantitative psychology." This sub-specialty is in addition to his certification as a clinical psychologist. Dr. Hancock's Parrish Street Clinic is a community health institution that serves patients with developmental disabilities. Dr. Hancock also deals regularly with law enforcement agencies and the courts in North Carolina. He also presents seminars at Duke University Law School on capital jurisprudence and mental retardation. He has a special interest in differential diagnosis between mental retardation and other cognitive illnesses. His credentials are impressive. In fact, with respect to all of the experts, it is difficult to imagine a more impressive array of forensic academicians and clinicians gathered together to opine on a single case.

[39] Tr. at p. 294, March 24, 2005.

VI. THE METHODOLOGY

The original three experts (Dr. Hammer, Dr. Olley, and Dr. Huntsman) simultaneously evaluated Petitioner Hill at the Mansfield Correctional Institution. Without Court interference, they divided the workload amongst themselves and conducted a variety of tests that will be discussed later. These experts demonstrated professionalism in their joint endeavors. In short, they worked well together.

Because the Ohio Supreme Court in *Lott* invoked the PCR statute as the "suitable statutory framework for reviewing. [an] *Atkins* claim," this Court looks to the statutory scheme in R.C. 2953.23, which mandates that the trial court **examine the entire record**, including transcripts of the underlying case, before it even considers whether there are substantive grounds for relief. R.C. 2953.23(C). And unless the files and record of the case demonstrate that a petitioner **is not** entitled to relief, the court shall proceed to a prompt hearing on the issues, even if a direct appeal is pending. Id. at subsection (E).

If the trial court is obligated to review the entire file before granting a hearing, *a fortiori*, the trial court is obliged to consider (and is entitled to consider) the facts and the evidence of the underlying case as part of the totality of the evidence on the issue of mental retardation. Nevertheless, this topic is complex. The U.S. Supreme Court has rejected the so-called "nexus test." (See discussion, infra, footnote 12.) Specifically, the High Court has rejected the theory that mental retardation must be apparent from the facts of the underlying crime—which is to say, that it must bear a nexus to the crime in order to be considered as a defense. This is a nullification test.

This court of common pleas, therefore, is required to reject the threshold test of "constitutional relevance" adopted by the U.S. Court of Appeals (5th Cir.) and overruled by the U.S. Supreme Court. That test places heavy emphasis on the facts of the underlying crime, requiring that a criminal's mental retardation be tied to the crime, in order to validate the defense of mental retardation. Otherwise the defense would have no traction, and would be nullified.[40] But, insofar as this Court is aware, the fact-finder in an *Atkins* hearing is, nevertheless, entitled to consider the underlying facts of the case. These facts are merely a part of the totality of the circumstances. These facts do not drive the determination of whether the Petitioner has met his burden of proof. Nor do the facts nullify probative testimony of **MR**.[41]

By invoking the PCR statute as the procedural guide in *Lott*, the Ohio Supreme Court has directed trial courts to consider "all files and records pertaining to the proceedings against the petitioner, including *** the court reporter's transcript."[42] These records would naturally contain the facts of the case. The petitioner would be the first to cite facts in the trial record that indicate mental retardation. Common sense would dictate that the State would cite facts in evidence indicating the absence of mental retardation. Therefore, this Court finds that the facts of the underlying case are relevant and material, but only as part of the totality of circumstances, in determining whether the Petitioner has established his burden of proof on the second prong.

The methodology employed by this court, therefore, is one to be guided by the PCR statutory scheme in determining relevant evidence on the one hand, and to look to the Ohio

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[40]See *Tennard v. Dretke* (2004), 124 S.Ct. 2562. See, also, *Smith v. Texas* (2004) 125 S.Ct. 400.
[41]The term MR is meant to describe mental retardation in its tripartite forensic sense, as defined by AAMR and APA.
[42] Ohio Rev. Code 2953.21.53(C).

Supreme Court, on the other hand, for its instruction that trial judges in Atkins cases must retain experts and rely upon their opinions in deciding **MR.** Nevertheless, "[t]he court "shall not be bound by the opinion testimony of expert witnesses or by test results, but may weigh and consider all evidence bearing on the issue of mental retardation." *In Re Hawthorn* (2005), 35 Cal.4th 40, 50. Just the same, this court is not at liberty to treat capriciously the valuable, relevant and probative opinion testimony of the experts. So also, it may well be that the experts themselves have considered the totality of the evidence in arriving at their relative opinions.

The underlying facts of the crime may have only marginal value; but this fact-finder is admonished, in all events, to avoid application of the nexus test.

VII. THE UNDERLYING CASE

A. The Crimes

The facts of the crimes are set forth in considerable detail by the Ohio Court of Appeals and by the Ohio Supreme Court, in their consecutive decisions affirming the capital conviction of the Petitioner. The following facts are taken from the decision of the Ohio Supreme Court:

> "On September 10, 1985, at approximately 5:15 p.m., twelve-year old Raymond Fife left home on his bicycle to visit a friend, Billy Simmons. According to Billy, Raymond would usually get to Billy's residence by cutting through the wooded field with bicycle paths located behind the Valu-King store on Palmyra Road in Warren.
>
> ***
>
> "At approximately 5:50 p.m. on the date in question, Simmons called the Fife residence to find out where Raymond was. Simmons then rode his bicycle to the Fifes' house around 6:10 p.m. "When it was apparent that Raymond Fife's

whereabouts were unknown, Simmons continued on to a Boy Scouts meeting, while members of the Fife family began searching for Raymond.

"At approximately 9:30 p.m., Mr. Fife found his son in the wooded field behind the Valu-King. Raymond was naked and appeared to have been severely beaten and burnt in the face. One of the medics on the scene testified that Raymond's groin was swollen and bruised, and that it appeared that his rectum had been torn. Raymond's underwear was found tied around his neck and appeared to have been lit on fire.

"Raymond died in the hospital two days later. The coroner ruled Raymond's death a homicide. The cause of death was found to be cardiorespiratory arrest secondary to asphyxiation, subdural hematoma and multiple trauma. The coroner testified that the victim had been choked and had a hemorrhage in his brain, which normally occurs after trauma or injury to the brain. The coroner also testified that the victim sustained multiple burns, damage to his rectal-bladder area and bite marks on his penis. The doctor who performed the autopsy testified that the victim sustained numerous external injuries and abrasions, and had a ligature mark around his neck. The doctor also noticed profuse bleeding from the victim's rectal area, and testified that the victim had been impaled with an object that had been inserted through the anus, and penetrated through the rectum into the urinary bladder."

64 Ohio St3d 313.

Several high school students offered eyewitness testimony, each from different vantage points, and at slightly different times, the totality of which was—

- to place young Raymond Fife riding his bicycle in the Valu-King parking lot, shortly after 5 pm, at the same time that Danny Lee Hill and Timothy Combs were observed standing together in front of a nearby store;
- to hear a child's screams from the nearby woods at about 515 pm; and, at the same time to observe Tim Combs alone walking toward the woods; and
- to observe Danny Lee Hill and Tim Combs walking together out of the woods between 530 pm and 6 pm—Combs at the time pulling up the zipper of his blue jeans, and Hill throwing a **stick** back into the woods.

Powerful forensic testimony was introduced:

- which connected a broken broom **stick** (recovered in the vicinity) to the size and shape of organ damage to the body of young Raymond, with splinters on the stick matching splinters in the anatomy of the victim; and
- which linked Danny Lee Hill's dental impressions to bite marks on the victim's penis.[43]

Danny Lee Hill presented himself at the Warren Police Department on September 12, 1985, two days after the attack. He offered misleading information about Raymond's murder in effort to collect a $5,000 reward.[44] The Petitioner gave various statements to the authorities, in which he sought to implicate Combs and exculpate himself, but his denials were saturated with details known only to the authorities. In addition, the State offered evidence of other recent prior acts—two violent rapes against women in the relatively recent past, and an incident involving an effort to commit anal intercourse and felatio upon a cellmate in a juvenile detention facility.[45] In essence, then, circumstantial evidence, direct eyewitness evidence, forensic evidence, and Danny Le Hill's own statements established beyond a reasonable doubt that he murdered young Raymond Fife.

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[43] The bite marks on Raymond's penis were compared with dental impressions taken from both Petitioner Hill and his confederate Timothy Combs. Petitioner's impression demonstrated a distinctive fracture of tooth number 8. The State's forensic odontologist concluded to a reasonable degree of dental certainty that Petitioner Hill had inflicted the bite marks. (Trial Tr .p. 937-945). The defense's forensic odontologist testified Hill was a "likely" source of the bite marks. (Trial Tr.p. 1157-1158). Though no forensic evidence could be detected on Petitioner's clothing, his own brother testified that he saw Petitioner in the family's bathroom washing what appeared to be blood from a gray pair of trousers which Petitioner wore the day of the attack. (Trial T.p. 41-42). The Petitioner was observed washing his pants three days in a row.

[44] Suppression hearing Tr.p. 382, Trial Tr .p. 218.

[45] See Evidence Rule 404(B) "Other crimes, wrongs, acts." This evidence will be revisited anecdotally as part of the history bearing application to prong 2 of the forensic definition of MR.

B. Mental Health Issues in the Underlying Case

Independent of *Atkins*, mental health issues play out in different contexts, and at different stages of a trial. The trial of Danny Lee Hill was no exception. Especially is this apparent in capital jurisprudence, when the attention to detail and the level of scrutiny is high. In the first instance, mental health issues take the form of defenses of incompetence to stand trial and insanity at the time of the alleged offense. Whereas competency is to be resolved by the trial judge before commencement of the trial, insanity is a jury issue during the first phase—the guilt phase—of a capital trial. In capital cases, where the mitigation phase is bifurcated from the guilt phase of the trial, mental retardation has, for a long time prior to the date of the *Atkins* decision, been a topical defense in mitigation in two statutory respects—the first relating to mental disease or defect, [46] and the second relating to mental retardation.[47] under the statutory catchall provision of : "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death."[48] These mitigation factors are considerations for the jury. The Ohio Court of Appeals has recently observed that "[t]here is a significant difference between expert testimony offered for mitigation purposes and expert testimony offered for *Atkins* purposes." [49] This distinction is important because Danny Lee Hill

[46] R.C. 2929.04(B)(3)
[47] R.C. 2929.04(B)(7)
[48] Under the competency-to-stand-trial scheme, and "for purposes of a separate mental retardation evaluation," only a licensed clinical psychologist (and not a psychiatrist) is qualified as an expert. See definition of "examiner" R.C. 2945.37(A)(2)(a) and (b). And See R.C. 2945.371(H). This restriction would not apply during the mitigation phase of the jury trial (under the catchall provision of R.C. 2929.04(B)(7).
[49] *State v. Bays*, 2005-Ohio-47 (2d Dist.) at par. 23. In *State v. Lorraine* (May 20, 2005), 11th Dist. No. 2003-T-0159, the court held that mitigation evidence, because it was introduced without the benefit of the *Lott* and *Atkins* decisions, was insufficient to determine that Lorraine was *not* mentally retarded for *Atkins* purposes. Therefore, this Court must likewise find that mitigation evidence now twenty years old cannot be wholly dispositive of whether a defendant *is* mentally retarded. While it may be relevant, its probative value comprises only a part of the totality of the circumstances and evidence produced.

has been acknowledged by three courts—the Court of Common Pleas of Trumbull County, the Ohio Court of Appeals, and the Ohio Supreme Court—to be a mentally retarded person. But, here are some examples of the context in which "mental retardation" has been articulated—

- By the Court of Common Pleas: On Hill's motion to suppress statements, the trial court issued the following opinion:

> **"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.** The Court reaction is conclusion after seeing and listening to the defendant at the Suppression Hearing and listening to and watching the tape recording and videotaped statements of the defendant. The Court concludes that the statements were made voluntarily, willingly, and knowingly."
>
> Excerpt of a judgment entry dated Jan. 17, 1986
>
> (Quoted in *State v. Hill*, 64 Ohio St 3d at 316

- By the Court of Appeals: First, on the suppression issue:

> **"Appellant, in the case at bar, admittedly suffers from some mental retardation (although the evidence presented is divergent as to the severity of the handicap) and has had concomitant difficulties in language comprehension throughout his formal education. Appellant is categorized as being mildly to moderately retarded.** Evidence was presented which indicates that appellant is illiterate and this court acknowledges that literal recognition of each

word contained in the "Miranda Rights" and/or "waiver form" may be beyond appellant's mental comprehensive capacity. (Emphasis in bold added.)

"*** The audio and video tapes of appellant's interrogations disclose that appellant was capable of understanding the questions put to him and of responding intelligently.

'Moreover, the behavior of the appellant during the police investigation belies the notion that he was no more than a malleable victim of police suggestion. **Appellant possessed the requisite intelligence to implicate other persons in the murder and was capable of modifying his story when inconsistencies were demonstrated to him. Additionally, appellant qualified and corrected the police officer's misstatements of the factual scenario which he had related to them. He also was able to follow "verbal concepting," displaying an understanding of the officers direction of questioning and the dialogue utilized during the interrogation."**

1989 Ohio App. LEXIS 4462, pp 4-5.

Secondly, on the issue of Hill's waiver of his jury trial rights, in favor of a bench trial before a three-judge panel:

"There is no evidence in the record indicating that the trial court accepted the waiver without scrupulously ascertaining appellant's ability to understand the impact of his actions. Further, there is enough competent evidence to determine that the trial court's decision was not against the manifest weight of the evidence. **In so holding, this court does not express any opinion as to the ability of other mentally retarded persons to waive their constitutional rights.** Such a decision will have to be made on an individual case by case basis, considering all appropriate facts and the totality of the circumstances of each case. This court does, however, hold that sufficient evidence exists in this matter to determine that appellant effectively (knowingly, intelligently and voluntarily) waived these constitutional rights."

Id. at page 9.

Thirdly, on the issue of the mitigation phase of the trial:

"Generally, the [trial] court did consider **appellant's low mental age.**

"Appellant's mother during mitigation also testified that appellant had fallen off a swing and, on another occasion, had been hit by an automobile. **However, no**

express evidence was offered which indicated appellant's retardation was the result of the physical traumas. To the contrary, evidence was offered which suggested that seventy-five percent of the time, the cause of the retardation is unknown. Furthermore, Dr. Crusin indicated that neither of the injury reports indicated brain damage. As such, there was no evidence before the court which it could consider during mitigation on this subject."

Id. at page 18.

- By the Ohio Supreme Court: On the mitigation issue:

"With respect to the enumerated mitigating factors set forth in R.C. 2929.04, **we find that defendant's mental retardation is a possible** mitigating factor. See *Penry v. Lynaugh* (1989), 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256. However, as the *Penry* court noted, there are various levels of mental retardation, and a person must be viewed individually as to the degree of retardation."

64 Ohio State 3d at 335

These judicial comments and conclusions regarding mental retardation are based upon the following testimony as gleaned from the trial record by the Ohio Supreme Court:

"[W]e review the testimony in the record, and note first that defendant's mother, Vera Williams, testified that all of her children were "slow" and that defendant's father never lived with the family. In sum, defendant had a poor family environment.

"Dr. Douglas Darnall, a psychologist, testified that defendant had an I.Q. of 55 and that his intelligence level according to testing fluctuates between mild retarded and borderline intellectual functioning, and that he is of limited intellectual ability. Dr. Darnall did state, however, that defendant was able to intellectually understand right from wrong.

"Dr. Nancy Schmidtgoessling, a clinical psychologist, testified that defendant had a full scale I.Q. of 68, which is in the mild range of mental retardation, and that the defendant's mother was also mildly retarded. Dr. Schmidtgoessling also testified that defendant's moral development level was 'primitive,' a level at which 'one do[es] things based on whether you think you'll get caught or whether it feels good. [T]hat's essentially whereabout [*sic*] a 2-year old is.'

> "Dr. Douglas Crush, another psychologist, testified that defendant had a full-scale I.Q. of 64, and that his upper level cortical functioning indicated very poor efficiency.
>
> "Other mitigation testimony on behalf of defendant indicated that he was a follower and not a leader, who had to be placed in group homes during his youth.
>
> "Defendant also gave an unsworn statement to the trial court, in which he stated that he was sorry what happened, and that he didn't want to die. Defendant then started to cry."
>
> *State v. Hill* (1992), 64 Ohio St. 3d 313, 334-335.

Though not noted in the Ohio Supreme Court's opinion, Dr. Crush admitted on cross examination that Petitioner Hill may not have been cooperating fully, i.e., that he may have malingered during the course of his neuropsychological testing. (Mitigation Tr. page 324-325, Atkins Tr. Vol. IV.page 908).

C. Res Judicata Revisited

With the historical judicial pronouncements of Danny Lee Hill's mental capacity in mind, it will be helpful to revisit the res judicata issue. It cannot be denied that the mental health issues in the underlying case, as articulated by three different state courts, present a profile of a criminal defendant who is said to be mentally retarded. However, the prime rule of judicial decision-making is to interpret words and phrases *in context*. The role of the court is to discern the intent of judicial pronouncements—the words and phrases—in context according to the rules of grammar and common usage. In this respect, both the Ohio Supreme Court and the United States Supreme Court have made it clear that mental retardation is to be judged in context.

In *State v. Lott*, the seminal guide for Ohio judges on Atkins issues, the State argued that res judicata foreclosed the issue of MR as a defense, since it could have been raised in

direct appeal, as opposed to collateral proceedings.[50] Our High Court rejected that argument, citing no less than three factors that place the issue in a different context. These factors are as follows:

- Lott lacked the opportunity to fully litigate his mental retardation claim;
- although a convicted capital defendant could have raised mental retardation in a variety of different settings, such as for issues of competency, a variety of waiver issues, as well as sanity, and especially in mitigation, the development of the law—pre-Atkins—did not present MR as a complete constitutional bar; and
- most notably, Lott did not have Atkins's guidance as to what constitutes mental retardation.[51]

But the very best evidence that res judicata does not apply in the context advanced by the Petitioner may be gleaned from the Atkins case itself. Daryl Renard Atkins's full-scale IQ score was 59. He was said to be a "slow learner." According to the forensic psychologist, Atkins would automatically qualify for Social Security disability income; he comprised less than one percentile of the population at large, and that he was diagnosed "mildly mentally retarded." This analysis was supported by a review of both school and court records as well as the administration of the Wechsler Adult Intelligence Scales test (WAIS III). Against this evidence, the Commonwealth of Virginia did not contest the IQ score, but produced an expert witness who administered a portion of a 1972 version of a Wechsler Memory scale, conducted

[50] R.C. 2953.21 et seq. And see *State v. Perry* (1967) 10 Ohio St.2d 175. For a discussion of res judicata and its separate components of "issue preclusion" and "claim preclusion" *see MetroHealth Medical Center v. Hoffmann-LaRoche Inc.* (1997), 80 Ohio St.3d 212.

[51] Finally, the Lott opinion is instructive on two additional points: first, in considering res judicata in context, the doctrine would not apply even if mental retardation had actually been litigated by Lott; and, second, by implication under the doctrine of mutuality, both the State and a capital defendant are entitled to the same fresh approach in litigating Atkins issues. In *State v. Lorraine* (May 20, 2005), 11th Dist. No. 2003-T-0159, the court there held that mitigation evidence, because it was introduced without the benefit of the *Lott* and *Atkins* decisions, was insufficient to resolve mental retardation issues for *Atkins* purposes

two interviews of Atkins, himself, and interviewed correctional staff. The Commonwealth's expert concluded that Atkins's poor academic record was of his own choosing, that he possessed an anti-social personality, and that he was not mentally retarded. Faced with this divergence of opinion on the record below, here is what Justice John Paul Stevens had this to say:

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. **Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.** As was our approach in Ford v. Wainwright, with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." 477 U.S. 399, 405, 416-417 (1986).
>
> *Atkins v. Virginia*, 536 U.S. at 317

From these remarks, two messages are clear: one is explicit and the other is implicit. The explicit message is that the individual States are to be given deference in developing the procedures to enforce the constitutional mandate. The second message—an implicit one—is that mental retardation is to be judged in context. Unquestionably, the United States Supreme Court is serious about these two objectives, for it has not hesitated to protect this deference by peremptory action. Consider *Schriro v. Smith* (October 17, 2005) __U.S.__, 2005WL2614879, a per curiam opinion, in which the Supreme Court reversed the 9th Circuit for exceeding its authority in Federal Habeas Corpus by ordering a jury trial on the issue of MR, without

allowing the State of Arizona to establish its own procedures.[52] The Supreme Court, in its supervisory capacity over inferior federal courts, is requiring that state courts be accorded the first opportunity to consider each Atkins hearing on its merits.

This court concludes, then, that historical judicial pronouncements that Danny Lee Hill is a mentally retarded individual (accurate as they might be in limited context) are not at all determinative of his mental health in the context of the forensic definition of mental retardation. However, certain components of MR (the forensic definition) might be determined from historical pronouncements. The example that comes to mind relates to Prong I of the MR definition—viz., the full-scale IQ score of a capital defendant.

VIII. THE *ATKINS* ISSUES

A. The First Prong: Significantly Subaverage Intellectual Functioning

Significantly subaverage intellectual functioning is defined as an IQ of 70 or below.[53] All of the forensic MR definitions require an IQ of approximately two standard deviations below the mean.[54] Petitioner Hill's I.Q. scores have fluctuated over the years.

[52] In a filing on November 30, Petitioner Hill's attorneys have submitted a Report and Recommendation by Chief Federal Magistrate Judge Michael R. Merz, finding that although the Petitioner there has an unexhausted Atkins claim in Montgomery County Common Pleas Court, in fact a pending claim, he has an exhausted double jeopardy claim, for the reason that the trial court there denied his double jeopardy argument. The Petitioner claims this court did the same by denying his double jeopardy argument in an entry on March 19,2004. In fact, this court did no such thing. Nowhere in this court's 23-page entry of March 19, 2004 is the term "jeopardy" mentioned. The Chief Magistrate's Report refers to the case of *State v. Bies* (1996) 74 Ohio St.3d 320. In that case, the Supreme Court of Ohio refers to Petitioner Bies as having mild to borderline mental retardation. Whether that comment is in context with MR as forensically defined is not for this court to consider. This court has used MR throughout this opinion to mean mental retardation as forensically defined by Atkins and Lott. On the other hand the Petitioner's most recent filing cites MR in a much different context.

[53] *Lott,* at ¶12, 17. See definition in AAMR (1992 and 2002).; See, also APA's DSM-IV definition.

[54] The mean score of the WAIS-III is 100, and a single deviation is 15 points. Thus, a score of 70 constitutes two deviations below the mean.

1. Pre-Atkins IQ History-Age 6 to Age 33

All three experts[55] reviewed available school records and numerous IQ tests results, including several administered while Petitioner Hill was enrolled in the Warren City School System, and one at age 33 while a prisoner on Death Row. The following chart represents a summary of the Petitioner's IQ scores leading up to April of 2004 when, in response to this court's Order, Drs. Hammer, Olley and Huntsman journeyed to the Mansfield Correctional Institution for the purpose of assessing the Petitioner's current intellectual acumen.

CHRONOLOGICAL AGE	FULL SCALE IQ
6 YEARS and 2 MONTHS	**70**
8 YEARS and 8 MONTHS	**62**
13 YEARS and 4 MONTHS	**48**
13 YEARS and 5 M0NTHS	**49**
15 YEARS and 3 M0NTHS	**63**
17 YEARS OF AGE	**55**
18 YEARS OF AGE	**68**
18 YEARS OF AGE	**64**
33 YEARS OF AGE	**71**

[55] The three original experts assigned to this Atkins hearing were Drs. Hammer, Olley, and Huntsman.

Before discussing the events of this Death Row visitation, it will be helpful to analyze the above IQ scores in context with the available evidence.

At 6 and two months, a Warren City School psychologist first tested Hill. He scored a 70 on the Stanford-Binet, with a mental age of four and seven months. As a result, he was placed in special education, specifically, the Educably Mentally Retarded Class (EMR). (Atkins Tr.Vol. I, pp. 63-64).[56]

At eight years, eight months, Petitioner was re-tested and scored a 62. (Atkins Tr. Vol. IV, p. 893). At age thirteen years, four months, Petitioner scored 48 on the Wechsler Intelligence Scale for Children, placing him in the moderately mentally retarded range. (Atkins Tr. Vol. I, pp. 90-92). Evidently, only a month later (at age 13 and five months) the Petitioner was re-tested, registering a score of 49. (Atkins Tr. Vol. I, p. 146; and Petitioner's Exhibit 18). Nearly two years later, Hill was tested yet again at age 15 and three months, demonstrating a full-scale score of 63. In connection with serious juvenile delinquencies, Hill was tested at the age of 17; and, with the Fife murder charges pending, he was tested twice, with scores of 68 and 64 respectively.[57] Thus, with a rich record of IQ testing between the ages of 6 and 33, the average full scale score is 61.12. Because Dr. Hammer discounts the reliability of the two high 40s test scores for Hill at age 13, elimination of these scores from the mix produces an average full scale score of 64.72. It is interesting to observe that the highest test scores that Danny Lee

[56] Yet, according to Dr. Hammer, a witness for the Petitioner, a score of 70 when this test was administered in 1973 should *not* have placed the test taker in the range of mental retardation. The standard deviation for this Stanford-Binet at that time was 16, not 15, and thus the cut-off for mental retardation was 68, calculated thusly: 100 minus (2X16)= 78. (Atkins Tr. Vol. II, p. 346, Vol. V p. 762). However, these calculations may not include the Standard Error of Measurement factor, known as SEM.

[57] Dr. Nancy Schmidtgoessling administered a Wechsler Adult Intelligence Scale Revised (WAIS-R) on October 25, 1985, shortly after Hill's arrest for murder. The score: 68. The issue: Hill's "knowing," etc. waiver of his

Hill was able to achieve are the bookend scores of 70 and 71—the first at age 6, an age of innocence, and the last at age 33 on death row in the year 2000.[58] The purpose of the IQ test in 2000 is unclear, as is the identity of the party that ordered it. Mansfield Unit Manger Jennifer Risinger stated she escorted Petitioner Hill to take an IQ test in 2000 upon orders from the Warden, but she (Risinger) had no idea why the test was administered. [59]

2. Court-Ordered Testing under the guidance of Atkins and Lott

Doctors Hammer, Olley, and Huntsman arrived at the Mansfield Correctional Institution in April of 2004 for a three-day session in order to assess Petitioner Hill's current intellectual functioning. The three doctors agreed that Petitioner Hill was "faking bad" when tested.[60]

Petitioner scored a 58 on the Weschler Adult Intelligence Scale (WAIS-III) IQ test. (Atkins Tr. Vol. IV, p. 867). In order to confirm the their suspicions of malingering, Dr. Huntsman administered the Test of Mental Malingering (TOMM). As Dr. Huntsman testified, "[h]e performed so poorly that I think the only real conclusion would be that he was deliberately giving incorrect answers." (Atkins T.p. Vol. IV, p. 868).

Miranda rights. Dr. Douglas Crush, a specialist in neuropsychology, was retained to administer a WAIS-R test in preparation for the mitigation phase of the murder trial. Here, the full scale score was 64. (Mit. Tr. Page 299)

[58] (Atkins Tr. Vol. I, pg. 48).

[59] (Atkins Tr.. Vol. V, pp. 1209-1216).

[60] See testimony of Dr. Hammer (Atkins Tr. Vol. I. pp 130-133). The term 'faking bad' is a psychological term of art, of concern to clinicians and especially psycho-metricians (test designers). The term is easier to understand when compared with 'faking good.' Faking is defined as a "motivated attempt to manipulate the results of a psychological test." According to Glossary of Terms by Bruns and Disorbio (Excerpted from BHI 2 Manual, 2003), there are several types of faking: bad, good and double faking—faking bad on one part of a test (e.g., physical well-being), and faking good on the other (e.g., psychological well-being). For pure IQ tests, it would seem impossible to fake good; but there are many types of psychological tests other than IQ, such as forced-choice integrity testing for job applicants. And there are many situations in criminal jurisprudence in which psychological test taking and "faking bad" becomes relevant. See, for example *United States v. Curtis,* __F.3d__(4th Cir.No.02-4294 5-7-2003), involving the issue of psychological susceptibility to entrapment and "faking bad."

3. Judicial Fact-Finding on Prong I: Significantly Subaverage Intellectual Functioning

In determining whether the 1st prong of *Atkins* has been proved by a preponderance of the evidence, this court observes that the test of significantly subaverage intellectual functioning is defined as an IQ of 70 or below. For reasons of coincidence, or otherwise, this Petitioner seems to be right on the borderline of 70. This court finds that the Petitioner has satisfied Prong I of the forensic definition of MR. Dr. Hammer has credibly and perceptively observed that Danny Lee Hill—

> keeps bumping up against this ceiling of IQ of 70, and then everything kind of falls below that. When he's got a bad period, either unmotivated or maybe in a lot of trouble legally, those scores tend to drop off a bit even to lower ranges, which is not unusual. Atkins Tr. Vol. I. Pg. 106

And, further—

> … there's this … consistent … bumping against the ceiling of around the high 60s, 70s, something like that in terms of his maximal performance.
>
> Id. Page 258

Yet, at least in one instance the standard error of measurement (SEM) for one of the IQ tests placed the Petitioner above the Prong I cutoff score. In other instances, the SEM has not been analyzed; nor has the cultural bias factor been quantified, although all three experts acknowledged its existence. Dr. Hammer attributes the disparity in some of the scores to the subject's character flaws—"bad" periods of time when he is "unmotivated or maybe in a lot of trouble legally."[61]

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[61] Atkins Tr. Vol. I. Page 106.

However, Dr. Olley, the State's expert, had no difficulty finding that the Petitioner has satisfied Prong I of the diagnosis:

Q But it is your opinion, nonetheless, that he satisfied Prong I?

A. Prior to the age of 18, yes.

The State suggests that the Petitioner's decision to "fake bad" his most recent IQ test—a court-ordered test in the context of an Atkins hearing—tarnishes the preponderance of the evidence on Prong I. But, while the Petitioner's decision to skew the test results tells us something about his state of mind, and perhaps his own belief that he is smarter and more intelligent than he would prefer this court to believe, the IQ scores over time are what they are. The Petitioner satisfies Prong I by a preponderance of the evidence.[62]

B. The Second Prong: Significant Limitations in Two or More Adaptive Skills, Such as Communication, Self-Care and Self-Direction.

The second prong of the tripartite test defining mental retardation is "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction."[63] This prong was lifted from the 1992 AAMR definition of mental retardation. In

[62] Ohio Jury Instructions Section 3.50: Preponderance 1. DEFINITION. Preponderance of the evidence is the greater weight of the evidence; **that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it**. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may, or may not, be identical with (quantity) (the greater number of witnesses). [Emphasis added in bold.]

[63] *Lott*, at par. 12.

2002, the AAMR published an updated version of the second prong, by regrouping the various topics into three basic categories as follows:

I. Conceptual adaptive skills;

II. Social adaptive skills; and

III. Practical adaptive skills.

According to AAMR, a significant deficit in any one of the above categories satisfies the second prong for purposes of diagnosis. This change in the definition is said by the expert witnesses to be a distinction without a difference—a mere rearranging of the multiple concepts into three categories. This court is obliged to follow the forensic definition outlined by the Ohio Supreme Court in *Lott.*[64] On the other hand, the legislature (in a different context) defines mental retardation as one "in accordance with standard measurements as recorded **in the most current revision** of the manual of terminology and classification in mental retardation published by the American [A]ssociation on [M]ental [R]etardation." R.C. Section 5123.01(Q). (Emphasis in bold added.)

But, whether one gleans the adaptive behavior model from the 1992 definition or the 2002 definition, the psychological specialists agree that adaptive behavior issues are capable of being measured in a psychometric manner—a manner similar to the administration of an IQ test. This is the object of the Vineland Social Maturity Scale as well as the more modern SIB-R (the Scales of Independent Behavior), in which the mean score, typically like an IQ test, is

[64] Specifically, the APA's 1992 definition lists the following skill areas: communication; self-care; home living; social/interpersonal skills; use of community resources; self-direction; functional academic skills; work; leisure; health; and safety. (DSM-IV at pg.39).

scaled mathematically and statistically so that 100 represents the mean score for adaptive skills of the population at large.

This court's understanding is that a score separating mild retardation from "borderline"[65] is not wholly controlling—up or down—on the ultimate diagnosis. Here are some examples supporting that proposition. The first is gleaned from the Lott decision itself, in which the Ohio Supreme Court observed that a Prong I full–scale IQ score of above 70 presents a "rebuttable presumption" that a defendant **is not** mentally retarded.

> While IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue. *Murphy v. State*, 54 P.3d at 568, 2002 OK CR 32, at ¶29. We hold that there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70.
> Lott at 305

Theoretically, then, the experts, for example, could judge a defendant with a score of 75, as mentally retarded, although one might observe that a legal presumption that one is not mentally retarded—though a rebuttable one—is not easily overcome.[66]

A second example for the proposition that an IQ score alone is not dispositive of the diagnosis is contained in the APA manual itself.[67]

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[65] "Borderline" is a term of art denoting a full-scale score between the 1st and the 2d standard deviation. As outlined earlier in this opinion, one deviation represents 15 points. (Atkins Tr. Vol. I, pg. 106, in which the interrogator mentioned 84, when it should have been 85). Therefore, a "borderline" score would be a score between 85 and 71. Two standard deviations below the norm of 100 equal 70. Thus the range for Mild MR is between 70 and 56. Three standard deviations ("Moderate" MR) produce a range between 55 and 41, and so forth down to "Severe" MR (four deviations) and finally "Profound" MR (five deviations).

[66] In order to overcome a rebuttable presumption, the party must, in the first instance, dispel the presumption by equal weight, bringing the issue to equipoise; then, the party who has the burden of proof must produce sufficient evidence to preponderate in favor of the proposition. "[W]here a rebuttable presumption exists, a party challenging the presumed fact must produce evidence of a nature that counterbalances the presumption or leaves the case in equipoise. Only upon the production of sufficient rebutting evidence does the presumption disappear." [Citing authority.] See *Cleveland Mun. School Dist. Bd. of Ed. v. Cuyahoga Cty. Bd. Of Revision*, 107 Ohio St. 3d 250 at 253, 2005-Ohio-6434. Especially see *State v. Stallings*, 2004-Ohio-4571 (9th Dist.), overcoming rebuttable presumptions as to 1st and 2d prong, but not the 3d.

[67] See DSM-IV-TR, 4th ed. pp.41-42, discussing IQs between 70 and 75, when accompanied by significant deficits in adaptive behavior, thus warranting an MR diagnosis even though the subject has scored above 70.

A third example—a more practical one—is gleaned from a constellation of cases, post Atkins, in which a sub-70 full-scale IQ score, unaccompanied by significant Prong II deficits failed to achieve the MR diagnosis.[68] Thus, it is well recognized by the experts that "a diagnosis of mental retardation requires more than a low I.Q. score. Mental retardation—

> "is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence."
>
> *In Re Hawthorne* (2005), 35 Cal.4th 40, 49.

Test scores for both intelligence and adaptive behavior are within the domain of the experts. So also are the nuts and bolts of devising and administering an IQ test (for example a WAIS-III test)[69] as well as an adaptive behavior test (for example a SIB-R test). This is a way of saying that expert testimony is appropriate and necessary to assist the fact-finder. Thus, the Ohio Supreme Court, has observed:

> The trial court should rely on professional evaluations of [a petitioner's] mental status, and consider expert testimony, appointing experts if necessary, in deciding this matter.
>
> *Lott*, at par.18

This court is obligated to rely upon the professional evaluations of the Petitioner's mental status. And to the extent that the Petitioner intentionally corrupted the testing process itself, this court is entitled to consider that default as part of the totality of the evidence.

[68] The first example is Atkins himself, a defendant with an IQ of 59, who failed to prove MR by a preponderance of the evidence. See footnote 2, infra. See also *Ex parte Rodriguez*, _*S.W.3d*_, 2005 WL 1398132 (TxCt Cr.Appeals), with IQ scores of 60 and 68. There are numerous cases scattered throughout the country that emphasize the need to go beyond IQ scores in order to resolve Atkins diagnostic issues. E.g., *In Re Hawthorne* (2005), 35 Cal.4th 40,49. *In re. Holladay* (11th Cir2003), 331 F.3d 1169, 1175 n.3. And see *State v. White*, 2005-Ohio-6990 (12-30-05 C.A.9)

[69] Meaning Wechsler Adult Intelligence Scales test, 3d edition.

The Petitioner's decision to tarnish the testing process was not limited to the IQ test. It certainly would seem to have been in his better interests to cooperate with his own expert as to Prong II, but his lack of cooperation rendered impossible the task of the three psychologists in conducting an adaptive behavior assessment—a Prong II psychometric analysis. (Atkins Tr. Vol. II., page 294.) That lack of cooperation, in the view of this court, is critical, because Dr. Hammer believed there was a paucity of evidence during the pre-age 18 period—this in spite of the seeming wealth of records and the sheer number of IQ tests relative to Prong I. And Dr. Hammer was not alone in commenting upon the dearth of available evidence as to Prong II. Both Dr. Olley and Dr. Huntsman would have preferred more evidence to evaluate Prong II. According to Dr. Olley: "more [information] is better" when it comes to judging adaptive behavior—this, as opposed to an IQ test, where a score is a score. (Atkins Tr. Vol. II, pg. 513). And here is what Dr. Huntsman had to say—

> "[t]here was clear evidence of malingering on the SSSQ [Street Skills Survival Questionnaire] and as far as I'm concerned on the ABAS [Adaptive Behavior Assessment System]. And on both of these tests, Mr. Hill systematically denied being able to engage in behaviors that collateral information or subsequent interviews revealed that he could do, perform quite nicely." [70]
>
> (Atkins T.p., Vol. IV, p. 901-902).

Given Danny Lee Hill's decision to sabotage the testing procedures, his attorneys were left with Vineland testing scores from his school days, together with selective anecdotal evidence of isolated conduct reports. This evidence is a thin reed.

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[70] Dr. Huntsman also administered the TOMM (the Test of Memory Malingering) and concluded "the results of that test clearly indicate to me that he was malingering." Atkins Tr. Vol. IV, pg. 864

1. Vineland Social Maturity Scale—a Psychometric Test

The Vineland test was first published in 1935, by Dr. Edgar Doll, who named the test after the City of the same name in New Jersey. During the 1970s and 1980s, the Warren City Schools relied upon the Vineland Social Maturity Scale (Vineland I) to measure adaptive behavior. Four Vineland scores for the Petitioner were discovered among his school records. **These scores do not support a diagnosis of MR.**

The test was originally crafted as a barometer for judging the extent to which persons otherwise considered mentally retarded, and institutionalized, would be able to function in a socially responsible and independent manner; viz., outside of the institution. The Vineland reports two types of scores: "a social age" (also known as "age-equivalent") and a "social quotient," an SQ, achieved by the use of mathematical conversion tables. Thus, a full-scale score of 100 would represent the mean factor of social/adaptive skills, just as its companion IQ score of 100 would represent the mean factor of intelligence. Once the test is factored to 100, the psychologists are able to diagnose MR as two standard deviations below the mean. (Atkins Tr., Vol. III, pg. 560). It may be helpful to discuss the Q as in IQ or SQ. The Q, or quotient is "the numerical ratio, usually multiplied by 100, between a test score and a standard value."[71] An IQ score is achieved by dividing a person's mental age by his or her chronological age, times 100. For example, if a ten-year-old demonstrated a mental age of 7, his IQ would be 7/10 X 100 = 70. If the same test-taker were to demonstrate a mental age of ten, his IQ would be 10/10 X 100 = 100. Ideally, he would represent the mean score in society—a score midway

[71] Merriam-Webster's Collegiate Dictionary, 11th ed.

be 10/10 X 100 = 100. Ideally, he would represent the mean score in society—a score midway between the extremes. However, as one might suspect, the score resolution is not quite that simple. It is enough to say that resolution is beyond the ken of the non-professional—in fact, beyond the ken of this fact-finder. The raw scores in modern psychology are passed through complicated adjustment formulae and logarithms, in order that the mean of 100 can be achieved in society at large. For the fact-finder, reliance upon expert testimony is essential. However, the fact-finder's role is still to judge the ultimate reliability of the expert testimony, including the accuracy of the raw data—to the extent that the data is within the knowledge of the fact-finder.[72] This entire discussion regarding IQ has similar application to SQ.

The following chart represents a summary of the Petitioner's SQ scores, between the ages of 13 and 17:

	CHRONOLOGICAL AGE	SOCIAL AGE	SQ (SOCIAL QUOTIENT)
(1)	13	14	107 (Calculated **now** by Dr. Olley.)
(2)	15 and 3 mos.	12 and 0 mos.	78.6 (Calculated **now** by Dr. Olley.)
(3)	17 and 0 mos.	(Not reported)	82.9 (Reported **then** by Dr. Darnall.)
(4)	17 and 4 mos.	12 and 6 mos.	72.4 (Calculated **now** by Dr. Olley.)

[72] See Ohio Jury Instructions (OJI) standard instruction on expert testimony.

According to Dr. Olley, **only one** of Petitioner's Vineland scores included an SQ calculation. The three other scores registered **only social ages** (or age equivalent). Dr. Olley calculated the other three SQ scores by placing the social age as the numerator and the chronological age as the denominator, and then multiplying times 100. But Dr. Olley, himself was quick to observe that this approach offered only an approximation. The approach failed to account for a logarithmic factor, scaled to a deviation score; and, not having access to that factor, Dr. Olley relied on fundamental math to arrive at an *approximate* score. Although incisive cross examination by Public Defender Meyers cast doubt in Dr. Olley's own mind as to the efficacy of the approach, Dr. Olley's analysis was useful in at least two important respects. First, he explained that his simplified mathematical approach is exactly the method utilized during the psychology's early years of psychometric analysis; and, secondly, with sophisticated computer-assisted mathematical adjustments as part of the current scoring process, it is just not reliable to pursue an approach out of synch with the formula in vogue at the time of the test. The best example of the difficulty of achieving reliability by tinkering with the ingredients that comprise the formula for a modern score is exemplified by the efforts of Dr. Sparrow.

This leaves for discussion the SQ score of 82.9 registered by Dr. Darnall when the Petitioner was age 17. Dr. Darnall's calculations, which he obviously scaled to a mathematical factor (the formula not noted on the records), produced a full-scale score well above the 70 cut-off score for MR.[73] Dr. Darnall, himself, at the time, believed the score was an overestimate of

[73] It seems that many of these psychology tests are proprietary, thus explaining the absence of manuals and charts for particular time periods. On the other hand the Petitioner, for himself, as opposed to his counsel, argued that these records were intentionally concealed. None of the experts expressed any amazement over the absence of manuals and charts in the school records. Nor is there any evidence of concealment. But the Petitioner's concern about this demonstrates the extent to which he is capable of attention to detail.

Danny Lee Hill's adaptive skills, given that the informant was his mother.[74] How much of an overestimate we do not know. And while this court is not prepared to consider that score as reliable proof of anything—up or down—that score in the low 80s is not at all inconsistent with the rich record of anecdotal evidence bearing upon the Petitioner's social and communication skills.

2. Vineland Revised and Re-Visited—the Sparrow Project.

Dr. Sara Sparrow, a Connecticut psychologist and a distinguished scholar, revised Vineland I in 1984, when the Petitioner was 17. She re-named it the Vineland Adaptive Behavior Scales (Vineland II). Dr. Sparrow was retained to recalculate the Vineland I scores, which the Petitioner registered in the early to mid-1980s. The State conceded that Dr. Sparrow was a qualified expert, but the State eventually moved to strike her testimony as non-compliant with the Daubert Principle.[75] This court, sitting as trier of fact, elected to hear the testimony, but reserved ruling upon the issue. For reasons that follow, this court has concluded that the rate of error of Dr. Sparrow's conclusions on the limited issue of re-casting the Petitioner's old

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[74] Atkins Tr., Vol. III., pg. 565.

[75] In 1993, the United States Supreme Court issued its opinion in *Daubert v. Merrell Dow Pharmaceutials, Inc.* 509 U.S. 579. In its decision, the High Court established gate-keeping principles for trial judges faced with the issue of whether expert testimony offered in evidence is scientifically sound. As the gatekeeper, the trial judge must decide if the fact-finder is to hear the evidence. Evidence that is not scientifically unsound and unreliable is to be suppressed. The Daubert case (pronounced Dow-bear) enunciated a principle binding on inferior federal courts under the Supreme Court's supervisory power. But state court jurisdictions have adopted Daubert, including the Ohio Supreme Court in *Miller v. Bike Athletic Co.*(1998), 80 Ohio St.3d 607. And this court will be guided by the principles enunciated in the *Miller* decision.

scores in a fresh light is so high as to render her testimony inadmissible under the Daubert principle. As a secondary proposition (in the event a higher court finds this court's ruling to be in error), this court, as the fact-finder, rejects her opinion in favor of the opinion of Dr. Hancock

. Dr. Hancock testified that Dr. Sparrow's analysis and conclusions were unreliable and unscientific. Essentially, Dr. Sparrow revised the scores on two of the old tests, arriving at full-scale SQ scores below the 70 cut-off mark. She did this by a complicated back-to-the-future process. Yet, she admitted under cross-examination by Mr. Watkins that her re-scoring method is "not a common practice," not done for IQ tests.

Dr. Sparrow's general re-scoring methods and formulae were crafted during the period of time that the two Vinelands (I and II) were in transition. A linkage study was done **at that time**, which she **then** reported to be .55. (Atkins Rebuttal, Vol. VI. pg. 227). To her knowledge, this is the first time the "linkage" theory has been presented in court. (Id at 232). (Dr. Sparrow had not previously testified as an expert witness. She is not a psychometrics expert and could not render opinions concerning either the rate of error in her re-testing method or the statistical accuracy of her opinion. (Id at 170).

The State's surrebuttal witness, Dr. Timothy Hancock, reviewed the materials offered by Dr. Sparrow. He testified that where two different tests are equated (or "concorded") the strength of the relationship or "correlation" between the two tests should be that of r = .866 **at minimum in order to provide a 50%** certainty that the right true score will be predicted from one test to the other, (See 1st and 2nd paragraph of p. 240 Sparrow). The Sparrow materials correlation figure of .55 **approximates only 27% certainty, which means there is only a one**

in four chance that a re-score will be correct. (Atkins Rebuttal T.p. 338-345). Asked to refute Dr. Hancock's conclusions, Dr. Sparrow stated a statistician would be needed for such testimony. (Atkins Rebuttal T.p. 170). As Dr. Hancock opined, a .55 correlation "doesn't provide enough predictive validity, enough predicted power for it to be reliable." (Atkins Rebuttal Vol.6, pg. 337.

3. The Daubert Analysis.

In determining the admissibility of scientific evidence, the Supreme Court of Ohio in *Miller v. Bike Athletic Co.* (1998), 80 Ohio St. 3d 607, established the trial judge as the gatekeeper. The *Miller* court went on to state—

> "[i]n evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subject to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance."
>
> *Id.* at 611, citing *Daubert* at 593-594. [76]

See also the Ohio Rules of Evidence:

RULE 702. Testimony by Experts

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of

[76] See *State v. Hamilton*, 2002 WL 549841 (Ohio App. 11 Dist.), and *Jones v. Conrad*, 2001 WL 1001083 (Ohio App. 12 Dist.).

procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

The staff notes to Rule 702 (July 1, 1994 Amendment) include the following observations:

As to the reliability requirement, the Ohio cases have not adopted a definitive test of the showing required for expert testimony generally. The Ohio cases have, however, clearly rejected the standard of Frye v. United States (D.C. Cir. 1923), 293 F. 1013, under which scientific opinions are admissible only if the theory or test in question enjoys "general acceptance" within a relevant scientific community. See Williams, supra, 4 Ohio St. 3d at 58; Pierce, supra, 64 Ohio St. 3d at 496. See also Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993, ____ U.S. ____, 113 S. Ct. 2786 (similarly rejecting Frye and describing the reliability standard to be employed under the federal counterpart to Evid. R. 702.)

Under Ohio law it is also clear that reliability is properly determined only by reference to the principles and methods employed by the expert witness, without regard to whether the court regards the witness's conclusions themselves as persuasive or correct. See Pierce, supra, 64 Ohio St. 3d at 498 (emphasizing that unreliability could not be shown by differences in the conclusions of experts, without evidence that the procedures employed were "somehow deficient"). See also Daubert, supra, 113 S.Ct. at 2797 (the focus "must be solely on principles and methodology, not on the conclusions they generate").

And in *Jones v. Conrad*, 2001 WL 1001083 (Ohio App. 12 Dist.), the Court of Appeals upheld the trial judge's decision to exclude expert testimony because of its unreliability. The

Court citing three cases—*Daubert, Miller,* and *State v. Nemeth* (1998), 82 Ohio St. 3d 202, 210-211—offered this observation:

> Our analysis focuses on Ohio law regarding admissibility of evidence under *Evid. R. 702.* *** [T]he drafters of the revised rule left Ohio's standard of reliability to be further developed by case law. Although the Ohio Supreme Court has only addressed this issue in two cases, it is clear that pursuant to the court's decisions in *Miller* and *Nemeth,* this inquiry involves consideration of the *Daubert* factors. Although appellant argues that Ohio's standard is much lower than the federal standard, the Ohio Supreme Court has determined that at least some indicia of reliability is required before admitting expert testimony.

The issue in this case is not so much whether the two Vinelands are efficacious in themselves as testing instruments. (Nor does this court question the skill with which Dr. Sparrow—a distinguished academician—revised the original Vineland.) The issue is whether it is reliable to re-score test results that are 20 years old, so as to downgrade the SQ score into the MR category. Dr. Sparrow's correlation coefficient stands at .55, meaning that her error rate equals 75%. Dr. Hancock testified that he is unaware of any studies that even discuss the linkage between the two tests as Dr. Sparrow proposed. (Atkins Rebuttal Tr. Vol. VI, pg. 368). To discard Dr. Sparrow's opinion only because it lacks general acceptance would be inappropriate. But here the undisputed evidence is that linkage-accuracy is substantially below 50% to a mathematical probability—thus well below proof by a preponderance of the evidence. Well below probability. [77]

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[77] It should be noted that none of the original three experts were particularly impressed by the Vineland as an accurate reflection of *anyone's* adaptive functioning. Dr. Hammer testified that the SIB-R (Scales of Independent Behavior, Revised) is preferred in modern psychology over the Vineland. (Atkins Tr. Vol. II, pg. 434). Dr. Huntsman stated the Vineland was a **"bad instrument"** and [was] "ill-regarded [sic] and was***not a very **reliable measure for anybody."** (Atkins Vol. IV, p. 944, 948). Dr. Olley testified it was **"not a very good test."** (Atkins Rebuttal Tr.Vol. VI. pg. 392. (Emphasis in bold.)

4. Anecdotal Evidence and Prong II.

"Functional academic skills," "communication," "social/interpersonal skills" and ***"self-direction,"*** these and more, comprise the list of adaptive skills identified by AAMR in its forensic definition of mental retardation.[78] This court has reviewed the evidence, in the context of the second prong, in three time frames: the Petitioner's early years; the Petitioner at 17 to 18, and, finally the Petitioner as a prisoner on death row. The court has also sought to rely upon the opinions of the experts, realizing, nevertheless, that the burden of the decision falls ultimately upon the trier of fact and not the expert.[79] **Danny Lee Hill's adaptive skills are inconsistent with a mentally retarded individual.**

a) The Petitioner's Early Years.

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[78] The APA's 1992 definition lists the following skill areas: communication; self-care; home living; social/interpersonal skills; use of community resources; self-direction; functional academic skills; work; leisure; health; and safety. (DSM-IV at pg.39).

[79] See *Ex parte Jose Garcia Briseno,* 2004 WL 244826 (Tex. Crim. App). 135 S.W.3d 1, 8:

"The adaptive behavior criteria are exceedingly subjective, and undoubtedly experts will be found to offer opinions on both sides of the issue in most cases.

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"Although experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation, **the ultimate issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility.**" [Emphasis in bold added.]

See Kansas v. Crane, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (U.S.Kan.2002) (noting that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law"); Williams, 831 So.2d at 859. In determining an *Atkins* claim, "the trial court must not rely so extensively upon this expert testimony as to commit the ultimate decision of mental retardation to the experts."

Records for the Petitioner's early years in the public school system demonstrate a combination of both academic deficiencies and behavioral problems. There is a reference to a head injury "in an accident at a young age." (Respondent's Submission of Documents, Vol. VI., pg. 708.) However, this possibility was explored extensively with Dr. Hammer, who fairly well discounted this issue. Furthermore, the test results, over the years, belie any pattern attributable to organic brain dysfunction. And, finally, the profile of the Petitioner today, as will be seen, demonstrates what can only be viewed as a capacity for self-improvement—the subject of special commentary by Dr.Olley as well as Dr. Hancock.

Records for the early years indicate that the Petitioner was disruptive and immature in class. There are references to 'Danny being easily led.' But beyond that blanket statement, the specific anecdotes paint a different picture—that of Danny Lee Hill as a leader of one—a loner—and not a follower. Especially is this apparent when it comes to serious misconduct. According to a bus driver's written report dated 1-27-81, the Petitioner, at age 14, **by himself,** began to punch another student—a girl, and he had to be restrained by the driver from following her off the bus. (Id. Vol. VI. pg. 743.) On 2-10-82, about a year later, the Petitioner **(alone)** was caught, stealing.[80] Numerous juvenile delinquencies are contained in the records. None support the proposition that the Petitioner, either as a boy or a young man, was easily led. As the Petitioner turned 17, a cavalcade of crimes played out—one more violent than the other, but once again this Petitioner was not working with confederates, was not charged with gang

[80] About $77 had been stolen before a trap had been set. Only the Petitioner was identified as the thief. When interviewed, he was carrying a paring knife in his jacket. As a result, he was removed from the basketball team until he made restitution in the amount of some $100. He was quick to blame an innocent classmate for some of the crimes. (Respondent's Submission etc., Vol. VI. pg. 746-751.)

activity, was not a surrogate for another.[81] The totality of the anecdotal evidence for the early to mid-adolescent years of the Petitioner portrays a healthy boy described frequently by his teachers as lazy, who admits to experimenting with drugs and alcohol, who assaults the defenseless, steals frequently and lies a lot. Although his academic performance has been consistently poor, he is able to write in cursive, but prefers to print. In fact, his printing is neat and legible. (Id. Vol. VI. at 733)

Hill attacked Raymond Fife on September 10, 1985. Here is what Mrs. Kesco, a teacher at Fairhaven, had to say about him, some four years before the murder, in a memo dated October 2, 1981

> "Danny is a **bright, perceptive boy with high reasoning ability**. But his defiant attitude and refusal to obey any known authority hinders his learning. He is lazy, often verbally abusive, intimidating to other students and will bribe or steal for his own benefit." (Emphasis in Bold.)
>
> (Atkins Tr., Vol. II, pg. 398.)

b) The Petitioner at 17 to 18, including the Murder and the Trial

Three anecdotal events in 1984 are relevant to the issue of the Petitioner's self direction:

1. In March of 1984, some eighteen months before the murder of Raymond Fife, the Petitioner, acting alone, repeatedly raped a young mother, after breaking into her home. He bit her on the back and the breast, threatened to cut her vaginally and rectally, and threatened to rape and cut her baby. The victim escaped while Danny Lee Hill was putting on his pants. He, in turn, fled to the field behind Valu-King.

2. In the Morning of February 8, 1984, he raped a woman at knifepoint on a path leading from Valu-King. And—

3. While confined in a cell, during the winter of 1984, he attempted, unsuccessfully, to initiate sexual conduct with his cellmate.[82]

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[81] Prior to his 18th birthday, Hill was arrested some 15 to 20 times. (Mitigation Tr. Pg. 185.)

[82] See Supreme Court opinion affirming the judgment in *State v. Hill* (1992), 63 Ohio St. 3d 313 at 321.

The above is not the profile of a docile or tractable individual. Furthermore, the AAMR, an authority upon which *all* experts rely, has this to say about *adaptive behavior versus problem behavior:*

- "Adaptive behavior is conceptually different from maladaptive or problem behavior."
- "The presence of clinically significant levels of problem behavior found on adaptive behavior scales **does not meet the criterion of significant limitations in adaptive functioning.**" (Emphasis in bold.)
- "Behaviors that interfere with a person's daily activities, or with the activities of those around him or her, are problem behavior rather than the absence of adaptive behavior."

Source: AAMR, Mental Retardation Definition, Classification and Systems Support 2, (10th Ed, 2002) p. 79.

Having committed the murder of Raymond Fife, Danny Lee Hill demonstrated self-direction by presenting himself at the station house in search of a reward. He also must have known that he was a suspect, a fact he was to verify in taped interviews years later by Tribune Chronicle reporter Andrew Gray. His appearance at the police station was a desperate effort to misdirect the investigation. The police interrogation tapes demonstrate abundantly that Danny Lee Hill was able to hold his own with his adversaries. Dr. Olley had this to say on the topic of Hill's interrogation by the police:

> "***Mr. Hill in my observation during that statement was not easily influenced. **In fact, he stood his ground during that interrogation very, very strongly**. When the detectives and police officers suggested, didn't you do this, and did you do that, he said absolutely no. **He only modified his story a little bit when he was faced with evidence that he couldn't possibly have avoided**. And then he, I thought rather, made a good effort to take that information, revise his story in a way that made it congruent. **That to me is a kind of thinking and planning and integrating complex information that is a higher level than I have seen people with mental retardation able to do."** (Emphasis in bold.) (Atkins Tr. Vol. III p.5 (Atkins Tr. Vol. III, p. 586).

The totality of the evidence surrounding the interrogation, arrest, trial and conviction of Danny Lee Hill, presents a profile of a defendant with at least average communication skills, seldom, if ever, speaking out of context, and displaying abilities well above those described in his school records. Some examples:

- Said by his teachers to be unable properly to state his name and address, the defendant gave his full name and address to the police officers. The information included his apartment number.
- The defendant demonstrated accurate recollection of the time of day of various events, as well as accurate reference points in terms of months.
- The defendant demonstrated accurate attention to detail, particularly with respect to unspeakable events surrounding the attack upon young Raymond—details not known to the general public that he blamed upon his confederate Tim Combs.
- The defendant did not capitulate under the stress of interrogation.[83]
- The defendant was able to interact with his interrogators.[84]

c) The Petitioner as a Prisoner on Death Row.

Danny Lee Hill has been on death row for twenty years. Convicted at the age of 19, he is now 39 years of age. **MR** (meaning mental retardation in its forensic sense) contemplates a relatively static condition of both low IQ and low SQ, which, together, manifest themselves

[83] This is significant because Justice Stevens, for the *Atkins* court, stated "mentally retarded defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit." *Atkins*, supra, at 305.
[84] According to Dr. Huntsman the mentally retarded are easily led or become quiet and passive. To the contrary, Petitioner Hill was interactive with his interrogators and corrected them at various points in the interview. (Atkins Tr. Vol. IV, pg. 891). " So the conclusion that I would probably -- that I would draw from that would be that with a reasonable psychological certainty he was probably not retarded at the time of the offense. (Atkins Tr. Vol. IV, p. 908).

before the age of 18.[85] In fact, the Petitioner has demonstrated maturity inconsistent with a mentally retarded individual. Consider the following categories: vocabulary; legal nomenclature; context; reading ability; reasoning ability; ability to adjust to changing circumstances; use of community resources; physical appearance and apparent personal hygiene.

There are four sources of evidence are availabile from which this court is able to evaluate the social/ adaptive skills of the Petitioner as a prisoner on Death Row. They are, first, the audio-taped interviews of the Petitioner by Tribune Chronicle reporter Andrew Gray—particularly the 2d interview of July 13, 2000 lasting just under an hour; secondly, the conduct of the Petitioner in open court on many occasions, and his reaction to events changing circumstances; thirdly, the testimony of prison officials familiar with the day-to-day conduct of the prisoner; and, finally, the opinion testimony of the expert witnesses.

(i) *The Andrew Gray Interviews*

Two years before the United States Supreme Court handed down its landmark decision in *Atkins v. Virginia*, Danny Hill, *on his own initiative*, contacted his hometown newspaper, the Tribune Chronicle of Warren, Ohio, in an effort to generate publicity for his plight on death row. The Tribune assigned Andrew Gray to travel to the Mansfield Correctional Institution and to meet with Hill. Two sessions transpired, the first in May and the second in July of 2000

[85] The Petitioner's attorneys have generated considerable debate over the time frame within which mental retardation is to be judged. This court has ruled in pre-hearing motion practice (discussed in detail, infra) that the time frame for evaluating MR is the present, coupled of course with the proviso that manifestation must exist before the age of 18. This court, however, is prepared to make rulings in all three time frames, inasmuch as the experts themselves opined in all three time frames.

(Atkins Tr.Vol. IV, p. 1138). Assistant County Prosecutor LuWayne Annos interrogated Gray for the purpose of demonstrating that Danny Lee Hill's comprehension was superior to that of a mentally retarded person.

When Gray disclosed that the interviews had been taped with the Petitioner's permission, Petitioner's counsel demanded the tapes be produced. In fact, went so far as to ask this Court to hold Mr. Gray in contempt if he did not produce the tapes. (Atkins Tr. Vol. IV, pg. 1158). The tapes were surrendered the next day. (Atkins Tr. Vol. V, pp. 1169-1172).[86]

This court has reviewed the tape of the second interview in detail. From that review, this court notes the following:

- General Vocabulary: The Petitioner's word power seems inconsistent with a mentally retarded person. Admittedly, his grammar is very poor, noticeably with respect to pronouns and antecedents; also indulging in phrases such as "I had went ...," or ".....what he had did ...." But in an interview lasting nearly an hour, in which he did most of the talking, he was rarely at a loss for words; he never resorted to 'four-letter' words. Occasionally, he spoke metaphorically and colorfully, as in: "[County Prosecutor] Dennis Watkins "was just grabbing at air [during the trial];" or the "games being played by lawyers ...they tell you what you want to hear;" or a reference to the "political pass cards" of prosecutors and judges, "who use you to get bumped up," meaning elevated to a higher position; and also that "Dennis Watkins and Norma [meaning Miriam] Fife force-fed the community" with bad publicity. He speaks about the "news media" and "manipulative games." Seeking to turn the full blame on the Fife murder upon his confederate, Hill informs the reporter that Tim Combs "had a history" of raping boys.

- Legal Nomenclature: Here, the petitioner's knowledge is remarkable. The following terms are a permanent part of his vocabulary, meaning they are expressed with ease, and in context and with correct emphasis: "transcript," "the new technology" (referring to DNA), "circumstantial evidence," "evidentiary hearing," "dental impressions," "rape kit," "post conviction" (referring, in context, to post conviction relief procedure and

[86] Mr. Frank Robinson, Editor of the Tribune Chronicle, personally appeared voluntarily and delivered the tapes to the court. He stated there was a gentleman's agreement between the defendant and the reporter that if the defendant ever wanted a copy of the tapes they would be made available. The parties agreed that the tapes would be delivered to the State and arrangements made to copy and deliver to Petitioner's attorneys and to the court.

federal habeas corpus, as opposed to direct appeal), "the federal constitution," "pro death penalty" (referring to the prosecutor), "bogus issues," as in "don't waste the judge's time;" also "Eleventh District Court of Appeals" and "the Sixth Circuit," (demonstrating knowledge of our different judicial systems). Although the term "certiorari" may not be part of his vocabulary, he is well aware of the U.S. Supreme Court's discretionary power to grant or deny the issuance of the writ of certiorari. He is well aware of the Sixth Circuit's role as a court of last resort. He knows where courts are located geographically. He knows that when he gets into the federal system, the State Attorney General represents the State of Ohio, whereas in the state court system, he must deal with County Prosecutor Dennis Watkins.

- Context: Dr. Hammer referred to the "cloak of competence," a psychological term of art, common to mildly retarded persons, who "mask" their deficits. It is said that such persons are intelligent enough to be aware of their failings. Dr. Hammer remarked that these subjects rely on a script, and they can easily by thrown off track. The Petitioner has not demonstrated this failing. Rather, he communicates in context; he uses vocabulary in context; he emphasizes legal points in context. He can fairly well narrate a story with a beginning, middle and an end. It is when he is directed to the topic of the murder of Raymond Fife that the Petitioner disconnects.

- Reading Ability: The Petitioner has read his trial transcript, in his own words: "through and through." He gives the impression of being a frequent reader of the Tribune Chronicle. He reads the New York Times, and relates death penalty cases and issues from other states logically and in context. He can read out loud remarkably well, as he demonstrated during his first session with Gray. (Dr. Olley, Atkins Rebuttal Tr. Vol. VI. Pg. 380-381). He admits to having a "pen pal" in Niles.

- Reasoning Ability: Referring to his efforts to gain newspaper attention in mid 2000, the Petitioner questions whether his efforts will "backfire." He later encourages the reporter to write the story that he (Danny Lee Hill) is going to "throw up the flag." He adds that he will write a letter to the Public Defender and to Betty Montgomery (The Attorney General at the time), adding that he will be tested for "competency" when he advises her that he is foregoing further appeals. He refers to the prosecutors "theory" of the case; and he even lectures the reporter on the attorney client privilege, and how it is being ignored. He speaks of the need to "stay focused," a term he uses correctly in several different contexts. He describes the "main focus" of his fellow inmates. And from 20 years ago, he is able to describe people, places, things and events. He suggests that the reporter try to locate his father by checking with the DMV, telling the reporter to "lead him along," And, finally, he speaks philosophically about his friends and relatives who have "turned their backs" on him. He adds insightfully: "if the circle was reversed ...a whole different story.

The tapes corroborated Gray's testimony that the Petitioner orchestrated the interviews, did most of the talking, sought publicity for himself, read fluently, spoke coherently and responded to questions spontaneously. (Atkins Tr. Vol. IV, p. 1139-1147).

(ii) The Conduct of the Petitioner in Court.

This court had many opportunities to observe the Petitioner over an extended period of time.

- Personal appearance. For the most part he was polite, respectful and well behaved. He appeared to be clean and well groomed. He appeared to be in reasonably good health. In short, there is nothing about his general appearance—facial expressions or conduct—suggesting (at least to a layman) that the Petitioner is mentally retarded.

- Adjusting to Changing Circumstances: Although this court has no way of knowing the depth of the Petitioner's knowledge of the myriad of legal points raised in his behalf by his experienced and thorough counsel, this court is aware from the evidence and court developments that the Petitioner played an active role in the conduct of the hearing on several occasions. During the early stages, he was dissatisfied with the local public defender. He then executed a waiver in open court of that issue in favor of local counsel Maridee Costanzo and her then husband Roger Bauer—both independent contractors to that office. Secretly, he had brought Costanzo and Bauer on board to pursue an "innocence project," essentially intending to gut the Atkins hearing. When Hill learned that Bauer was having an affair with one of his (Hill's) prior rape victims, and that Bauer had not filed requested papers in federal habeas corpus, he demanded Bauer's removal. When he learned the true circumstances leading to Costanzo's entrée into his case—and her pro neo-Nazi political views—he demanded that she be removed as well. Then, when he learned that Costanzo had been indicted federally on an interstate murder-for-hire scheme, with the intended victim her husband, Attorney Roger Bauer, the Petitioner sought to have Costanzo brought in as a witness to derail the hearing. The wisdom of his conduct is not for this court to judge. What he did demonstrate was an awareness of changing events, a pattern of self-direction and a commitment to chart his own course.

- Use of Community Resources: Admittedly, the Petitioner's opportunity to use community resources is limited. But he was able to draw newspaper attention from Death Row in the year 2000. This aptitude has not ceased. The State submitted a videotape of unedited news footage from a hearing conducted by this court June 7, 2004, shot by WYTV, the Youngstown ABC affiliate. After the hearing, Petitioner invited the local news media to review an affidavit he had filed with the FBI and added: "If you want to talk to me, set it up with my attorney and I'll give you all an interview on everything." [87]

(iii) *Life on Death Row*

A number of Penitentiary officials, familiar with the Petitioner's conduct on Death Row at Mansfield, appeared as witnesses:

- Corrections Officer John Glenn: Despite a laundry list of complaints by the Petitioner during his interview by Drs. Hammer, Olley and Huntsman, Officer Glenn related there was no "dumbing down" of job assignments; the prisoner *never* had seizures (contrary to Hill's history of complaints to the experts); he was *not* ostracized by his fellow inmates; he played cards with the other inmates; and he was *not* illiterate.

- Death Row Case Manager Greg Morrow: Familiar with this prisoner since 1998, Officer Morrow verified that the Petitioner is able to communicate by written documents (in Death Row parlance, known as 'kites.'). He plays bingo with fellow inmates. Most notably, the Petitioner was among a handful of inmates assigned to the coveted DR-6, the newest of the Death Row pods. This required the inmate to be "self sufficient," to hold down a job, to maintain acceptable hygienic standards, and to be free of any rules infractions. In exchange, the DR-6 inmates were afforded more freedom. (Atkins Tr. Vol. IV, pg. 1106-1108). Furthermore, the Petitioner kept track of his own commissary account and executed his own commissary forms.[88]

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[87] Dr. Olley testified that he has evaluated nine other death row inmates to assess whether they were mentally retarded for purposes of escaping execution, and none of those inmates ever called the local news media to initiate an interview. (Atkins Tr. Vol. III, pg. 623). Self-initiated press conferences are germane to MR issues. See *Hall v. Texas* (2004), 160 S.W. 3d 24, 32 & 40. This is at least the second time that the Petitioner has sought to utilize the news media in his own behalf—the first being the Gray interviews.

[88] In one instance, he complained he was credited with $3 instead of $16. (Atkins Tr. Vol. IV, pp. 1109-1110).

- Death Row Unit Manager Jennifer Sue Risinger: In contact with the Petitioner daily for some three and half years, Officer Risinger confirmed that Hill always knew how much money he had in his commissary account. (Atkins Tr. Vol. IV, pg. 1220). Before he was transferred to DR-6, Petitioner Hill complained in kites to her about his work assignments. (Atkins Tr. Vol. V, pg. 1195). But he readily accepted his DR-6 assignment. **"His job was to make sure that the chemicals were distributed as directed. And he was told how to do it, explained how to do it. Said he could do it. Did it."** (Atkins Tr. Vol. V, pg. 1194). (Emphasis in bold.)

- Corrections Officer Steven Black: Having daily contact with Danny Lee Hill for 18 months on Death Row, Officer Black never had trouble communicating with him, and in fact, frequently discussed football with him. (Atkins Tr.. Vol. V, pg. 1228). **He personally observed Petitioner Hill reading newspapers and reading in the prison library**. (Atkins Tr. Vol. V, p. 1229). According to Officer Black, Hill was a person who could follow the rules. (Atkins Tr.. Vol. V, p. 1230). Dr. Hammer recorded one of the most telling points regarding the Petitioner and his life on Death Row. Here is what he said about his interview of Officer Black: "Mr. Black feels Danny Hill is playing a game to get others to believe he is mentally retarded. **He said Danny's actions changed after he heard of the Atkins decision**." (See "Respondent's Submission of Documents [etc.] ...Volume I," Dr. Hammer Report, Page 11.)

Adaptive functioning scores, according to AAMR and the experts, should be judged in context.[89] That a Death Row prisoner is living a restrictive life cannot be denied. But, according to the prison officials Danny Lee Hill's skills are certainly no less than average for a Death Row prisoner.

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[89] For example, if a child has only worn Velcro shoes, he may not know how to use laces. Several examples are offered by AAMR regarding limited opportunities to participate in community life, which, for example, would affect shopping skills and the use of money. "This should be taken into account when scores are interpreted." AAMR 10th Ed. pp. 85-86.

(iv)*The Expert Witnesses.*

1. Dr. Hammer: As previously noted, Dr. Hammer has concluded that the Petitioner satisfies Prong I, meaning two standard deviations below the mean. In the words of Dr. Hammer, Danny Lee Hill "keeps bumping up against the ceiling of IQ of 70." This court accepts that testimony. It is to be noted, nevertheless, that Hill demonstrated a full-scale IQ score of 71 on 11-06-2000. With an SEM of 2.32, Dr. Hammer notes that Hill's IQ score could be as low as 69. It is also correct to observe, however, that Hill's IQ could be as high as 73.[90] As for the 2d Prong of MR, however, this court does not accept the opinion of Dr. Hammer. The reason is that the evidence—both anecdotal and psychometrical—simply does not support the psychological opinions of this expert. The available evidence as to the Petitioner's SQ scores—four Vineland test scores—are all above 70. If Vineland is to be rejected, the professional analyst is left with anecdotal evidence. That anecdotal evidence does not support significant limitations in adaptive functioning, either now or during any relevant historical period.

2. Dr. Sparrow: This distinguished academician revised the original Vineland back in the 1970s. However, she was retained to re-score the test that Danny Lee Hill took many years ago. Because her own records demonstrate a mathematical accuracy rate of only 25%, her testimony fails the Daubert test. Even if accepted as evidence, her testimony is rejected as lacking in sufficient probative value. This court also notes that Drs. Hammer, Olley and Huntsman all agreed that Vineland is poorly regarded in the field of Modern Psychology. But ill regarded, or highly regarded, the Vineland scores at that time are well above 70. And, considering the Petitioner's adaptive skills today, who is to say that his mother was overstating his skills back then? And who is to say that his teacher was incorrect when she observed in 1981 that "Danny is a bright, perceptive boy with high reasoning ability?"

3.Dr. Hancock: A genuine expert in psychometrics and statistics, with considerable experience in clinical psychology and criminal jurisprudence, Dr. Hancock explained the mathematics supporting his conclusion that Dr. Sparrow's re-scoring of Petitioner's Vineland tests, a look-back period exceeding 20 years, was simply mathematically unreliable. His conclusions were not seriously challenged.

[90] According to Dr. Hammer, the SEM (meaning Standard Error of Measurement for Hill's Age group in 2000) was 2.32 up or down. This, according to WAIS-III Technical Manual, pg. 54. See page 12 of Dr. Hammer's report. Respondent's Submission of Documents [etc.] Vol. I.

4. Dr. Huntsman: A clinical psychologist, who specializes in forensic psychology for various judicial and executive branches of state and local government in Northeast Ohio, with substantial testing experience, Dr. Huntsman has concluded that the Petitioner is **not** mentally retarded but that he is considered to be borderline [91] intellectually, coupled with an anti-social personality and a diagnosis of malingering. Her opinion was expressed with reasonable psychological certainty, and was buttressed with substantial analysis. Like Dr. Olley, this expert was struck by the ease with which Danny Lee Hill was able to express legally complex narratives. For example, Hill took her through a cavalcade of attorneys from trial, through direct appeal, into what he described as the "post conviction phase." According to her report, he even advised her that as the case entered into the "post conviction phase," the attorneys withdrew, in order that the new attorney could raise "ineffective assistance of counsel" as an assignment of error. (Respondent's Submission of Documents ...[etc.] Vol. I, pg. 27.)

5. Dr. Olley: A Fellow of AAMR and a Director of the North Carolina Chapter of AAMR, Dr. Olley is a clinical professor, who has qualified as an expert in several States on 8th Amendment jurisprudence and mental retardation. In the past, he has always appeared in support of Death Row prisoners. The signature attribute of adaptive functioning, according to Dr. Olley is self-direction:

> [S]elf-direction, for example, in my view that is very important to the heart of what is meant by mental retardation in an adult.*** The person who can consider all of the factors in his adult functioning and make decisions for the present time, make decisions that will be appropriate in the future. So it's being in control of your own life and doing it without undue influence from other people. So that's the sense in which self-direction is import (Atkins Tr. Vol. III, p. 559).

Recalled to the stand following the discovery of the Gray tapes, Dr. Olley opined that a constellation of attributes demonstrated by the Petitioner were simply incompatible with mental retardation. Examples: recollections of events going back more than a dozen years, descriptions of events in sequence, degree of detail, accurate pronunciation, and remarkable reading ability, including intonation. All of this giving more support to his original opinion that the Petitioner is not now mentally retarded. (Atkins Tr. Rebuttal, Vol. VI. Pg. 381)

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[91] Borderline MR is one standard deviation below the mean, whereas Mild MR is two standard deviations below the mean. Borderline is not protected under *Atkins*.

In summary, then, this court relies upon the expert opinion of Drs. Huntsman, Hancock and Olley to conclude that the Petitioner has **not** satisfied Prong II of the forensic definition of MR.

C. The Third Prong: Onset Before the Age of Eighteen.

This Court has considered the totality of the evidence in order to determine whether Petitioner Hill manifested onset of both significantly subaverage intellectual functioning *and* significant impairments in adaptive skills prior to age 18. This Court understands that the third prong is as important as the other two, and that without proof of onset before age 18, the diagnosis of mental retardation fails. This is so even where proof of the first two prongs has been satisfied.

In analyzing the third prong—onset before age 18—the fact finder must necessarily revisit prongs one and two. These two prongs will be revisited in three different time frames: the current period, the period of the crimes, and the pre-18 period. It will be helpful to restate the relevant portion of footnote 3 of the U.S. Supreme Court's decision in *Atkins*:

> Mental retardation refers to substantial limitations in **present functioning.** It is characterized by significantly sub-average intellectual functioning, **existing currently** with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18. (Emphasis in bold.).

Petitioner Hill scored a 58 on an IQ test administered in prison by the three experts retained to testify in this case. All three agreed that Hill malingered—that it was patently apparent he was

"faking bad." Therefore the test score is invalid. This court declines to accept Dr. Hammer's suggestion that Petitioner Hill's true IQ falls currently somewhere in the high 60s. This is merely conjecture. What is not conjecture is the score of 71 that Hill registered in 2000 at the age of 33.

With respect to Prong II for the current time frame—including the Tribune Chronicle interviews by Andrew Gray in the year 2000—the anecdotal evidence portrays a person with remarkable communication skills, armed with correct legal nomenclature, one who speaks in context, one who adjusts his diction to his audience. Prison officials uniformly consider Danny Lee Hill to be fairly well mainstream for a prisoner on Death Row. They consider him average. He was self-sufficient enough to secure and maintain residence for three years in the coveted DR-6. During these Atkins hearings he was able to chart his own course, filing several pro-se motions. He was able to adjust to changing circumstances, particularly the Maridee Costanzo caper, and his secret plan to pursue an innocence project as part of the Atkins hearing. He spoke in open court respectfully and in context. In sum, the Petitioner has not presently demonstrated manifestation of Prong II deficiencies.

With respect to the Petitioner at about the ages of 17 to 19, three IQ test scores place him in the mild retardation category, so it is fair to say, and this court so finds, that the petitioner has satisfied Prong I of the forensic diagnosis of MR. However, deficits in adaptive functioning are not present from the available evidence. In fact the evidence is contra. The Petitioner demonstrated considerable self-direction in the form of a one-man crime spree at the age of 17. He was able to hold his own during police interrogation of the Fife murder. Indeed, the Petitioner demonstrated cunning by appearing at the station house in search of a reward—

not nearly as guileless as may have been thought at the time. As one can infer from the information volunteered to Gray, the Petitioner knew he was a suspect and his gambit in appearing was a desperate effort to misdirect the investigation.

Finally, with respect to the Petitioner's early years, this court relies on the opinion of both Dr. Olley and Dr. Huntsman that the evidence is insufficient to warrant a finding of adaptive behavior deficits. This court also notes that Vineland testing scored the Petitioner well above 70 for his SQ abilities, and one of his teachers described him thusly:

> "Danny is a **bright, perceptive boy with high reasoning ability**. But his defiant attitude and refusal to obey any known authority hinders his learning. He is lazy, often verbally abusive, intimidating to other students and will bribe or steal for his own benefit." (Emphasis in Bold.)
>
> (Atkins Tr., Vol. II, pg. 398.)

And in the words of J. Gregory Olley, Ph.D.:

> As we have repeatedly emphasized here, all three prongs of the definition [of MR] should be satisfied for a valid diagnosis.
>
> (Atkins Tr. Vol. III, pg. 795).

Dr. Olley added that he evaluated the evidence and that the Petitioner did not satisfy the diagnosis of MR at any of "the three points in time that we examined."

IX. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court has been called upon to rule whether Petitioner Danny Lee Hill has met his burden of proof on his claim of mental retardation. Under guiding principles laid down by the Supreme Court of the United States, and by the Supreme Court of Ohio, this court has held hearings, conducted its own *de novo* review of the evidence in order to determine the ultimate

issue, relied upon professional evaluations, appointed experts, issued findings of fact herein, and, finally, set forth its rationale for finding the Defendant/Petitioner **not** mentally retarded.

Specifically:

- This Court finds that the burden of proof, meaning the risk of non-persuasion (Evidence Rule 301) has remained throughout these proceedings upon the Petitioner to prove by a preponderance of the evidence that he is mentally retarded.

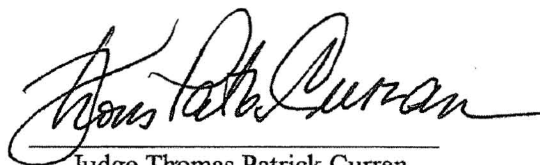
- This court finds that the Petitioner has failed to meet his burden to prove mental retardation, as forensically defined in accordance with law.

- This Court finds that the Petitioner Danny Lee Hill is **not** mentally retarded.

X. ORDER

For the reasons set forth above, and upon due consideration, this court **DENIES** the Petition for Post Conviction Relief of Defendant Petitioner Danny Lee Hill. **FINAL.**

SO ORDERED THIS 15th **DAY OF FEBRUARY, 2006**



Judge Thomas Patrick Curran
Sitting by Assignment
Art. IV Sec. 6 Ohio Constitution

TO THE CLERK OF COURT: YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD FORTHWITH BY ORDINARY MAIL.

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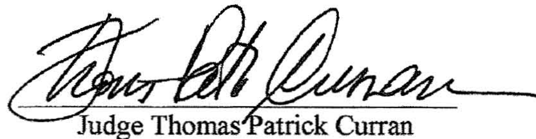

Judge Thomas Patrick Curran

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[Cite as *State v. Hill*, 177 Ohio App.3d 171, 2008-Ohio-3509.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

THE STATE OF OHIO,	:	**O P I N I O N**
Appellee,	:	
		CASE NO. 2006-T-0039
- vs -	:	
HILL,	:	**7/11/08**
Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 85 CR 317.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecuting Attorney, and LuWayne Annos, Assistant Prosecuting Attorney, for appellee.

Michael J. Benza and Jillian S. Davis, for appellant.

DIANE V. GRENDELL, P.J.

{¶1} Defendant-appellant, Danny Lee Hill, appeals the judgment of the Trumbull County Court of Common Pleas denying his petition for postconviction relief. For the following reasons, we affirm the decision of the court below.

{¶2} On September 10, 1985, 12-year-old Raymond Fife was found brutalized in a field near his home in Warren, Ohio. Raymond died two days later. In September 1985, Hill and an accomplice, Timothy Combs, were indicted for the crime. In 1986, Hill was

found guilty, by a three-judge panel in the Trumbull County Court of Common Pleas, of the following charges: aggravated murder with specifications of aggravating circumstances, kidnapping, rape, aggravated arson, and felonious sexual penetration.

{¶3} On February 26, 1986, a mitigation hearing was held to determine whether the death penalty would be imposed for Raymond's murder. The three-judge panel "considered the following factors in possible mitigation: (1) The age of the defendant; (2) The low intelligence of the defendant; (3) The poor family environment; (4) The failure of the State or society to prevent this crime; (5) The defendant's impaired judgment; (6) Whether or not he was a leader or follower." The three-judge panel concluded that "the aggravating circumstances in this case outweigh the mitigating factors beyond a reasonable doubt."

{¶4} On March 5, 1986, Hill was sentenced to the following: death for aggravated murder; imprisonment for an indeterminate period of ten to 25 years for kidnapping; imprisonment for determinate period of life for rape; imprisonment for an indeterminate period of ten to 25 years for aggravated arson; and imprisonment for a determinate period of life for felonious sexual penetration.

{¶5} Hill's convictions and sentence were upheld on appeal by this court. *State v. Hill* (Nov. 27, 1989), 11th Dist. No. 3720, 3745. In our review of the appropriateness of imposing the death penalty, this court noted: "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 I.Q. between 55 and 71, which would cause him to be

categorized as mildly to moderately retarded." Id. at *88. This court affirmed the conclusion that the evidence of low intelligence and impaired judgment were not significant mitigating factors. "Consideration of evidence delineating appellant's mental retardation is more properly applied when evaluating his ability to knowingly, intelligently and voluntarily waive his constitutional rights. There is no evidence presented that requires the conclusion that this crime was committed because a mental defect precluded appellant from making the correct moral or legal choice." Id. at *90.

{¶6} Hill appealed his case to the Ohio Supreme Court, which, in accordance with R.C. 2929.05(A), independently reviewed the record to determine that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case. *State v. Hill* (1992), 64 Ohio St.3d 313, 335, 595 N.E.2d 884.

{¶7} The Supreme Court acknowledged that Hill's "mental retardation is a possible mitigating factor." Id. The court summarized the testimony of the psychologists who testified during the mitigation phase of Hill's trial:

{¶8} Dr. Douglas Darnall, a psychologist, testified that defendant had an I.Q. of 55 and that his intelligence level according to testing fluctuates between mild retarded and borderline intellectual functioning, and that he is of limited intellectual ability. Dr. Darnall did state, however, that defendant was able to intellectually understand right from wrong.

{¶9} Dr. Nancy Schmidtgoessling, a clinical psychologist, testified that defendant had a full scale I.Q. of 68, which is in the mild range of mental retardation, and that the defendant's mother was also mildly retarded.

{¶10} Dr. Schmidtgoessling also testified that defendant's moral development level was "primitive," a level at which "one do[es] things based on whether you think you'll get caught or whether it feels good. [T]hat's essentially whereabout [*sic*] a 2-year old is."

{¶11} Dr. Douglas Crush, another psychologist, testified that defendant had a fullscale I.Q. of 64, and that his upper level cortical functioning indicated very poor efficiency.

{¶12} Having reviewed this testimony, the Supreme Court found "a very tenuous relationship between the acts he committed and his level of mental retardation." Id. at 335. "When considering the manner in which the victim was kidnapped and killed; the rape, burning, strangulation and torture the victim endured," the court concluded that "these aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt" and affirmed the sentence of death. Id.

{¶13} In 2002, the United States Supreme Court held that the execution of mentally retarded criminals violates the Eighth Amendment's ban on cruel and unusual punishments. *Atkins v. Virginia* (2002), 536 U.S. 304. In *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, the Ohio Supreme Court addressed the implications of the *Atkins* decision on the execution of capital punishment in Ohio. The court adopted three criteria for establishing mental retardation, based on clinical definitions approved in *Atkins*: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." Id. at ¶ 12. The court further held that "[w]hile IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue," and "there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70." Id.

{¶14} On January 17, 2003, Hill filed a petition to vacate Danny Hill's death sentence pursuant to *Atkins v. Virginia*, 122 S.Ct. 2242, *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, and R.C. 2953.21. Hill asserted that his mental retardation is "a fact of record in his case" and that the state is thereby "barred by the doctrine of collateral estoppel from any attempt to relitigate the proven fact that [Hill] is a person with mental retardation." In the alternative, Hill argued the trial court should take judicial notice of the fact that he is a person with mental retardation and/or hold a hearing on the issue of his mental retardation.

{¶15} On April 4, 2003, the trial court ruled that Hill's petition stated "substantive ground for relief sufficient to warrant an evidentiary hearing." The court granted the state's and Hill's requests to retain their own experts in the field of mental retardation. Over Hill's objection, the court determined to retain its own expert to evaluate Hill "pursuant to his *Atkins* claim." The court denied Hill's request to have a jury empanelled to adjudicate his *Atkins* claim.

{¶16} The state retained as its expert Dr. J. Gregory Olley, a professor at the University of North Carolina at Chapel Hill and a director of the university's Center for the Study of Development and Learning. Hill retained as his expert Dr. David Hammer, a professor at the Ohio State University and the director of psychology services at the university's Nisonger Center. The court, through the Forensic Center of Northeast Ohio, retained Dr. Nancy Huntsman, of the Court Psychiatric Clinic of Cleveland.

{¶17} In April 2004, Drs. Olley, Hammer, and Huntsman evaluated Hill at the Mansfield Correctional Institution for the purposes of preparing for the *Atkins* hearing. At this time, Hill was administered the Wechsler Adult Intelligence Scale ("WAIS-III") IQ test, the Test of Mental Malingering, the Street Survival Skills Questionnaire, and the

Woodcock-Johnson-III. The doctors concurred that Hill was either "faking bad" and/or malingering in the performance of these tests. As a result, the full scale IQ score of 58 obtained on this occasion was deemed unreliable, and no psychometric assessment of Hill's current adaptive functioning was possible. Thus, the doctors were forced to rely on collateral sources in reaching their conclusions, such as Hill's school records containing evaluations of his intellectual functioning, evaluations performed at the time of Hill's sentencing and while Hill was on death row, institutional records from the Southern Ohio Correctional Institution and the Mansfield Correctional Institution, interviews with Hill, corrections officers, and case workers, and prior court records and testimony.

{¶18} The evidentiary hearing on Hill's *Atkins* petition was held on October 4 through 8 and 26 through 29, 2004, and on March 23 through 24, 2005. Doctors Olley and Huntsman testified that in their opinion, Hill is not mentally retarded. Doctor Hammer concluded that Hill qualifies for a diagnosis of mild mental retardation.

{¶19} In the course of the trial, an issue arose regarding the interpretation of the results of the Vineland Social Maturity Scale test, a test designed to measure adaptive functioning and performed on Hill four times prior to the age of 18. Hill presented the testimony of Sara S. Sparrow, Ph.D, professor emerita of Yale University, to rebut certain opinions expressed by Dr. Olley. In turn, the state called Timothy Hancock, Ph.D., executive director of the Parrish Street Clinic, in Durham, North Carolina, as a surrebuttal witness to Dr. Sparrow.

{¶20} The following lay persons also testified at the hearing regarding Hill's functional abilities: corrections officer John Glenn, death row case manager Greg Morrow, death row unit manager Jennifer Sue Risinger, and corrections officer Steven Black.

{¶21} On November 30, 2005, Hill filed a petitioner's supplemental authority and renewed double jeopardy motion, in which he asserted that the state is barred by the doctrine of collateral estoppel and the Double Jeopardy Clause from relitigating the issue of his mental retardation.

{¶22} On February 15, 2006, the trial court issued its judgment entry denying Hill's petition for postconviction relief in which he claimed to be a person with mental retardation and rejecting his arguments regarding double jeopardy/collateral estoppel.

{¶23} On March 15, 2006, Hill filed a timely notice of appeal to this court.

{¶24} On August 21, 2006, Hill, acting pro se, filed a motion to withdraw the merit brief filed by counsel and a request that this court would order a competency hearing to determine whether Hill is competent to waive all appeals and proceedings in this matter. The basis for the motion is that appointed counsel had filed a merit brief in this appeal without properly investigating Hill's " 'Atkins' claims and/or constitutional violations."

{¶25} On October 27, 2006, this court issued the following judgment entry: "The trial court is directed to promptly hold an evidentiary hearing to determine Appellant's competency to make decisions regarding his counsel and possible waiver of the right to appeal. Depending upon the outcome of that determination, the trial court shall further determine whether Appellant has actually decided to waive his right to proceed in the appeal; and whether that decision has been made voluntarily, knowingly and intelligently."

{¶26} The trial court appointed Thomas Gazley, Ph.D., with the Forensic Psychiatric Center of Northeast Ohio, to evaluate Hill. Dr. Gazley interviewed Hill on two occasions in November 2006. On December 7, 2006, a hearing was held on the competency issue.

{¶27} On December 8, 2006, the trial court issued a judgment entry finding that Hill is "competent to make a decision whether or not to pursue an appeal" and has, "in open court," expressed his desire to pursue an appeal from the adverse decision of the trial court on the issue of mental retardation.

{¶28} On February 1, 2007, this court overruled Hill's motion to withdraw the merit brief filed by counsel, and request that this court would order a competency hearing as moot.

{¶29} On appeal, Hill raises the following assignments of error:

{¶30} "[1.] The Trial Court Erred in failing to Apply Double Jeopardy and *Res Judicata* Doctrines to Prevent Renewed Litigation of Mr. Hill's Status as a Person with Mental Retardation."

{¶31} "[2.] The Trial Court Erred in Denying Mr. Hill a Jury Determination of his Mental Retardation Status and Not Imposing the Burden of Proof on the State of Ohio to Prove the Absence of Mental Retardation Beyond a Reasonable Doubt."

{¶32} "[3.] The Trial Court Erred in Finding that Mr. Hill Was Not a Person with Mental Retardation."

{¶33} "[4.] The Trial Court Erred in Determining Mr. Hill was Competent to Proceed with this Appeal."

{¶34} Under the first assignment of error, Hill argues that relitigation of the issue of his mental retardation is barred by the Double Jeopardy Clause of the Fifth Amendment and by the doctrine of res judicata/collateral estoppel. Hill cites several cases in which the fact of his mental retardation has allegedly been judicially determined. *Hill*, 11th Dist. Nos. 3720, 3745 ("[a]ppellant, in the case at bar, admittedly suffers from some mental

retardation"); *Hill*, 64 Ohio St.3d at 335 ("we find that defendant's mental retardation is a possible mitigating factor").

{¶35} Collateral estoppel is one aspect of the doctrine of res judicata and precludes the relitigation in a second action of an issue or issues that have been "actually and necessarily litigated and determined in a prior action." *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, 195, citing *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, 112; *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 381. Cf. *Ashe v. Swenson* (1970), 397 U.S. 436, 443 (collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit").

{¶36} "Collateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action." *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 183, citing *Whitehead*, 20 Ohio St.2d 108, at paragraph two of the syllabus.

{¶37} Application of the doctrine of res judicata/collateral estoppel to a particular issue is a question of law. *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 174 Ohio App.3d 135, 2007-Ohio-6594, at ¶ 41. Accordingly, it is reviewed under a de novo standard of review, i.e. without deference to the lower court's decision. *Rossow v. Ravenna* (Mar. 29, 2002), 11th Dist. No. 2001-P-0036.

{¶38} The lower court, in considering this issue, began with the premise that *Atkins* and *Lott* created a new standard and a new procedure for determining whether a capital offender's mental retardation barred his execution. The court observed that Hill's "earlier claims of mental retardation (during the pre-trial and trial phases of the underlying case)

related to voluntariness of statements, waiver of counsel at an investigatory stage, and waiver of *Miranda* rights." With respect to the Eighth Amendment, however, the issue of mental retardation has "constitutional dimensions and constitutional imperatives" distinguish it from the myriad contexts in which it has previously been considered. Thus, mental retardation "has been scientifically, psychologically, and artfully (in the legal sense) defined in fresh light." Cf. *Lott*, 97 Ohio St.3d 202, 2002-Ohio-6625, ¶ 17 ("*Atkins* established the new standard for mental retardation"). On this basis, the lower court concluded that, for Hill, the issue of mental retardation is being litigated for the first time.

{¶39} Our analysis focuses on the first element of collateral estoppel: whether the issue of Hill's mental retardation "was actually and directly litigated in the prior action." We hold that the issue of Hill's mental retardation was not "actually and directly litigated" at his sentencing hearing because the finding that he was mentally retarded was not essenital to the imposition of the death penalty in the same way that it is essential in the *Atkins/Lott* context .

{¶40} Hill maintains that "the issue of mental retardation was essential to his argument against the imposition of the death penalty." Hill relies on the Sixth Circuit's decision in *Bies v. Bagley* (C.A.6, 2008), 519 F.3d 324, decided during the pendency of this appeal.[1]

{¶41} In *Bies*, the Sixth Circuit concluded the determination that an offender is mentally retarded during the penalty phase is a "necessary" finding because, under Ohio law, "a sentencing court may not impose the death penalty unless that court has first considered any mitigating factors weighing against a death sentence, * * * and found those

1. We note that this court is "not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court," although such decisions are accorded "some persuasive weight." *State v. Burnett* (2001), 93 Ohio St.3d 419, 424.

mitigating factors proven by a preponderance of the evidence." Id. at 336; R.C. 2929.04(B). "[B]ecause a sentencing court's inquiry is open-ended, determining which mitigating factors are actually present in a case is a necessary first step to determining whether those factors outweigh the aggravating circumstances." *Bies,* 519 F.3d at 337.

{¶42} We disagree. The fact that the sentencing court in a capital case must weigh potential mitigating factors against the aggravating circumstances does not mean that a finding that an offender is, or is not, mentally retarded constitutes a necessary finding for the imposition of the death penalty. Rather, the contrary is true under Ohio law. Ohio's death penalty statutes do not require that any express finding be made regarding an offender's mental retardation. Moreover, at the time Hill was sentenced, an offender's retardation was not a bar to the imposition of the death penalty.

{¶43} The "Criteria for Imposing Death or Imprisonment for a Capital Offense" statute provides that the trier of fact in the penalty phase "shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

{¶44} "Whether the victim of the offense induced or facilitated it;

{¶45} "Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

{¶46} "Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

{¶47} "The youth of the offender;

{¶48} "The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

{¶49} "If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

{¶50} "Any other factors that are relevant to the issue of whether the offender should be sentenced to death." R.C. 2929.04(B).

{¶51} Two observations should be made with respect to the statute. The first is that the statute does not require any express finding regarding an offender's mental retardation. In pre-*Atkins* capital cases, an offender's mental retardation was typically considered as a factor, under subsection (7), potentially affecting the offender's moral culpability for his or her actions. See, e.g., *State v. Bies* (1996), 74 Ohio St.3d 320, 328; *State v. Gumm* (1995), 73 Ohio St.3d 413, 432-433; *Hill*, 64 Ohio St.3d at 335; cf. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, at ¶ 267 (an offender's "limited intellectual abilities are entitled to significant weight in mitigation under the catchall provision of R.C. 2929.04(B)(7)"). Thus, the three-judge panel that sentenced Hill to death did not expressly find or even acknowledge Hill's retardation. Rather, the sentencing entry noted that Hill's "low intelligence," "impaired judgment," and "whether or not he was a leader or a follower" were considered as mitigating factors. An express finding that Hill was mentally retarded was neither required nor necessary to sentence him to death under Ohio law at that time.

{¶52} The second observation is that no particular mitigating factor precludes the imposition of the death penalty. The statute is "open-ended" in that the trier of fact must consider any relevant factor. Simply because all revelant factors must be considered does not mean that all relevant factors are material to the imposition of the death penalty. The

determination that particular mitigating factors exist is necessary only in the sense that these factors must be weighed against the aggravating circumstances, which, in contrast, must be found to exist beyond a reasonable doubt for the death penalty to be imposed.

{¶53} Beyond consideration of Ohio's death-penalty statute, under the federal law in effect at the time of Hill's sentencing, the determination that an offender was mentally retarded was not necessary to the outcome of a capital sentencing hearing. In other words, at the time of his original sentencing, Hill was eligible for the imposition of the death penalty regardless of whether he was found to be mentally retarded. As stated by the United States Supreme Court, "mental retardation is a factor that may well lessen a defendant's culpability for a capital offense," but it could not be said "that the Eighth Amendment precludes the execution of any mentally retarded person * * * convicted of a capital offense simply by virtue of his or her mental retardation alone." *Penry v. Lynaugh* (1989), 492 U.S. 302, 340.

{¶54} Because mental retardation did not preclude the imposition of the death penalty at the time of Hill's sentencing, the state did not have "a full and fair opportunity to litigate" the issue during the penalty phase of Hill's trial, as is necessary before collateral estoppel may be applied. *Bies*, 519 F.3d at 338, citing *N.A.A.C.P. Detroit Branch v. Detroit Police Officers Assn.* (C.A.6, 1987), 821 F.2d 328, 330; *Goodson*, 2 Ohio St.3d at 201 ("an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action").

{¶55} "Collaterally estopping a party from relitigating an issue previously decided against it violates due process where it could not be foreseen that the issue would subsequently be utilized collaterally, and where the party had little knowledge or incentive

to litigate fully and vigorously in the first action due to the procedural and/or factual circumstances presented therein." *Goodson*, 2 Ohio St.3d at 201; *State ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42, at paragraph two of the syllabus ("[w]here there has been a change in the facts since a decision was rendered in an action, which either raises a new material issue or which would have been relevant to the resolution of a material issue involved in the earlier action, neither the doctrine of *res judicata* nor the doctrine of collateral estoppel will bar litigation of that issue in a later action").

{¶56} In the present case, the state did not have the knowledge or incentive to vigorously litigate the issue of Hill's mental retardation, because that issue was only tangentially relevant to whether the death penalty was appropriate. There was no reason for the state to contest the evidence of retardation introduced at the mitigation hearing because that evidence did not link Hill's alleged retardation with his culpability for the murder of Raymond Fife. Without this connection, the fact that Hill might be mentally retarded was not particularly relevant to whether Hill could be executed.

{¶57} This conclusion is well supported by the remarks of this court and of the Ohio Supreme Court in the direct appeals of Hill's case. This court observed that Hill's own expert witness, Dr. Darnall, "testified that [Hill] possessed an intellectual understanding of right and wrong and further stated that [Hill's] crimes cannot be attributed to the fact that he was mentally retarded." *Hill,* 11th Dist. Nos. 3720, 3745. Thus, "[c]onsideration of evidence delineating appellant's mental retardation is more properly applied when evaluating his ability to knowingly, intelligently and voluntarily waive his constitutional rights." Id. at *90. Likewise, the Ohio Supreme Court dismissed the evidence of Hill's retardation because it found, "[u]pon a careful review of the expert testimony proffered with

respect to defendant's mental retardation, * * * a very tenuous relationship between the acts he committed and his level of mental retardation. As several of the experts pointed out, defendant did not suffer from any psychosis, and he knew right from wrong." *Hill,* 64 Ohio St.3d at 335.

{¶58} In sum, the United States Supreme Court's decision in *Atkins* changed the law with respect to capital punishment, making an offender's mental retardation a material fact as to whether the death penalty could be imposed. *State v. Lorraine*, 11th Dist. No. 2003-T-0159, 2005-Ohio-2529, at ¶ 27, citing *State v. Bays*, 159 Ohio App.3d 469, 2005-Ohio-47, at ¶ 23 ("[t]here is a significant difference between expert testimony offered for mitigation purposes and expert testimony offered for *Atkins* purposes"). Previously, an offender's retardation was merely a consideration relative to the degree of moral culpability that may be imputed to an offender for his or her actions. Post-*Atkins*, the fact of an offender's retardation constitutes an absolute bar to the imposition of the death penalty.

{¶59} Additionally, there has been no prior judicial determination that Hill is retarded in accordance with the standards and procedures established by *Lott*. *Hill v. Anderson* (C.A.6, 2002), 300 F.3d 679. In a prior habeas petition regarding Hill's *Atkins* claim in the Sixth Circuit, the court ordered the petition to be dimissed and Hill's case remanded for consideration of his *Atkins* claims in state court. The court explained that "the state of Ohio has not formally conceded that [Hill] is retarded," although several Ohio courts have reached this conclusion, and there is testimony to support it. Id. at 682. "Hill's retardation claim has not been exhausted or conceded. Ohio should have the opportunity to develop its own procedures for determining whether a particular claimant is retarded and ineligible for death." Id.

{¶60} As noted above, the three-judge panel did not make any express finding regarding Hill's retardation, but merely noted that his "low intelligence" and "impaired judgment" were considered as mitigating factors. The statements of subsequent reviewing courts regarding Hill's retardation were made without reference to any particular standard or definition of retardation. Thus, Hill's case is distinguishable from *Bies*, wherein the Sixth Circuit noted that "the state supreme court applied the same clinical definition of mental retardation in its determination that [Bies] is mentally retarded as it did in deciding *Lott*." 519 F.3d at 334.

{¶61} For the foregoing reasons, the question of whether Hill is mentally retarded was not necessary for or particularly relevant to Hill's sentencing and, therefore, not "actually and directly litigated." Similarly, under the trial court's analysis, *Atkins* and *Lott* established a new standard for determining what constitutes mental retardation within the context of the Eighth Amendment. Thus, under either analysis, collateral estoppel does not bar the relitigation of this issue. Hill's first assignment of error is without merit.

{¶62} Under the second assignment of error, Hill asserts that the burden of proving that he is not mentally retarded is on the state. Hill further argues the state must meet its burden by proving that he is not retarded beyond a reasonable doubt and that he is entitled to have this determination made by a jury of his peers.

{¶63} Hill relies upon a line of United States Supreme Court cases beginning with *Apprendi v. New Jersey* (2000), 530 U.S. 466, and which stand for the proposition that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. In *Ring v. Arizona* (2002), 536 U.S. 584, the United States Supreme Court applied its holding in *Apprendi* capital sentencing statutes, such as

Ohio's, which require the finding of certain aggravating factors before the death penalty may be imposed. In *Ring*, the Supreme Court held that the existence of such aggravating factors must be determined by a jury and proven beyond a reasonable doubt. Id. at 602.

{¶64} When the United States Supreme Court ruled that the Eighth Amendment forbade the execution of the mentally retarded, it left to the individual states the task of developing the appropriate procedures for enforcing the prohibition. *Atkins*, 536 U.S. at 317; *Hill*, 300 F.3d at 682 ("Ohio should have the opportunity to develop its own procedures for determining whether a particular claimant is retarded and ineligible for death").

{¶65} In *Lott*, the Ohio Supreme Court held that "[t]he procedures for postconviction relief outlined in R.C. 2953.21 et seq. provide a suitable statutory framework for reviewing" *Atkins* claims raised by offenders sentenced to death before *Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, at ¶ 13. The Ohio Supreme Court further held that "the trial court," authorized by R.C. 2953.21(A)(1)(a) to determine the merits of postconviction relief petitions, "shall decide whether the petitioner is mentally retarded by using the preponderance-of-the-evidence standard" and that the petitioner bears the burden of establishing that he or she is mentally retarded. Id. at ¶ 17 and 21. The Ohio Supreme Court expressly stated that "these matters should be decided by the court and do not represent a jury question" and that "placing this burden on a criminal defendant does not violate due process." Id. at ¶ 18 and 22. The court relied upon decisions of the United States Supreme Court that sanity and competence may be presumed, and the offender bears the burden of rebutting the presumption. Id. at ¶ 22, citing *Medina v. California* (1992), 505 U.S. 437, 445-446.

{¶66} Hill responds that the Ohio Supreme Court's decision in *Lott* does not override "the clear mandate" the United States Supreme Court's decisions in *Apprendi* and *Ring*.

{¶67} Initially, we note that this court is bound to follow the precedent established by *Lott* on the issues of procedure and burden of proof for addressing postconviction claims of mental retardation. *Lorraine*, 2005-Ohio-2529, at ¶ 57; *State v. Waddy*, 10th Dist. No. 05AP-866, 2006-Ohio-2828, at ¶ 16.

{¶68} Even considering the substance of Hill's assignment of error, we reject the argument that the *Apprendi/Ring* line of cases requires the issue of an offender's mental retardation to be decided by a jury under a reasonable-doubt standard. These cases apply to factors *enhancing* an offender's punishment beyond what is authorized by statute. "[T]he absence of mental retardation," however, is not "the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt." *In re Johnson* (C.A.5, 2003), 334 F.3d 403, 405. The determination that an offender is not mentally retarded "simply mean[s] that there [i]s nothing to prevent the court from imposing the maximum penalty of death." *State v. Were*, 2005-Ohio-376, at ¶ 59. "The issue of retardation can affect a sentence only by mitigating it. It can never enhance it." Id. See also *Walker v. True* (C.A.4, 2005), 399 F.3d 315, 326 ("'an *increase*' in a defendant's sentence is not predicated on the outcome of the mental retardation determination; only a decrease." Emphasis sic.); *State v. Laney* (S.C.2006), 627 S.E.2d 726, 731 ("[t]he fact a defendant is not mentally retarded is not an aggravating circumstance that increases a defendant's punishment; rather, the issue is one of eligibility for the sentence imposed by the jury").

{¶69} The second assignment of error is without merit.

{¶70} Under the third assignment of error, Hill argues the trial court erred in its determination that he is not a person with mental retardation.

{¶71} 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 and cited in *Atkins*. *White*, 2008-Ohio-1623, at ¶ 5. "These definitions require (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Lott*, 2002-Ohio-6625, at ¶ 12.

{¶72} The petitioner raising an *Atkins* claim "bears the burden of establishing that he is mentally retarded by a preponderance of the evidence." Id. at ¶ 21. "In considering an *Atkins* claim, the trial court shall conduct its own de novo review of the evidence in determining whether the defendant is mentally retarded. The trial court should rely on professional evaluations of [the petitioner's] mental status, and consider expert testimony, appointing experts if necessary, in deciding this matter." Id. at ¶ 18. Accord, *White*, 2008-Ohio-1623, at ¶ 44-48.

{¶73} "[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, at ¶ 58.

{¶74} With respect to the first criterion, significantly subaverage intellectual functioning is clinically defined as an IQ below 70.[2]

{¶75} Hill's IQ was measured nine times between 1973, when he was six years old, and 2000, when he was 33 years old. The scores range from 48 to 71, with the mean being 61.12. In April 2004, Hill scored a 58 on the Wechsler Adult Intelligence Scale. Drs. Hammer, Olley, and Huntsman all agreed that this result was unreliable due to Hill's intentionally trying to obtain a low score.

{¶76} The trial court found, by a preponderance of the evidence, that Hill satisfied the first criterion, a conclusion supported by the opinions of Drs. Hammer and Olley. Hill does not challenge the court's finding that he demonstrates significantly subaverage intellectual functioning.

{¶77} The second criterion under *Lott* for mental retardation requires the offender to demonstrate significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction.[3] Like intellectual functioning, a person's adaptive skills are subject to standardized measurement, properly known as psychometric analysis.

{¶78} In the present case, Drs. Hammer, Olley, and Huntsman attempted to administer various adaptive behavior tests, including the Street Survival Skills Questionnaire ("SSSQ"), the Woodcock Johnson Tests of Achievement, and the Adaptive

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2. More precisely, significantly subaverage intellectual functioning is defined as two standard deviations below the mean for the general population, i.e. an adjusted score of 100 on a standardized test. A single deviation is considered 15 points. Two deviations means a score of 70 or lower. It should also be noted that an IQ score below 70 is not determinative of a diagnosis of mental retardation. Cf. *Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, at ¶12 (holding "that there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70").

3. The American Psychiatric Association's definition of mental retardation identified the following categories of adaptive skills: communication; self-care; home living; social/interpersonal skills; use of community resources; self-direction; functional academic skills; work; leisure; health; and safety. In 2002, the American Association on Mental Retardation distilled these categories into three broad groups of adaptive skills:

Behavior Assessment System ("ABAS-II"). No reliable results could be obtained, again on account of Hill's lack of effort. In several instances, Hill denied being able to perform certain skills that it could be determined from independent observation or collateral information sources that he was able to perform.

{¶79} On four occasions, between 1980 and 1984, the Vineland Social Maturity Scale ("Vineland I"), a measure of adaptive behavior, was administered to Hill. Vineland I yields two types of scores. The first is a "social age" or "age-equivalent" score. The second is a "social quotient" or SQ, similar to an IQ in that the score is scaled according to an average score of 100 for the general population. An SQ score of 70, representing two standard deviations below the mean, is necessary for a diagnosis of mental retardation. Only three social age scores are recorded from the results of the Vineland I tests. When Hill was 13 years old, it was reported that his social age was 14. When Hill was 15 and 17 years old, his reported social age was 12. In only one instance was an SQ score calculated. When Hill was 17, Dr. Darnall determined his SQ to be 82.9, which would place Hill in the "borderline" category of mental development, but would not support a diagnosis of mental retardation. Dr. Darnall testified at the mitigation hearing that there was room for "potential bias" in the results of the Vineland I SQ score, however, because the source of the information was Hill's mother, and she might have overstated Hill's abilities.

{¶80} At the evidentiary hearing, Dr. Olley calculated approximate SQ scores for Hill based on the reported social age scores and obtained results that placed Hill in the borderline range of social/adaptive development.

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conceptual adaptive skills; social adaptive skills; and practical adaptive skills. The Association on Mental Retardation's definition requires that a significant deficit in only one of these groups be demonstrated.

{¶81} In rebuttal, Hill presented the testimony of Dr. Sparrow, who helped to revise the Vineland I test in 1984, renaming it the Vineland Adaptive Behavior Scales ("Vineland II"). Dr. Sparrow testified that at the time the Vineland II test was being developed, a "linkage study" was conducted by administering both Vineland tests to a sample population of 389 persons to determine what correlation existed between the tests. Based on the study's results, Dr. Sparrow developed a method of predicting what Vineland II scores would be obtained based on Vineland I scores. In this way, she was able to recalculate Hill's Vineland I scores to reflect what he would have obtained under the Vineland II test. Hill's recalculated Vineland scores placed him in the mentally retarded range of scores with respect to adaptive functioning.

{¶82} In response to Dr. Sparrow's testimony, the state presented Dr. Hancock as a surrebuttal witness. Dr. Hancock opined that, based on the degree of correlation between the two Vineland tests testified to by Dr. Sparrow, her recalculation of Hill's adaptive skills was only 27 percent reliable.[4] Thus, Dr. Hancock concluded that Hill's recalculated Vineland scores were not scientifically reliable. Based on Dr. Hancock's testimony, the state objected to the admission of Dr. Sparrow's testimony.

{¶83} The Ohio Rules of Evidence provide that a witness may testify as an expert when "[t]he witness' testimony is based on reliable scientific, technical, or other specialized information" and "[t]he particular procedure, test, or experiment was conducted in a way that will yield an accurate result." Evid.R. 702(C)(3). "In evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether

4. Specifically, Dr. Sparrow testified that the correlation coefficient between Vineland I and II used in the linkage study was .55. According to Dr. Hancock, a minimum coefficient of .866 was necessary to provide 50% certainty that the correct score on Vineland II would be predicted from Vineland I scores.

there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance." *Miller v. Bike Athletic Co.* (1980), 80 Ohio St.3d 607, 611, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 593-594. The "inquiry focuses on whether the principles and methods * * * employed to reach [the] opinion are reliable, not whether [the] conclusions are correct." Id.

{¶84} "Decisions regarding the admissibility of evidence are within the broad discretion of the trial court." *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, at ¶ 20; *Kumho Tire Co. v. Carmichael* (1999), 526 U.S. 137, 152 ("a court of appeals is to apply an abuse-of-discretion standard when it 'reviews a trial court's decision to admit or exclude expert testimony' "). "Even in the event of an abuse of discretion, a judgment will not be disturbed unless the abuse affected the substantial rights of the adverse party or is inconsistent with substantial justice." *Beard*, at ¶ 20.

{¶85} In the present case, the trial court "concluded that the rate of error of Dr. Sparrow's conclusions on the limited issue of re-casting [Hill's] old scores in a fresh light is so high as to render her testimony inadmissible under the Daubert principle." The trial court explained that it was rejecting Dr. Sparrow's testimony, not because she lacked the proper qualifications or because her opinions lacked general acceptance, but because Dr. Hancock testified the accuracy of her linkage study between the tests fell below 50 percent mathematical probability, and this conclusion was not disputed. The trial court's conclusion regarding Dr. Sparrow's testimony does not constitute an abuse of discretion.

{¶86} Alternatively, the trial court stated that it would reject Dr. Sparrow's testimony in favor of the more credible testimony of the other experts who concluded that Hill's adaptive capabilities are greater than those of a person with mental retardation. The trial court noted that Drs. Hammer, Olley, and Huntsman all testified that the Vineland tests

were not the most accurate measurement of adaptive behavior available and that other tests are preferable, such as the Scales of Independent Behavior, Revised ("SIB-R"). Cf. *White*, 2008-Ohio-1623, at ¶ 49-51.

{¶87} Apart from the problematic standardized measurements of Hill's adaptive skills, the trial court and the expert witnesses had to rely on collateral, largely anecdotal evidence to determine the level of Hill's adaptive functioning. The trial court acknowledged that such evidence constituted a "thin reed" on which to make conclusions about Hill's diagnosis, but also recognized that this situation was the result of Hill's failure to cooperate with the experts retained to evaluate him.[5] This court further emphasizes that the burden was on Hill to demonstrate that he is mentally retarded, not on the state to prove that he is not mentally retarded.

{¶88} The anecdotal evidence before the trial court consisted of the following:

{¶89} *Public School Records.* Hill's public school records amply demonstrate a history of academic underachievement and behavioral problems. Hill is often described as a lazy, manipulative, and sometimes violent youth. Although there are references to Hill's being easily led or influenced by others, the trial court noted that much of Hill's serious misconduct, including two rapes committed prior to Fife's murder, occurred when he was acting alone. Hill knew how to write and was described by at least one of his special education teachers as "a bright, perceptive boy with high reasoning ability."

{¶90} *Hill's Trial for the Murder of Raymond Fife.* The trial court observed that the record of Hill's murder trial provided evidence of Hill's ability concerning self-direction and self-preservation. In particular, the court noted Hill's initiative in coming to the police in

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5. Hill's own expert, Dr. Hammer, testified that the results of Hill's performance on the Test of Memory Malingering ("TOMM") "casts doubt on all the testing information collected from Mr. Hill during the evaluation process."

order to misdirect the focus of the investigation by implicating others and Hill's ability to adapt his alibi to changing circumstances in the course of police interrogation. This last point was also noted by Dr. Olley in his hearing testimony: Hill "stood his ground during that interrogation very, very strongly. * * * He not only modified his story a little bit when he was faced with evidence that couldn't possibly have avoided. * * * That to me is a kind of thinking and planning and integrating complex information that is a higher level than I have seen people with mental retardation able to do."

{¶91} *Death Row Records.* At the time of the evidentiary hearing, Hill had been incarcerated on death row for 20 years. From this period of time, the trial court considered audiotaped interviews of Hill by Warren's Tribune Chronicle reporter Andrew Gray in the year 2000. These interviews were arranged on Hill's initiative in order to generate publicity for his case. The trial court found Hill's performance on these tapes demonstrated a high level of functional ability with respect to Hill's use of language and vocabulary, understanding of legal processes, ability to read and write, and ability to reason independently.

{¶92} The trial court considered the evidence of the various prison officials who testified at the evidentiary hearing. These witnesses consistently testified that Hill was an "average" prisoner with respect to his abilities in comparison with other death row inmates. They testified that Hill interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules. Prison officials offered further testimony in their interviews with the expert psychologists. One official opined that Hill began to behave differently after *Atkins* was decided, and he believed that Hill was "playing a game" to make others think he is

retarded. Another official reported that Hill's self-care was "poor but not terrible" and that Hill had to be reminded sometimes about his hygiene.

{¶93} *Hill's Appearances in Court.* The trial court stated that it had "many opportunities" to observe Hill over an extended period of time and, as a lay observer, did not perceive anything about Hill's conduct or demeanor suggesting that he suffers from mental retardation.

{¶94} Finally, the trial court relied on the expert opinions of Drs. Olley and Huntsman that, with reasonable psychological certainty, Hill's adaptive skill deficiencies do not meet the second criterion for mental retardation set forth in *Lott*. Both doctors relied, in part, on the same anecdotal evidence considered by the trial court. The doctors also conducted interviews with Hill and particularly noted Hill's memory of events surrounding Fife's murder 20 years before and his ability to recount the narrative of the events and the complex legal history of his case since that time.

{¶95} It is important to note that the trial court's use of anecdotal evidence in the present case is distinguishable from the use of such evidence in *White*, 2008-Ohio-1623. In *White*, the Ohio Supreme Court reversed a trial court's finding that an *Atkins* petitioner is not mentally retarded where the trial court had relied on anecdotal evidence, such as the fact that the petitioner had a driver's license and could play video games, to support its finding that the petitioner did not demonstrate significant deficits in adaptive skills.

{¶96} In the present case and in *White,* the trial court relied upon its own perceptions and other lay testimony that the petitioner appeared to function normally. The Supreme Court held that this reliance constituted an abuse of discretion in light of expert testimony that "retarded individuals '*may look relatively normal in some areas* and have * * * significant limitations in other areas.' " (Emphasis sic.) Id. at ¶ 69.

{¶97} The difference between the two cases lies in the fact that in the present case, two of the expert psychologists considered the same anecdotal evidence as the trial court and concluded that Hill was not mentally retarded. The trial court's conclusions were consistent with and supported by the expert opinion testimony. In *White*, the two psychologists who examined the petitioner concluded that there were significant deficiencies in two or more areas of adaptive functioning. Id. at ¶ 21. Thus, the trial court in *White* had substituted its judgment for that of the qualified experts. "While the trial court is the trier of fact, it may not disregard credible and uncontradicted expert testimony in favor of either the perceptions of law witnesses or of the court's own expectations of how a mentally retarded person would behave. Doing so takes an arbitrary, unreasonable attitude to the evidence before the court and [results] in an abuse of discretion." Id. at ¶ 74.

{¶98} Another difference is that in *White,* the experts were able to administer the SIB-R to the petitioner and obtain a psychometrically reliable measurement of his adaptive functioning. Id. at ¶ 14-20. In the present case, the only qualitative measurement of Hill's adaptive functioning, the Vineland I test administered when Hill was 17, indicated that Hill functioned at a level above that of the mentally retarded. Apart from this test, the trial court in the present case had no choice but to rely on anecdotal evidence and/or Drs. Olley and Sparrow's doubtful extrapolations of Hill's adaptive ability.

{¶99} In light of the foregoing, there is abundant competent and credible evidence to support the trial court's conclusion that Hill does not meet the second criterion for mental retardation.

{¶100} With respect to the third criterion, the trial court found that Hill had failed to demonstrate the onset of mental retardation before the age of 18. The trial court's

conclusion mirrors its findings under the first two criteria: Hill demonstrated, by a preponderance of the evidence, significantly subaverage intellectual functioning prior to the age of 18, but failed to demonstrate significant limitations in two or more adaptive skills. The evidence supporting the trial court's conclusions is discussed above.

{¶101} The third assignment of error is without merit.

{¶102} In the fourth and final assignment of error, Hill argues that he was not properly evaluated to determine his competency to proceed with this appeal. Hill asserts that Dr. Gazley did not perform any psychological testing in his evaluation and that the trial court failed to provide Hill with the resources to conduct an independent competency evaluation.

{¶103} "There is no requirement that [an offender] be competent in order for his appeal to proceed * * * in the court of appeals." *State v. Brooks* (2001), 92 Ohio St.3d 537, 539.

{¶104} After the filing of Hill's appeal, however, this court remanded this case with orders for the trial court to determine his competency "to make decisions regarding his counsel and possible waiver of the right to appeal." Cf. *State v. Jordan*, 101 Ohio St.3d 216, 2004-Ohio-783, at ¶ 27 (discussing the standard of competence necessary to waive counsel); *State v. Berry* (1997), 80 Ohio St.3d 371, 375-376 (discussing the standard of competence necessary to waive collateral proceedings in a capital case).

{¶105} The trial court appointed Dr. Gazley through the Forensic Psychiatric Center of Northeast Ohio, who interviewed Hill on two occasions. Dr. Gazley also reviewed a court-ordered psychological evaluation of Hill performed by Dr. Huntsman from June 2004. Dr. Gazley concluded, with reasonable psychological certainty, that Hill's "current statements regarding the appeal process, as well as his legal representation, are indicative

of adequate mental capacity and a knowing, intelligent, and voluntary reasoning ability, having chosen means which relate logically to his stated end." The trial court conducted a competency hearing at which Dr. Gazley testified and found Hill competent to proceed with his appeal.

{¶106} Hill cites no authority for the proposition that Dr. Gazley's evaluation of his competency was inadequate or that he is entitled to an independent evaluation. On the contrary, it has been held that "[a] defendant in a criminal case has no absolute right to an independent psychiatric evaluation" to determine competency. *State v. Marshall* (1984), 15 Ohio App.3d 105, at paragraph two of the syllabus; accord *State v. Perry* (June 14, 2001), 5th Dist. No. 00-CA-83. Moreover, "a psychiatrist's written report and corroborative testimony that the defendant was competent to stand trial is sufficient evidence to support the trial court's finding of competency." *State v. Neeley*, 12 Dist. No. CA2002-02-002, 2002-Ohio-7146, at ¶ 13.

{¶107} The fourth assignment of error is without merit.

{¶108} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas denying Hill's petition for postconviction relief on the grounds that he is a person with mental retardation is affirmed. Costs to be taxed against appellant.

Judgment accordingly.

MARY JANE TRAPP, J., concurs.

COLLEEN MARY O'TOOLE, J., dissents.

COLLEEN MARY O'TOOLE, J., dissenting.

{¶109} I respectfully dissent.

{¶110} With respect to appellant's third assignment of error, the majority contends that the trial court did not err by finding that appellant was not a person with mental retardation. I disagree.

{¶111} In *Atkins v. Virginia* (2002), 536 U.S. 304, 308, fn. 3, the United States Supreme Court quoted the definitions of mental retardation promulgated by the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association ("APA").

{¶112} The AAMR defines mental retardation as "'substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.' " Id., quoting Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th Ed.1992).

{¶113} The APA's definition is similar: " 'The essential feature of Mental Retardation is significantly subaverage general intellectual functioning * * * that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety * * *. The onset must occur before age 18 years * * *. "Mild"mental retardation is typically used to describe people with an IQ level of 50 to 55 to approximately 70.'" Id., quoting Diagnostic and Statistical Manual of Mental Disorders 41 (4th Ed.2000) 42-43.

{¶114} In *State v. Lott,* 97 Ohio St.3d 303, 2002-Ohio-6625, at ¶ 12, the Supreme Court of Ohio held: "Clinical definitions of mental retardation, cited with approval in *Atkins,*

provide a standard for evaluating an individual's claim of mental retardation. * * * [Again,] [t]hese definitions require (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18."

{¶115} The following chart represents a summary of appellant's IQ scores and psychological evaluations up to April 2004, all of which fall in the mildly mentally retarded range:

{¶116}

CHRONOLOGICAL AGE	FULL SCALE IQ
6 years and 2 months	70
8 years and 8 months	62
13 years and 4 months	48
13 years and 5 months	49
15 years and 3 months	63
17 years	55
18 years	68
18 years	64
33 years	71

{¶117} Appellant's date of birth is January 6, 1967. Appellant entered kindergarten in the Warren city schools and was referred by his teacher, as she had questions and concerns "regarding his present level of intellectual functioning." As a result of his first evaluation on March 20, 1973, appellant was placed in special education, specifically an educably mentally retarded ("EMR") class, due to his score on the Stanford-Binet test. Appellant, at age six, did not know his age and thought he was nine. He was immature, did not know his address, and possessed functioning in the visual motor category at the three year, six month level. His reading and verbal skills were at the five-year-old level, and he had a mental age of four years, six months. He was placed on medication, as he was also hyperactive. His intellectual functioning was in the third percentile as compared to the general population. Appellant was tested again on September 10, 1975. He was chronologically eight years and eight months. He tested at an overall 62, which at the time

was categorized as educably mentally retarded. Appellant earned a mental age on the Stanford-Binet test of five years and six months. He was placed in the first stanine group or in the first percentile in comparison to the general population. He was deficient in reading at a 1.2 grade level, and his spelling was at a .6 grade-level equivalent. He indicated weakness in verbal reasoning and abstract thinking. He could not spell his last name correctly. It is noted in the evaluation that appellant "will be limited to his ability to generalize, to transfer learning from one situation to another, to do abstract reasoning or to do much self evaluation."

{¶118} Dr. Hammer testified that appellant tested in the mild mentally retarded range. Appellant's score of 48 on the Wechsler Intelligence Scale for Children at age 13 years and four months taken in May 1980 established him in the moderately mentally retarded range. His "relative weaknesses lie 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." He frequently engaged in behaviors such as making noises and faces when talking, rolling eyes to the back of his head, being restless and tired, working with pencil hanging out of mouth. He exhibits weaknesses in reasoning ability, originality, verbal interaction, and lack of intellectual independence.

{¶119} Appellant was tested again at his school on August 22, 1982. At 15 years old, his reading and math were at a third-grade level. The next psychological evaluation was performed by the juvenile court's psychologist at the request of Judge Norton for a bind-over proceeding on or about January 10, 1984. Appellant was accused of and later pleaded guilty to two rapes. In two years' time, he had amassed 13 juvenile felony charges. At age 17 and in ninth grade with a score of 55, Dr. Douglas Darnall, a

psychologist for the Trumbull County Court of Common Pleas, opined that appellant was mildly mentally retarded and possessed "significant [deficiency] in his verbal functioning, possessed poor judgment, does not think of consequences, is highly suggestible." He also opined that appellant requires long-term structured rehabilitation, "Because of his passivity and limited intellectual ability he can easily be swayed." He also stated, "Danny does not comprehend the seriousness of his offenses." Dr Darnall further opined in his report that "his level of adaptive functioning is poor. And he needs a highly structured facility that can provide programming for mentally retarded youth." Further, he stated that unfortunately, the record shows that his family cannot provide such an environment. The probation department agreed and requested, due to his mental retardation and the risk of exploitation if placed in an adult facility, that the request for the bind over should be denied and that he should be placed in a group home and that "Danny will in time need to live in an adult halfway house which would be able to provide both social as well as vocational habilitation." The bind over was denied, and appellant was sentenced to TCY. On April 25, 1984, the chief psychologist at TCY, Dr. R.W.Jackson, opined in regard to retesting appellant as part of the intake procedure that he tested at a 65 IQ and described appellant as "intellectually limited, socially constricted youth with very few interpersonal coping skills, rather immature and self centered with needs of attention and approval of others." He also stated that "it appears that Danny will adjust himself to a well structured program. He is so easily led and willing to do what he is instructed to do." Furthermore, "In a structured program Danny could no doubt function quite well." Appellant's sentence was concluded after his 18th birthday. He was discharged in 1985 and was returned home to his mother, who is also mentally retarded, and reenrolled in school.

{¶120} Shortly after his arrest on the charges for which he has been convicted and sentenced to death, appellant, at the age of 18, scored a 68 on the Wechsler Adult Intelligence Scale Revised test. As part of the mitigation preparation, appellant was administered another test in which he scored a 64. At age 33, appellant submitted to an IQ test in prison on which he scored a 71.

{¶121} In the instant case, pursuant to the foregoing, appellant was found to be mentally retarded. The record establishes that appellant met the first prong of *Atkins/Lott* as evidenced by IQ scores below 70. The trial court properly found that appellant satisfied that prong.

{¶122} With regard to adaptive skills, the Supreme Court of Ohio in *White*, 118 Ohio St.3d 12, 2008-Ohio-1623, at ¶ 13, recently stated:

{¶123} "'(C)linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills *** that became manifest before age 18.' *Atkins*, 536 U.S. at 318, 122 S.Ct. 2242, 153 L.Ed.2d 335. Adaptive skills are those skills that one applies to the everyday demands of independent living, such as taking care of oneself and interacting with others. Adaptive behavior tests are designed to assess how a person applies those skills in the tasks of everyday life."

{¶124} The Supreme Court in *White* continued:

{¶125} "The mentally retarded are not necessarily devoid of all adaptive skills. Indeed, 'they may look relatively normal in some areas and have certain significant limitations in other areas.' Mildly retarded persons can play sports, write, hold jobs, and drive. * * * [I]n determining whether a person is mentally retarded, one must focus on those adaptive skills the person lacks, not on those he possesses." *White,* 118 Ohio St.3d, 2008-Ohio-1623, 885 N.E.2d 905, at ¶ 65.

{¶126} Drs. Hammer, Olley, and Huntsman all agreed on a protocol for testing appellant in April 2004, and administered various tests, including the Wechsler Adult Intelligence Scale-III, the Test of Memory Malingering, Street Survival Skills Questionnaire, Woodcock-Johnson Tests of Achievement, and the Adaptive Behavior Assessment System-II. All three experts agreed, after testing appellant, that the results were unreliable. Thus, it became necessary to look at other sources, including historical data, to make a determination regarding appellant's mental retardation. The historical data indicated substantial deficits in adaptive skills.

{¶127} The trial court, however, found that appellant is not mentally retarded, based upon his superior adaptive behavior. The trial court stressed appellant's fluency with the language and his articulate presentations in interviews. However, throughout his life, various examiners, including Risinger, have found that appellant had poor hygiene, was easily led, and was unable to provide his address and phone number. All of the examiners who tested appellant before age 33, in preparation for the hearing, found him lacking in multiple adaptive areas. Dr. Sparrow testified that although appellant may have a good vocabulary, adaptive-behavior communications do not measure level of vocabulary in any way. Anyone who talks to him is "left in the dust" trying to figure out what he is talking about. This shows a deficit in the adaptive behavior of language.

{¶128} The trial court compared appellant to other death row inmates. However, pursuant to the AAMR, the diagnosis of mental retardation is relative to the general population. Although appellant may be manipulative and a malingerer, he can still be and is mentally retarded.

{¶129} Appellant introduced the rebuttal testimony of Dr. Sparrow, one of the three authors of the Vineland Adaptive Behavior Scale, which was a revision of the Vineland

Social Maturity Scale, and administered to appellant four times. Although her credentials are very impressive, the trial court determined that Dr. Sparrow's rate of error in recasting the old Vineland scores was so high as to render her testimony inadmissible under *Daubert*, or alternatively, her testimony was rejected outright in favor of Dr. Hancock's opinion.

{¶130} In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 592-593, 113 S.Ct. 2786, 125 L.Ed.2d 469, the court held that the trial court must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid" and can be applied to the facts at issue properly. The court said that many considerations will bear on the inquiry, including whether the theory can be tested, whether it has been subjected to peer review and publication, what its known or potential error rate is and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is flexible, and its focus must be on principles and methodology, not on the resulting conclusions.

{¶131} Here, Dr. Sparrow testified about a linkage between the two tests. She indicated that within the control group of people taking both the old and new Vineland, she used a straight correlation between the scores. Dr. Sparrow stated that when two tests target the same areas, one can use this method to link and make a comparison of the scores. The technique at issue has been tested. The linkage data is included in the testing manual, so the methodology has gained general acceptance. Dr. Sparrow's testimony should not have been excluded. However, the error is harmless. Even without her testimony, the historical evidence is overwhelming in regard to adaptive deficits and mental retardation as observed and documented by both the juvenile court and the

multiple evaluators at the Warren city schools and Brickhaven residential placement and the juvenile department of corrections TCY .

{¶132} The prior testing and independent observations demonstrate by a preponderance of the evidence that appellant's scores prior to the age of 18 satisfy the criteria for deficits in adaptive behavior with respect to the second standard under *Lott.*

{¶133} With regard to the onset before age 18, the trial court found that although appellant had an IQ in the mildly mentally retarded range, there was no evidence to show that he met the criteria of deficits in adaptive functioning. This is dehors the record. The trial court concluded this despite overwhelming evidence and evaluations to the contrary from a multitude of sources that he spent virtually all of his school years in programs for the mentally retarded. Appellant's IQ scores ranged from 48 to 70, during the time period when he was first tested at six years and two months, up to the age of 18. The record establishes that appellant had poor personal hygiene, was immature, behaved inappropriately, had difficulty making friends, lagged behind intellectually, and was consistently developmentally slow. Appellant committed serious crimes at the age of 17. However, the fact that he engaged in criminal conduct does not negate a diagnosis of mental retardation. The record supports the fact that appellant experienced the onset of mental retardation prior to the age of 18, thereby satisfying the third standard under *Lott.*

{¶134} Based on *Atkins*, executing a person with mental retardation status, regardless of context, violates the Eighth Amendment. Here, I believe the trial court abused its discretion in finding that appellant was not a person with mental retardation, because he met the three *Lott* criteria for classification as mentally retarded.

{¶135} Accordingly, I would affirm in part, reverse in part, and remand the matter for resentencing under the statutory guidelines for noncapital cases of aggravated murder.

CASE NO. ______

CAPITAL CASE

IN THE UNITED STATES SUPREME COURT

DANNY LEE HILL,

Petitioner,

v.

TIM SHOOP, WARDEN,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME 2 of 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DANNY LEE HILL,	:	**CASE NO. 4:96 CV 00795**
	:	
Petitioner,	:	
	:	**JUDGE JOHN R. ADAMS**
vs.	:	
	:	
CARL ANDERSON, Warden,	:	
	:	**MEMORANDUM OF OPINION**
Respondent.	:	

This matter is before the Court upon Petitioner Danny Lee Hill's ("Hill" or "Petitioner") Amended Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254. Through this petition, Hill challenges the constitutionality of his death sentence, rendered by an Ohio court, under *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the Eighth Amendment forbids the execution of intellectually disabled offenders.[1] (ECF No. 94.) The Respondent, Warden Carl Anderson ("Respondent"), filed a Supplemental Return of Writ Regarding Atkins Claim. (ECF No. 98.) Hill filed a Traverse and Supplement to Traverse. (ECF Nos. 102 and 103, respectively.) For the following reasons, the Amended Petition for Writ of Habeas Corpus is denied.

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[1] This Court will use the term "intellectual disability" in place of the term "mental retardation" in this opinion. The designation intellectually disabled, or "ID," is now widely used by the medical community, educators and others, since the label mentally retarded long has carried a painful stigma. The terms are synonymous. *See* American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support* 12 (11th ed. 2010) ("[T]he term ID covers the same population of individuals who were diagnosed previously with mental retardation."). *See also Hall v. Florida*, slip op. at 2 (U.S. May 27, 2014).

I. Factual History

On February 28, 1986, a three-judge panel sentenced Hill to death for the aggravated murder of twelve-year-old Raymond Fife ("Fife"). The Supreme Court of Ohio set out the following account of Hill's crime, as adduced by the evidence presented at trial, and judicial proceedings upon considering Hill's direct appeal of his conviction and sentence:

> On September 10, 1985, at approximately 5:15 p.m., twelve-year-old Raymond Fife left home on his bicycle to visit a friend, Billy Simmons. According to Billy, Raymond would usually get to Billy's residence by cutting through the wooded field with bicycle paths located behind the Valu-King store on Palmyra Road in Warren.
>
> Matthew Hunter, a Warren Western Reserve High School student, testified that he went to the Valu-King on the date in question with his brother and sister shortly after 5:00 p.m. Upon reaching the front of the Valu–King, Hunter saw Tim Combs and defendant-appellant, Danny Lee Hill, walking in the parking lot towards the store. After purchasing some items in the Valu–King, Hunter observed defendant and Combs standing in front of a nearby laundromat. Combs greeted Hunter as he walked by. Hunter also saw Raymond Fife at that time riding his bike into the Valu–King parking lot.
>
> Darren Ball, another student at the high school, testified that he and Troy Cree left football practice at approximately 5:15 p.m. on September 10, and walked down Willow Street to a trail in the field located behind the Valu–King. Ball testified that he and Cree saw Combs on the trail walking in the opposite direction from the Valu–King. Upon reaching the edge of the trail close to the Valu–King, Ball heard a child's scream, "like somebody needed help or something."
>
> Yet another student from the high school, Donald E. Allgood, testified that he and a friend were walking in the vicinity of the wooded field behind the Valu–King between 5:30 p.m. and 6:00 p.m. on the date in question. Allgood noticed defendant, Combs and two other persons "walking out of the field coming from Valu–King," and saw defendant throw a stick back into the woods. Allgood also observed Combs pull up the zipper of his blue jeans. Combs "put his head down" when he saw Allgood.
>
> At approximately 5:50 p.m. on the date in question, Simmons called the Fife residence to find out where Raymond was. Simmons then rode his bicycle to the Fifes' house around 6:10 p.m. When it was apparent that Raymond Fife's whereabouts were unknown, Simmons continued on to a Boy Scouts meeting, while members of the Fife family began searching for Raymond.

At approximately 9:30 p.m., Mr. Fife found his son in the wooded field behind the Valu–King. Raymond was naked and appeared to have been severely beaten and burnt in the face. One of the medics on the scene testified that Raymond's groin was swollen and bruised, and that it appeared that his rectum had been torn. Raymond's underwear was found tied around his neck and appeared to have been lit on fire.

Raymond died in the hospital two days later. The coroner ruled Raymond's death a homicide. The cause of death was found to be cardiorespiratory arrest secondary to asphyxiation, subdural hematoma and multiple trauma. The coroner testified that the victim had been choked and had a hemorrhage in his brain, which normally occurs after trauma or injury to the brain. The coroner also testified that the victim sustained multiple burns, damage to his rectal-bladder area and bite marks on his penis. The doctor who performed the autopsy testified that the victim sustained numerous external injuries and abrasions, and had a ligature mark around his neck. The doctor also noticed profuse bleeding from the victim's rectal area, and testified that the victim had been impaled with an object that had been inserted through the anus, and penetrated through the rectum into the urinary bladder.

On September 12, 1985, defendant went downtown to the Warren Police Station to inquire about a $5,000 reward that was being offered for information concerning the murder of Raymond Fife. Defendant met with Sergeant Thomas W. Stewart of the Warren Police Department and told him that he had "just seen Reecie Lowery riding the boy's bike who was beat up." When Stewart asked defendant how he knew the bike he saw was the victim's bike, defendant replied, "I know it is." Defendant then told Stewart, "If you don't go out and get the bike now, maybe [Lowery will] put it back in the field." According to Stewart, the defendant then stated that he had seen Lowery and Andre McCain coming through the field at around 1:00 that morning. In the summary of his interview with defendant, Stewart noted that defendant "knew a lot about the bike and about the underwear around the [victim's] neck." Also, when Stewart asked defendant if he knew Tim Combs, defendant replied, "Yeah, I know Tim Combs. * * * I ain't seen him since he's been out of the joint. He like boys. He could have done it too."

On September 13, 1985, the day after Stewart's interview with defendant, Sergeant Dennis Steinbeck of the Warren Police Department read Stewart's summary of the interview, and then went to defendant's home and asked him to come to the police station to make a statement. Defendant voluntarily went to the police station with Steinbeck, whereupon defendant was advised of his *Miranda* rights and signed a waiver-of-rights form. Defendant made a statement that was transcribed by Steinbeck, but the sergeant forgot to have defendant sign the statement. Subsequently, Steinbeck discovered that some eyewitnesses had seen defendant at the Valu–King on the day of the murder.

On the following Monday, September 16, Steinbeck went to defendant's

house accompanied by defendant's uncle, Detective Morris Hill of the Warren Police Department. Defendant again went voluntarily to the police station, as did his mother. Defendant was given his *Miranda* rights, which he waived at that time as well. After further questioning by Sergeants Stewart and Steinbeck and Detective Hill, defendant indicated that he wanted to be alone with his uncle, Detective Hill. Several minutes later, defendant stated to Hill that he was "in the field behind Valu-King when the young Fife boy got murdered."

Defendant was given and waived his *Miranda* rights again, and then made two more voluntary statements, one on audiotape and the other on videotape. In both statements, defendant admitted that he was present during the beating and sexual assault of Raymond Fife, but that Combs did everything to the victim. Defendant stated that he saw Combs knock the victim off his bike, hold the victim in some sort of headlock, and throw him onto the bike several times. Defendant further stated that he saw Combs rape the victim anally and kick him in the head. Defendant stated that Combs pulled on the victim's penis to the point where defendant assumed Combs had pulled it off. Defendant related that Combs then took something like a broken broomstick and jammed it into the victim's rectum. Defendant also stated that Combs choked the victim and burnt him with lighter fluid. While defendant never admitted any direct involvement in the murder, he did admit that he stayed with the victim while Combs left the area of the attack to get the broomstick and the lighter fluid used to burn the victim.

Upon further investigation by authorities, defendant was indicted on counts of kidnapping, rape, aggravated arson, felonious sexual penetration, aggravated robbery and aggravated murder with specifications.

On December 16, 1985, a pretrial hearing was held on defendant's motion to suppress statements made to police officers both orally and on tape. On January 17, 1986, the court of common pleas concluded as follows:

"It is the opinion of this Court that no Fourth Amendment violation was shown because [defendant] was at no time 'seized' by the police department, but rather came in either voluntarily, or as in the case of September 16th because of his mother's demands.

" * * *

"Defendant's Fifth Amendment Rights were clearly protected by the numerous *Miranda* Warnings and waivers. 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 of his signatures.

"Though defendant is retarded, he is not so seriously impaired as to have been incapable of voluntarily and knowingly given the statements which the

defendant now seeks to suppress. The Court reaches this conclusion after seeing and listening to the defendant at the Suppression Hearing and listening to and watching the tape recording and videotaped statements of the defendant. The Court concludes that the statements were made voluntarily, willingly, and knowingly."

Meanwhile, on January 7, 1986, defendant appeared before the trial court and executed a waiver of his right to a jury trial.

On January 21, 1986, defendant's trial began in front of a three-judge panel. Among the voluminous testimony from witnesses and the numerous exhibits, the following evidence was adduced:

Defendant's brother, Raymond L. Vaughn, testified that he saw defendant wash his gray pants on the night of the murder as well as on the following two days. Vaughn identified the pants in court, and testified that it looked like defendant was washing out "something red. * * * It looked like blood to me * * *."

Detective Sergeant William Carnahan of the Warren Police Department testified that on September 15, 1985 he went with eyewitness Donald Allgood to the place where Allgood stated he had seen defendant and Combs coming out of the wooded field, and where he had seen defendant toss "something" into the woods. Carnahan testified that he returned to the area with workers from the Warren Parks Department, and that he and Detective James Teeple found a stick about six feet from the path where Allgood saw defendant and Combs walking.

Dr. Curtis Mertz, a forensic odontologist, stated that: "It's my professional opinion, with reasonable degree of medical certainty, that Hill's teeth, as depicted by the models and the photographs that I had, made the bite on Fife's penis."

The defense called its own forensic odontologist, Dr. Lowell Levine, who stated that he could not conclude with a reasonable degree of certainty as to who made the bite marks on the victim's penis. However, Levine concluded: "What I'm saying is either Hill or Combs, or both, could have left some of the marks but the one mark that's consistent with the particular area most likely was left by Hill."

Doctor Howard Adelman, the pathologist who performed the autopsy of the victim's body, testified that the size and shape of the point of the stick found by Detective Carnahan was "very compatible" with the size and shape of the opening through the victim's rectum. Adelman described the fit of the stick in the victim's rectum as "very similar to a key in a lock."

State v. Hill, 64 Ohio St. 3d 313, 313-17, 595 N.E.2d 884, 886-89 (Ohio 1992).

II. Procedural History[2]

A. State-Court Proceedings

The Trumbull County Grand Jury indicted Hill for the aggravated murder of Raymond Fife on September 10, 1985.[3] (App. to Return of Writ, Ex. A.) Hill's intellectual disabilities quickly surfaced as a central issue in Hill's defense when his counsel, Attorney James Lewis of the Ohio Public Defender's Office, filed a motion to suppress Hill's statements to police. Hill argued that because he was intellectually disabled, the police were able to coerce him into signing a waiver of his right to counsel, which he could not read and did not understand, and confessing to his role in the crime. The court conducted a three-day hearing on the suppression motion beginning on December 16, 1985, at which numerous witnesses testified, including Hill and a clinical psychologist who opined that Hill was mildly intellectually disabled. (ECF Nos. 28, 29.) The trial court denied Hill's motion. On January 7, 1986, Hill again appeared before the trial court and executed a waiver of his right to a jury trial. (ECF No. 30.)

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[2] The procedural history of Hill's direct appeals, post-conviction proceedings, and initial habeas proceedings is more fully set forth in this Court's Memorandum of Opinion and Order dated September 29, 1999. (ECF No. 54.) The Court includes here only the procedural history relevant to the claims pending before the Court, as asserted in Hill's Amended Petition for Writ of Habeas Corpus. (ECF No. 94.)

[3] The first count of the Indictment charged Hill with aggravated murder in violation of Ohio Rev. Code § 2941.14. The murder count included four capital felony murder specifications under Ohio Rev. Code § 2929.04(A)(7), charging Hill with murder while committing kidnapping, rape, aggravated arson and aggravated robbery. Hill also was indicted separately for: kidnapping, in violation of Ohio Rev. Code § 2905.01; rape, in violation of Ohio Rev. Code § 2907.02; aggravated arson, in violation of Ohio Rev. Code § 2909.02; aggravated robbery, in violation of Ohio Rev. Code § 2911.01; and felonious sexual penetration in violation of Ohio Rev. Code § 2907.12(A)(1)(3). (App. to Return of Writ, Ex. A.)

Hill's trial began on January 21, 1986, before a three-judge panel. At the close of trial, on January 31, 1986, the panel of judges deliberated for five hours and unanimously found Hill guilty on all counts, except the aggravated robbery count and the specification of aggravated robbery to the aggravated murder count. (ECF No. 27.) The court held a mitigation hearing beginning on February 26, 1986, at which three psychologists testified that Hill was intellectually disabled. The panel considered the following factors in possible mitigation:

> (1) The age of [Hill]; (2) The low intelligence of [Hill]; (3) The poor family environment; (4) The failure of the State or society to prevent this crime; (5) [Hill's] impaired judgment; (6) Whether or not he was a leader or follower.

The panel concluded that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. Two days later, on February 28, 1986, the panel sentenced Hill to ten to twenty-five years' imprisonment for both aggravated arson and kidnapping, life imprisonment for rape and felonious sexual penetration, and the death penalty for aggravated murder with specifications.[4] (ECF No. 24.)

Hill appealed his conviction and sentence to the Eleventh District Court of Appeals and the Ohio Supreme Court. He maintained throughout his direct appeals that he was intellectually disabled, and that because of this condition his constitutional rights were violated during the police interrogation and trial. He claimed, for example, that his Sixth Amendment right to counsel and Fourteenth Amendments rights were violated because, as an intellectually disabled person, he could not knowingly, voluntarily, and intelligently waive his right to counsel during

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[4] Timothy Combs also was charged and convicted in a separate trial as a principal offender in Fife's murder. *See State v. Combs,* No. 1725, 1988 WL 129449 (Ohio Ct. App. Dec. 2, 1988).

custodial interrogation. *Hill*, 64 Ohio St. 3d at 318-19, 595 N.E.2d at 890-91. He further argued that his statements to the police were not voluntary, because they were induced by psychological tactics designed to take advantage of an intellectually disabled person who was essentially illiterate. *Id*. at 318-19, 595 N.E.2d at 890-91. He also claimed that, given his intellectual disability, the police did not properly advise him of his *Miranda* rights, nor did he knowingly, voluntarily and intelligently waive such rights. *Id.* at 319, 595 N.E.2d at 891. Finally, Hill asserted that the trial court failed to consider all of the evidence of his intellectual disability as mitigating evidence when determining his sentence. *Id.* at 333-35, 595 N.E.2d at 901-02.

In discussing Hill's claims, both the Eleventh District Court of Appeals and the Ohio Supreme Court acknowledged Hill's intellectual disability. The Ohio Supreme Court stated, "[W]e find that [Hill's] mental retardation is a possible mitigating factor." *Id*. at 335, 595 N.E.2d at 901. It summarized the testimony of the psychologists who testified during the mitigating phase of Hill's trial, stating:

> Dr. Douglas Darnall, a psychologist, testified that defendant had an I.Q. of 55 and that his intelligence level according to testing fluctuates between mild retarded and borderline intellectual functioning, and that he is of limited intellectual ability. Dr. Darnall did state, however, that defendant was able to intellectually understand right from wrong.
>
> Dr. Nancy Schmidtgoessling, a clinical psychologist, testified that defendant had a full scale I.Q. of 68, which is in the mild range of mental retardation, and that the defendant's mother was also mildly retarded. Dr. Schmidtgoessling also testified that defendant's moral development level was "primitive," a level at which "one do[es] things based on whether you think you'll get caught or whether it feels good. [T]hat's essentially whereabout [*sic*] a 2–year old is."
>
> Dr. Douglas Crush, another psychologist, testified that defendant had a full-scale I.Q. of 64, and that his upper level cortical functioning indicated very poor efficiency.

> Other mitigation testimony on behalf of defendant indicated that he was a follower and not a leader, who had to be placed in group homes during his youth.

Id. at 334-35, 595 N.E.2d at 901. Similarly, the court of appeals concluded that Hill

> admittedly suffers from some mental retardation (although the evidence presented is divergent as to the severity of the handicap) and has had concommitant difficulties in language comprehension throughout his formal education. [Hill] is categorized as being mildly to moderately retarded. Evidence was presented which indicates that [Hill] is illiterate . . . .

State v. Hill, Nos. 3720, 3745, 1989 WL 142761, at *6 (Ohio Ct. App. Nov. 27, 1989). It also found,

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

Id. at *32.

The Ohio courts, however, denied Hill's claims based on his intellectual disability and did not find his disability to be a significant mitigating factor. The Ohio Supreme Court noted that "there are various levels of mental retardation, and a person must be viewed individually as to the degree of retardation." *Hill*, 64 Ohio St. 3d at 335, 595 N.E.2d at 901. It ultimately found "a very tenuous relationship between the acts he committed and his level of mental retardation. As several of the experts pointed out, [Hill] did not suffer from any psychosis, and he knew right from wrong." *Id*. The court also found that based on legal precedent and Hill's "prior dealings with the criminal process as a juvenile, [Hill's] mental aptitude did not undercut the voluntariness of his statements or his waiver of *Miranda* rights." *Id*. at 318, 595 N.E.2d at 890.

The court of appeals, in rejecting Hill's *Miranda* claim, concluded,

> However, from the record here, particularly during the suppression hearing, this court is also aware (as was the trial court below) of the long and multifaceted exposure [Hill] has had with the state's criminal justice system. The evidential table in this case also demonstrates that [Hill] exhibited a functional capacity to understand [his *Miranda*] rights, including the right to appointed counsel. . . .
>
> Moreover, the behavior of [Hill] during the police investigation belies the notion that he was no more than a malleable victim of police suggestion. [Hill] possessed the requisite intelligence to implicate other persons in the murder and was capable of modifying his story when inconsistencies were demonstrated to him. Additionally, [Hill] qualified and corrected the police officers's [*sic*] misstatements of the factual scenario which he had related to them. He was also able to follow "verbal concepting," displaying an understanding of the officers [*sic*] direction of questioning and the dialogue utilized during the interrogation.

Hill, 1989 WL 142761, at *6. It also discounted Hill's low intelligence and impaired judgment as mitigating factors, stating,

> Consideration of evidence delineating [Hill's] mental retardation is more properly applied when evaluating his ability to knowingly, intelligently and voluntarily waive his constitutional rights. There is no evidence presented that requires the conclusion that this crime was committed because a mental defect precluded [Hill] from making the correct moral or legal choice.

Id. at *32.

The Ohio courts affirmed Hill's conviction and sentence on direct appeal. *State v. Hill*, Nos. 3720, 3745, 1989 WL 142761 (Ohio Ct. App. Nov. 27, 1989); *State v. Hill*, 64 Ohio St. 3d 313, 595 N.E.2d 884 (Ohio 1992), *reh'g denied*, 65 Ohio St. 3d 1421, 598 N.E.2d 1172 (Ohio 1992). Hill then sought review from the United States Supreme Court. One of the questions he presented to the Court was,

> Whether a conviction and sentence of death may stand when statements are elicited from a mentally retarded, essentially illiterate accused through misconduct of law enforcement officials, coercion by psychological tactics, and promises of leniency in violation of the Fourth, Sixth and Fourteenth Amendments.

(App. to Return of Writ, Ex. T, 2.) The Supreme Court denied certiorari on March 29, 1993. *Hill v. Ohio*, 507 U.S. 1007 (1993).

Hill continued to assert claims related to his intellectual disability in state post-conviction proceedings, including claims related to the trial court's weighing of mitigating factors, his waiver of his right to counsel and to a jury, and ineffectiveness of trial counsel for not properly investigating and presenting evidence of his intellectual disability. He attached to his petition affidavits of two experts in the field of intellectual disability, each of whom averred that Hill was intellectually disabled. (App. to Return of Writ, Ex. Y.) The trial court denied Hill's post-conviction petition on July 18, 1994, specifically finding the two expert opinions "unpersuasive and insufficient to establish substantive grounds for relief ." (*Id*., Exs. FF; GG, 11.) The Eleventh District Court of Appeals affirmed the trial court's decision on July 16, 1995. *State v. Hill*, No. 94-T-5116, 1995 WL 418683 (Ohio Ct. App. June 16, 1995). The Ohio Supreme Court declined further review of that decision on November 15, 1995. *State v. Hill*, 74 Ohio St.3d 1456, 656 N.E.2d 951 (Ohio 1995) (Table).

B. Initial Habeas Proceedings

Hill filed a Notice of Intent to File a Petition for Writ of Habeas Corpus with this Court on April 18, 1996. (ECF No. 1.) He was represented by Attorneys Patricia Milhoff and George Pappas Jr. In his habeas petition, Hill reasserted his constitutional claims relating to his intellectual disability, arguing that the Ohio courts' rulings on those claims were contrary to, or an unreasonable application of, established federal law, or an unreasonable determination of the facts. (ECF No. 18.) Another judge on this Court denied Hill's petition on September 29, 1999. (ECF No. 54.)

Hill appealed the decision to the Sixth Circuit Court of Appeals. While his appeal was pending, the Supreme Court decided *Atkins v. Virginia,* 536 U.S. 304 (2002), which barred the execution of intellectually disabled offenders. Less than two months later, on August 13, 2002, the Sixth Circuit returned Hill's case to this Court with instructions to remand Hill's unexhausted *Atkins* claim to state court and stay his remaining claims pending resolution of the *Atkins* claim. *Hill v. Anderson*, 300 F.3d 679, 683 (6th Cir. 2002). The court explained that it did not dismiss Hill's "mixed petition" of exhausted and unexhausted claims, as it is authorized to do under AEDPA's § 2254(b)(2), because "Hill's new claim should first be heard by a state court," and because the issue of Hill's intellectual disability raised "a serious question" regarding the voluntariness of his confession. *Id*. at 680, 682. The court noted that "the state of Ohio has not formally conceded that [Hill] is retarded," but that "Ohio courts reviewing his case have concluded that Danny Hill is retarded, *see, e.g., Hill,* 595 N.E.2d at 901, and voluminous expert testimony supported this conclusion, J.A. at 3264-67, 3332-25, 3379-80 . . . ." *Id*. at 682. It further observed,

> A suspect's "mental condition is surely relevant to an individual's susceptibility to police coercion." *Colorado v. Connelly*, 479 U.S. 157, 165, 107 S. Ct. 515, 93 L.Ed.2d 473 (1986). State courts, including the Ohio Supreme Court, have clearly stated that Hill is retarded. *See Hill,* 595 N.E.2d at 901. The retarded have, "by definition . . . diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins,* 536 U.S. at —, 122 S. Ct. at 2250. . . .

Id. at 683. The court remarked that Hill's interactions with his uncle, Detective Morris Hill, was "of special concern." *Id*. at 682-83.

In accordance with the Sixth Circuit's remand instructions, on August 20, 2002, this

Court dismissed Hill's *Atkins* claim and stayed his remaining claims pending exhaustion of his state-court remedies. (ECF No. 60.)

C. State *Atkins* Proceedings

Hill filed a petition to vacate his death sentence with the Trumbull County Court of Common Pleas on November 27, 2002, and an amended petition to vacate on January 17, 2003. (Supp. App., Disc 1, 31-32.) In his petition, he asserted that his intellectual disability is "a fact of record in his case" and that the state is thereby "barred by the doctrine of collateral estoppel from any attempt to relitigate the proven fact that [he] is a person with mental retardation." In the alternative, Hill argued the trial court should take judicial notice of the fact that he is a person with intellectual disability and/or hold a hearing on the issue of his intellectual disability. (*Id*. at 103-08.) The court appointed Attorneys James Lewis, Anthony Consoldane, and Gregory Meyers of the Ohio Public Defender's Office to represent him. (*Id*. at 32.)

The Eleventh District Court of Appeals, in reviewing Hill's *Atkins* claims on appeal from the trial court, provided this account of Hill's state-court *Atkins* proceedings:

> On April 4, 2003, the trial court ruled that Hill's petition stated "substantive ground for relief sufficient to warrant an evidentiary hearing." The court granted the state's and Hill's requests to retain their own experts in the field of mental retardation. Over Hill's objection, the court determined to retain its own expert to evaluate Hill "pursuant to his *Atkins* claim." The court denied Hill's request to have a jury empanelled [*sic*] to adjudicate his *Atkins* claim.
>
> The state retained as its expert Dr. J. Gregory Olley, a professor at the University of North Carolina at Chapel Hill and a director of the university's Center for the Study of Development and Learning. Hill retained as his expert Dr. David Hammer, a professor at the Ohio State University and the director of psychology services at the university's Nisonger Center. The court, through the Forensic Center of Northeast Ohio, retained Dr. Nancy Huntsman, of the Court Psychiatric Clinic of Cleveland.

In April 2004, Drs. Olley, Hammer, and Huntsman evaluated Hill at the Mansfield Correctional Institution for the purposes of preparing for the Atkins hearing. At this time, Hill was administered the Wechsler Adult Intelligence Scale ("WAIS–III") IQ test, the Test of Mental Malingering, the Street Survival Skills Questionnaire, and the Woodcock–Johnson–III. The doctors concurred that Hill was either "faking bad" and/or malingering in the performance of these tests. As a result, the full scale IQ score of 58 obtained on this occasion was deemed unreliable, and no psychometric assessment of Hill's current adaptive functioning was possible. Thus, the doctors were forced to rely on collateral sources in reaching their conclusions, such as Hill's school records containing evaluations of his intellectual functioning, evaluations performed at the time of Hill's sentencing and while Hill was on death row, institutional records from the Southern Ohio Correctional Institution and the Mansfield Correctional Institution, interviews with Hill, corrections officers, and case workers, and prior court records and testimony.

The evidentiary hearing on Hill's *Atkins* petition was held on October 4 through 8 and 26 through 29, 2004, and on March 23 through 24, 2005. Doctors Olley and Huntsman testified that in their opinion, Hill is not mentally retarded. Doctor Hammer concluded that Hill qualifies for a diagnosis of mild mental retardation.

In the course of the trial, an issue arose regarding the interpretation of the results of the Vineland Social Maturity Scale test, a test designed to measure adaptive functioning and performed on Hill four times prior to the age of 18. Hill presented the testimony of Sara S. Sparrow, Ph.D., professor emerita of Yale University, to rebut certain opinions expressed by Dr. Olley. In turn, the state called Timothy Hancock, Ph.D., executive director of the Parrish Street Clinic, in Durham, North Carolina, as a surrebuttal witness to Dr. Sparrow.

The following lay persons also testified at the hearing regarding Hill's functional abilities: corrections officer John Glenn, death row case manager Greg Morrow, death row unit manager Jennifer Sue Risinger, and corrections officer Steven Black.

On November 30, 2005, Hill filed a petitioner's supplemental authority and renewed double jeopardy motion, in which he asserted that the state is barred by the doctrine of collateral estoppel and the Double Jeopardy Clause from relitigating the issue of his mental retardation.

On February 15, 2006, the trial court issued its judgment entry denying Hill's petition for postconviction relief in which he claimed to be a person with mental retardation and rejecting his arguments regarding double jeopardy/collateral estoppel.

On March 15, 2006, Hill filed a timely notice of appeal to this court.

On August 21, 2006, Hill, acting pro se, filed a motion to withdraw the merit brief filed by counsel and a request that this court would order a competency hearing to determine whether Hill is competent to waive all appeals and proceedings in this matter. The basis for the motion is that appointed counsel had filed a merit brief in this appeal without properly investigating Hill's "'*Atkins*' claims and/or constitutional violations."

On October 27, 2006, this court issued the following judgment entry: "The trial court is directed to promptly hold an evidentiary hearing to determine Appellant's competency to make decisions regarding his counsel and possible waiver of the right to appeal. Depending upon the outcome of that determination, the trial court shall further determine whether Appellant has actually decided to waive his right to proceed in the appeal; and whether that decision has been made voluntarily, knowingly and intelligently."

The trial court appointed Thomas Gazley, Ph.D., with the Forensic Psychiatric Center of Northeast Ohio, to evaluate Hill. Dr. Gazley interviewed Hill on two occasions in November 2006. On December 7, 2006, a hearing was held on the competency issue.

On December 8, 2006, the trial court issued a judgment entry finding that Hill is "competent to make a decision whether or not to pursue an appeal" and has, "in open court," expressed his desire to pursue an appeal from the adverse decision of the trial court on the issue of mental retardation.

On February 1, 2007, this court overruled Hill's motion to withdraw the merit brief filed by counsel, and request that this court would order a competency hearing as moot.

State v. Hill, 177 Ohio App. 3d 171, 178-80, 894 N.E.2d 108, 113-15 (Ohio Ct. App. 2008).

On appeal to the Eleventh District Court of Appeals, Hill raised the following assignments of error:

1. The trial court erred in failing to apply double jeopardy and res judicata doctrines to prevent renewed litigation of Mr. Hill's status as a person with mental retardation.

2. The trial court erred in denying Mr. Hill a jury determination of his mental retardation status and not imposing the burden of proof on the State of Ohio to

prove the absence of mental retardation beyond a reasonable doubt.

3. The trial court erred in finding that Mr. Hill was not a person with mental retardation.

4. The trial court erred in determining Mr. Hill was competent to proceed with this appeal.

(Supp. App., Disc 1, 4004-49.)

The Ohio court of appeals affirmed the trial court's decision on July 11, 2008. *Hill*, 177 Ohio App. 3d at 195, 894 N.E.2d at 127. One member of the three-judge panel, Judge Colleen Mary O'Toole, dissented from the majority's conclusion that the trial court did not err in finding that Hill was not intellectually disabled. *Id*. at 195-201, 894 N.E.2d at 127-31. She stated,

> Based on *Atkins*, executing a person with mental retardation status, regardless of context, violates the Eighth Amendment. Here, I believe the trial court abused its discretion in finding that [Hill] was not a person with mental retardation, because he met the three *Lott* criteria for classification as mentally retarded.

Id. at 201, 894 N.E.2d at 131. The Ohio Supreme Court declined to review the case on August 26, 2009, with two justices dissenting. *State v. Hill*, 122 Ohio St. 3d 1502, 912 N.E.2d 107 (Ohio 2009) (Table).

D. Resumed Habeas Proceedings

After Hill had exhausted his state-court remedies, both parties promptly moved this Court to reopen Hill's habeas action, which this Court granted on October 1, 2009. (ECF Nos. 63, 65, 68, respectively.) Attorneys Mark Vander Laan and Christopher McDowell represented Hill. On October 22, 2009, Hill moved to substitute Attorneys Vander Laan and McDowell with Attorney Dennis Sipe. (ECF No. 69.) In a telephone conference with the Court a week later, Hill withdrew his request, and the Court deemed his motion moot. (ECF No. 75.) On November 10,

2009, Hill filed a motion pro se "to stop all proceedings." (ECF No. 77.) The Court conducted a telephone conference with all parties on November 20, 2009, during which Hill withdrew his motion to dismiss his habeas action and requested the Court substitute the Ohio Federal Public Defender's Office as his counsel. The Court granted Hill's motion to substitute counsel and denied his motion to dismiss his case. (ECF No. 85.)

On February 24, 2010, Hill moved for an extension of time until March 15, 2010, in which to file an amended habeas petition, which the Court granted. (ECF Nos. 89, 90.) On March 4, 2010, Hill filed an affidavit with the Court, asking it again "to stop all proceedings." He explained that he believed his counsel were not ready to file an amended habeas petition before the approaching deadline and they were not following his instructions. (ECF No. 91.) Hill's counsel filed a response four days later, explaining their client's confusion. (ECF No. 92.) Hill then filed another motion to stop the proceedings on March 12, 2010, without providing any basis for the motion. (ECF No. 93.) The Court denied the motion on March 24, 2010, noting Hill's frequent, and disruptive, attempts to substitute counsel and dismiss his appeals. (ECF No. 96.)

On March 15, 2010, Hill filed an Amended Petition for Writ of Habeas Corpus in this Court. In it, he asserts three claims: 1) that the death sentence imposed against him violates the Eighth Amendment under *Atkins* due to his intellectual disability; 2) that counsel assigned to represent him at the state *Atkins* hearing rendered ineffective assistance of counsel by failing to investigate and to present compelling and relevant evidence in support of the *Atkins* claim; and 3) that he is actually innocent of the death penalty because he is mentally retarded. (ECF No. 94.) Respondent filed a Supplemental Return of Writ Regarding Atkins Claim on April 30, 2010.

(ECF No. 98.) After requesting and receiving an extension of time, Hill filed a Traverse on August 2, 2010, and a Supplement to Traverse on August 5, 2010. (ECF Nos. 102 and 103, respectively.)

On September 9, 2010, Hill requested an extension of time to file motions. (ECF No. 114.) Respondent opposed the motion, and the Court denied it on September 13, 2010. (ECF Nos. 115 and 116, respectively.) Hill then filed several motions with the Court on September 20, 2010. He sought to expand the record with various declarations supporting his *Atkins* claims. (ECF Nos. 119 and 120.) Hill also requested discovery to support his *Atkins* claims and his *Atkins*-related ineffective-assistance claim. (ECF No. 117.) And he sought an evidentiary hearing on his *Atkins* claims. (ECF No. 118.) On October 4, 2010, Hill filed a motion to supplement his motions for evidentiary hearing and expansion of the record. (ECF No. 129.) Respondent opposed all motions. (ECF Nos. 123, 125, 131.)

This Court ruled on Hill's motions on December 14, 2010. It denied Hill's motion to expand the record, concluding that "Petitioner cannot show that he was not at fault for failing to develop the record" at the state *Atkins* hearing and therefore did not satisfy 28 U.S.C. § 2254(e)(2)'s requirements that a petitioner demonstrate that the factual predicates of his claim could have been previously discovered through the exercise of due diligence, and that he is actually innocent. (ECF No. 132, 13.) The Court also denied Hill's discovery request concerning his *Atkins*-related ineffective-assistance claim during post-conviction proceedings, because "Petitioner is not entitled to effective assistance of counsel during post-conviction proceedings and the issue cannot be heard on habeas review." (*Id*. at 15.) It granted discovery relating to the *Atkins* claims generally, however, as the information, if fully developed, may entitle Hill to relief.

(*Id*. at 16.) Finally, it denied without prejudice Hill's motion for an evidentiary hearing because, again, Hill did not meet the criteria of § 2254(e)(2). (*Id*. at 17.)

Hill notified the Court that he had completed discovery on April 13, 2011. (ECF No. 135.) On April 27, 2011, Hill moved to expand the record with the discovery obtained, which the Court granted "for the sole purpose of determining whether an evidentiary hearing is appropriate in this matter." (ECF Nos. 140 and 145, respectively.)

On May 23, 2012, Hill requested that the Court reconsider its December 14, 2010, ruling regarding his requests for discovery and to expand the record "in relation to" his ineffective-assistance claim in light of the recent United States Supreme Court decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). (ECF No. 146, 1.) The Court denied Hill's request on July 10, 2012. (ECF No. 148.)

III. Petitioner's Grounds for Relief

Hill asserts three grounds for relief. They are:

1. Mr. Hill is mentally retarded and thus ineligible for the death penalty. Mr. Hill's sentence of death violates his right to be free from cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

2. Court appointed *Atkins* counsel rendered ineffective assistance to Mr. Hill, and the trial court allowed for the continued representation of *Atkins* counsel in spite of knowing that there was a complete and absolute breakdown in the attorney-client relationship, thereby denying Hill his right to counsel in violation of his Sixth, Eighth and Fourteenth Amendment Rights.

3. Because Mr. Hill is mentally retarded, he is innocent of the death penalty.

(ECF No. 94, *passim*.)

IV. Standard of Review

Hill's Amended Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), since it was filed after the Act's effective date. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *Murphy v. Ohio,* 551 F.3d 485, 493 (6th Cir. 2009). AEDPA, which amended 28 U.S.C. § 2254, was enacted "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and 'to further the principles of comity, finality, and federalism.'" *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (quoting (*Michael) Williams v. Taylor*, 529 U.S. 362, 436 (2000)). As the United States Supreme Court recently explained, the Act "recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013). AEDPA, therefore, "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Id*.

One of AEDPA's most significant limitations on the federal courts' authority to issue writs of habeas corpus is found in § 2254(d). That provision forbids a habeas court from granting relief with respect to a "claim that was adjudicated on the merits in State court proceedings" *unless* the state-court decision either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Habeas courts review the "last *explained* state-court judgment" on the federal claim at issue. *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991) (emphasis original).

A state-court decision is contrary to "clearly established federal law" under § 2254(d)(1)

only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. Even if the state court identifies the "correct governing legal principle," a federal habeas court may still grant the petition if the state court makes an "unreasonable application" of "that principle to the facts of the particular state prisoner's case." *Id*. at 413. A state-court decision also involves an unreasonable application if it unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Id*. at 407. As the Supreme Court has advised, "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (citing *Williams*, 529 U.S. at 410). "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011).

A state-court decision is an "unreasonable determination of the facts" under § 2254(d)(2) only if the court made a "clear factual error." *Wiggins v. Smith,* 539 U.S. 510, 528-29 (2003). Review under this clause, as its plain language indicates, also is limited to "the evidence presented in the State court proceeding." Furthermore, the petitioner bears the burden of rebutting the state court's factual findings "by clear and convincing evidence." *Burt*, 134 S. Ct. at 15; *Rice v. White*, 660 F.3d 242, 250 (6th Cir. 2011). This requirement mirrors the "presumption of correctness" AEDPA affords state-court factual determinations, which only can be overcome

by clear and convincing evidence.[5] 28 U.S.C. § 2254(e)(1). The Supreme Court repeatedly has declined to define the "precise relationship" between § 2254(d)(2) and § 2254(e)(1). *Burt*, 134 S. Ct. at 15; *see also Wood v. Allen*, 558 U.S. 290, 300 (2010). It has explained, however, that it is

> incorrect . . ., when looking at the merits, to merge the independent requirements of § 2254(d)(2) and (e)(1). AEDPA does not require a petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions.

Miller-El v. Cockrell, 537 U.S. 322, 341 (2003). "[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the sate-court proceeding." *Id*. at 340. In addition, "it is not enough for the petitioner to show some unreasonable determination of fact; rather, the petitioner must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice,* 660 F.3d at 250. And, as Supreme Court has cautioned, "'a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'" *Burt*, 134 S. Ct. at 15 (quoting *Wood*, 558 U.S. at 301).

Indeed, the Supreme Court repeatedly has emphasized that § 2254(d), as amended by AEDPA, is an intentionally demanding standard, affording great deference to state-court adjudications of federal claims. In *Harrington v. Richter*, 131 S. Ct. 770 (2011), the Supreme Court held that as long as "fairminded jurists could disagree on the correctness of the state court's

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[5] Section 2254(e)(1) provides: "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

decision," then relief is precluded under that provision. *Id*. at 786 (internal quotation marks omitted). The Court admonished that a reviewing court may not "treat[] the reasonableness question as a test of its confidence in the result it would reach under de novo review," and that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. at 785. Rather, § 2254(d) "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems" and does not function as a "substitute for ordinary error correction through appeal." *Id*. (internal quotation marks omitted). Thus, a petitioner "must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. at 786-87. This is a very high standard, which the Court readily acknowledges: "If this standard is difficult to meet, that is because it is meant to be." *Id.* at 786.

Nevertheless, the Supreme Court recognized in *Harrington* that AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." *Id.* at 786. "[E]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El*, 537 U.S. at 340. Rather, "under AEDPA standards, a federal court can disagree with a state court's factual determination and 'conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.'" *Baird v. Davis*, 388 F.3d 1110, 1123 (7th Cir. 2004) (quoting *Miller-El*, 537 U.S. at 340) (Posner, J.).

In addition to § 2254(d)'s limitations, AEDPA precludes habeas review of some claims that have not been properly exhausted before the state courts, or were procedurally barred by the state courts. Section 2254(b)(1) provides that a federal court may not award habeas relief to an

applicant in state custody "unless it appears that – the applicant has exhausted the remedies available in the courts of the State; or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1); *see also Rose v. Lundy*, 455 U.S. 509 (1982). Thus, exhaustion is fulfilled once a state supreme court provides a convicted defendant an opportunity to review his or her claims on the merits. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). If under state law there remains a remedy that a petitioner has not yet pursued, exhaustion has not occurred and the federal habeas court cannot entertain the merits of the claim. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). Rather than dismiss certain claims the court deems unexhausted, however, a habeas court need not wait for exhaustion if it determines that a return to state court would be futile. *Lott v. Coyle*, 261 F.3d 594, 608 (6th Cir. 2001).

In circumstances where the petitioner has failed to present a claim in state court, a habeas court may deem that claim procedurally defaulted because the Ohio state courts would no longer entertain the claim. *Buell v. Mitchell*, 274 F.3d 337, 349 (6th Cir. 2001). To obtain a merit review of the claim, the petitioner must demonstrate cause and prejudice to excuse his failure to raise the claim in state court, or that a miscarriage of justice would occur were the habeas court to refuse to address the claim on its merits. *Seymour v. Walker*, 224 F.3d 542, 550 (6th Cir. 2000) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)).

Also, even where a state prisoner exhausts available state-court remedies, a federal court may not consider "contentions of general law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." *Wainwright*, 433 U.S. at 87. If a

> state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). To be independent, a state procedural rule and the state courts' application of it "must rely in no part on federal law." *Fautenberry v. Mitchell*, No. C-1-00-332, 2001 WL 1763438, at * 24 (S.D. Ohio Dec. 26, 2001) (citing *Coleman*, 501 U.S. at 732-33). To be adequate, a state procedural rule must be "'firmly established and regularly followed'" by the state courts at the time it was applied. *Beard v. Kindler*, 558 U.S. 53, 60 (2009). If a petitioner fails to fairly present any federal habeas claims to the state courts but has no remaining state remedies, then the petitioner has procedurally defaulted those claims. *O'Sullivan*, 526 U.S. at 848; *Rust*, 17 F.3d at 160.

The Court will address the issues of exhaustion and procedural default presented in this case when it reviews Hill's individual claims.

V. Analysis of Petitioner's Grounds for Relief

A. *First Ground for Relief:* Atkins *Claim*

Hill's first claim for relief is that he is intellectually disabled pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), and therefore ineligible for execution. Hill raised this claim on post-conviction and appealed it to the Eleventh District Court of Appeals and the Ohio Supreme Court. This claim is therefore preserved for federal habeas review.

1. Legal Standards: *Atkins* and *Lott*

In *Atkins v. Virginia*, the United States Supreme Court held that, in light of "our evolving

standards of decency," executing the intellectually disabled violates the Eighth Amendment's ban on cruel and unusual punishment. *Atkins*, 536 U.S. at 321. The Court recognized a national consensus that intellectually disabled persons are "categorically less culpable than the average criminal." *Id*. at 316. It explained,

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 318. The Court also found intellectually disabled offenders at "special risk of wrongful execution." *Id*. at 320. It pointed to the possibility of false confessions; the defendant's difficulty in persuasively showing mitigation, providing meaningful assistance to counsel, and testifying; and his or her demeanor, which may create an unwarranted impression of lack of remorse. *Id*. at 320-21. The Court concluded that given the impairments of intellectually disabled individuals, executing them would not "measurably advance the deterrent or the retributive purpose of the death penalty." *Id*. at 321.

The *Atkins* Court acknowledged the difficulties inherent in defining intellectual disability. It stated,

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. . . . Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.

Id. at 317. But it did not define the condition. Instead, as it did in the context of mental competency, the Court entrusted the states with "'the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Id*. (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)).

The Court did, however, point states to the clinical definitions of intellectual disability promulgated by the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association ("APA").[6] *Id*. at 308 n.3 (citing AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992) (hereinafter, "AAMR 1992 Manual") and APA, *Diagnostic and Statistical Manual of Mental Disorders* 41-43 (4th ed. 2000) (hereinafter, "DSM-IV-TR")). It explained that those criteria "require not only subaverage

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[6] The Court observed:

> The American Association on Mental Retardation (AAMR) defines intellectual disability as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." . . .
>
> The American Psychiatric Association's definition is similar: The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." . . . "Mild" mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70.

Id. at 308 n.3 (citations omitted).

intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id*. at 318. It noted that "[existing state] statutory definitions of mental retardation are not identical, but generally conform to [those] clinical definitions . . . ."[7] *Id*. at 317 n.22. In its recent decision in *Hall v. Florida*, the Supreme Court explained that these clinical definitions of intellectual disability "were a fundamental premise of *Atkins*." *Hall v. Florida*, slip op. at 18 (U.S. May 27, 2014). The Court stressed in *Hall* that a court's legal determination of the condition, "although distinct from a medical diagnosis," must be "informed" by "the views of medical experts" and "the medical community's diagnostic framework." *Id*. at 19-20.

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[7] The AAMR has cautioned, however, that "[t]he field of mental retardation is currently in a state of flux regarding not just a fuller understanding of the condition of mental retardation, but also the language and process used in naming, defining, and classifying" the condition. AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* xiii (10th ed. 2002) (hereinafter, "AAMR 2002 Manual"). At the heart of this evolving field is the very definition of intellectual disability, which has been revised nine times since 1908. *Id*. at 20-23. Since *Atkins* was decided, the AAMR has updated its manual twice: a tenth edition was published in 2002, and an eleventh edition in 2010. AAMR 2002 Manual; AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Support* (11th ed. 2010) (hereinafter, "AAMR 2010 Manual"). The APA published a fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (hereinafter, "DSM-V") in 2013. Many of the most recent changes to the clinical definitions of intellectual disability, as articulated in these updated guidelines, concern the criteria for adaptive behavior, which the Court will examine in more detail below.

In addition, as already noted, mental retardation is now commonly referred to as intellectual disability. *See supra* n.1. *See also* AMMR 2002 Manual, 5 ("The history of the condition we now know as mental retardation is replete with name changes, including feebleminded, mental defective, mentally deficient, and others. These new names arose as new theoretical frameworks appeared and older names came to signal stigma and distorted power relationships."). The AAMR has changed its name accordingly, to the American Association on Intellectual and Developmental Disabilities ("AAIDD"), although the Court will refer to the organization as AAMR throughout this opinion for consistency.

Soon after *Atkins* was decided, the Ohio Supreme Court established the "substantive standards and procedural guidelines" for Eighth Amendment intellectual disability claims in Ohio in *State v. Lott*, 97 Ohio St. 3d 303, 305, 779 N.E.2d 1011, 1014 (Ohio 2002). The court adhered to the clinical definitions cited with approval in *Atkins*, holding that to prevail on an *Atkins* claim, the defendant must prove that he or she: (1) suffers from "significantly subaverage intellectual functioning," (2) experienced "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction," and (3) manifested "onset before the age of 18." *Id*. The court noted, however, that "[w]hile IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue." *Id*. It therefore held that "there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70." *Id*.

Because Lott's trial occurred before *Atkins* was decided, the Ohio Supreme Court determined that his *Atkins* hearing would be conducted before the trial court pursuant to Ohio's post-conviction procedures. *Id*. It further held that the trial court should conduct a de novo review of the evidence, "rely[ing] on professional evaluations of Lott's mental status, and consider[ing] expert testimony, appointing experts if necessary, in deciding this matter." *Id.* at 306, 779 N.E.2d at 1015. The court also held that the trial court, not a jury, would decide if a petitioner is intellectually disabled, and the petitioner bears the burden of proving his or her intellectual disability by a preponderance-of-the-evidence standard. *Id.*

2. § 2254(d)(1): Reasonableness of Ohio court's application of Supreme Court precedent

Hill asserts, "To the extent that the state procedures themselves used to render the factual findings of the mental retardation clinical components contributed to and fostered inaccurate and unreliable factfinding by the trial court, the procedures violated clearly established federal law of" *Ford v. Wainwright*, 477 U.S. 399 (1986), *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Atkins* under § 2254(d)(1). (ECF No. 94, 15.) In *Ford* and *Panetti*, the Supreme Court held that state proceedings used to determine capital inmates' competency for execution must provide procedural due process protections. *See Ford*, 477 U.S. at 411-12; *Panetti*, 551 U.S. at 949. This argument lacks merit.

First, Hill does not clearly identify which state procedures violated these principles in his case. But even so, there is no "clearly established Federal law, as determined by the Supreme Court" on this issue, and § 2254(d)(1) does not apply. *See Williams v. Mitchell*, No. 1:09 CV 2246, 2012 WL 4505774, at **22- 28 (N.D. Ohio Sept. 28, 2012) (Nugent, J.). The Supreme Court has not addressed whether or to what extent *Ford*'s due process requirements extend to state-court determinations of intellectual disability under *Atkins*.[8] To the contrary, in *Bobby v. Bies*, 556 U.S. 825 (2009), the Court continued to emphasize that states themselves are responsible for "developing appropriate ways to enforce [*Atkins*'] constitutional restriction," and

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[8] The Sixth Circuit has not addressed this issue either. Other circuit courts are split on the issue. *Compare Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir. 2007) (noting that "[e]ven though *Atkins* did not specifically mandate any set of procedures, it was decided against the backdrop of the Supreme Court's and lower court's due process jurisprudence"), *and Ochoa v. Workman*, 669 F.3d 1130, 1143 (10th Cir. 2012) (finding that Fourteenth Amendment due process protections are applicable in *Atkins* hearings, at least with respect to Oklahoma's decision to provide a right to a jury in such hearings); *with Hill v. Humphrey*, 662 F.3d 1335, 1360 (11th Cir. 2011) (distinguishing *Ford* and *Panetti* and holding that "[h]ere, by contrast, *Atkins* established only a substantive Eighth Amendment right for the mentally retarded, not any minimum procedural due process requirements for bringing that Eighth Amendment claim").

implicitly approved of Ohio's standard for intellectual disability claims. *Id*. at 831 (quoting *Atkins*, 536 U.S. at 317). *See also Schriro v. Smith*, 546 U.S. 6, 9 (2005) ("States, including Arizona, have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. While those measures *might*, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition.") (emphasis added).

Moreover, even assuming that *Ford* and *Panetti* do apply here, this Court finds that the Ohio courts' adjudication of Hill's *Atkins* claim comported with the due process right to a "fair hearing" guaranteed in *Ford*. *See Ford*, 477 U.S. at 424 (Powell, J., concurring). Hill, assisted by appointed counsel and two appointed expert witnesses, conducted substantial briefing and discovery regarding his claim. (*See* Supp. App., Disc 1, 1-33.) The trial court, in accordance with the procedures established in *Lott*, held a twelve-day hearing, at which Hill submitted more than 500 pages of evidence. (*See id.* at 486-1013.) At its conclusion, the trial court issued an 84-page opinion, which thoroughly examined the evidence and explained its decision. (*See id.* at 3399-3483.) Hill then was provided with appointed counsel to appeal this decision to two higher state courts. (*See id.* at 3496-4517.) Thus, Hill was provided a full and fair opportunity to develop and present his *Atkins* claim in state court, and this claim fails.

3. § 2254(d)(2): Reasonableness of Ohio court's factual determinations regarding Hill's intellectual disability

As Hill concedes in his Traverse, his *Atkins* claim is more appropriately addressed as it relates to the Ohio appellate court's factual analysis under § 2254(d)(2). (ECF No. 102, 47.) Hill's primary argument under *Atkins* is that the "historical data and uncontroverted evidence

demonstrated that Mr. Hill meets the criteria established under psychological terms and under state law." (ECF No. 94, 20.) Respondent, in his six-page Return of Writ, counters Hill's claim simply by referring the Court to the "wealth of evidence" in the state-court record, the trial court's opinion, and audio and video recordings of Hill speaking to the trial court judge and a newspaper reporter. (ECF No. 98, 5.)

The Court first must determine the standards that govern its review of Hill's claim under § 2254(d)(2). Respondent, in his Return of Writ's only well-developed argument, contends that the Supreme Court decision in *Wood v. Allen*, 558 U.S. 290 (2010), "can fairly be read to say" that under § 2254(d)(2), a state-court finding is reasonable "if there is evidence in the State court record to support it." (*Id*. at 4.) The Court disagrees.

In *Wood*, the Court held that, "[r]eviewing all of the evidence, . . . even if it is debatable," a state court's conclusion that the petitioner's counsel made a strategic decision not to investigate further into, or present to the jury, information contained in a report about the petitioner's mental deficiencies was not unreasonable under § 2254(d)(2). *Wood*, 558 U.S. at 303. In doing so, the Court addressed the standard of review under § 2254(d)(2). It declined to reach the question of whether the "arguably more deferential" clear-and-convincing-evidence standard of § 2254(e)(1) "applies in every case presenting a challenge under § 2254(d)(2)," because its "view of the reasonableness of the state court's factual determination in this case [did] not turn on any interpretive difference regarding the relationship between these provisions." *Id*. at 300-01. But it "assume[d] for the sake of argument that the factual determination at issue should be reviewed . . . only under § 2254(d)(2) and not under § 2254(e)(1)." *Id.* at 301. The Court also acknowledged that "[t]he term 'unreasonable' is no doubt difficult to define." *Id.* at 301 (quoting *Williams,* 529

U.S. at 410)). But it stressed: "It suffices to say, however, that 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*. The Court explained,

> In *Rice* [*v. Collins*, 546 U.S. 333, 339 (2006)], for example, in which we assumed, *arguendo*, that only § 2254(d)(2) and not § 2254(e)(1) applied, . . . we rejected the Ninth Circuit's conclusion that a state-court factual determination was unreasonable. We noted that even if "[r]easonable minds reviewing the record might disagree" about the finding in question, "on habeas review that *does not suffice* to supersede the trial court's . . . determination." [*Id*. at 341-42.]

Id. (emphasis added). The Court also observed, "As for any evidence that may plausibly be read as inconsistent with the [state-court] finding that counsel made a strategic decision, we conclude that *it does not suffice* to demonstrate that the finding was unreasonable." *Id*. at 302-03 (emphasis added).

Thus, the Court in *Wood* did not state, as Respondent argues, that a state-court factual determination is reasonable if *any evidence* exists to support it. Rather, it reiterated that a habeas court, after reviewing *all of the evidence*, must find *sufficient* evidence of unreasonableness to warrant relief under § 2254(d)(2), and that is more evidence than would make the state-court decision merely debatable or would lead the habeas court to a different result. Respondent's interpretation of *Wood*, though offering bright-line clarity, would render § 2254(d)(2)'s standard virtually insurmountable, extending deference nearly to the point of "abandonment or abdication of judicial review." *Miller-El*, 537 U.S. at 340.

In this case, then, under § 2254(d)(2), the Court must review "the evidence presented in the State court proceeding" to determine whether the state court's adjudication of Hill's *Atkins* claim "was based on an unreasonable determination of the facts." The state-court decision at

issue is from the Eleventh District Court of Appeals, which was the last Ohio court to render an explained judgment regarding Hill's claim. *Ylst*, 501 U.S. at 805. Hill bears the burden of rebutting that court's particular factual *findings* "by clear and convincing evidence." *Burt*, 134 S. Ct. at 15; *Rice,* 660 F.3d at 250. The Court is limited in its review to "the evidence presented in the State court proceeding."[9] 28 U.S.C. § 2254(d)(2). "[I]t is not enough for [Hill] to show some unreasonable determination of fact; rather, [he] must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice,* 660 F.3d at 250. Ultimately, Hill must show that the *decision as a whole* was unreasonable. *Miller-El*, 537 U.S. at 341; *see also Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011). And "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood*, 558 U.S. at 301.

The Court now examines the Ohio court of appeals' review of the state trial court's ruling that Hill had not met his burden of proving, by a preponderance of the evidence, that he was intellectually disabled, as defined by: (1) significantly subaverage intellectual functioning; (2) significant limitations in two or more adaptive skills; and (3) onset before the age of 18. *Lott*, 97 Ohio St. 3d at 305.

a. significant subaverage intellectual functioning

The Ohio court of appeals agreed with the trial court that Hill met the first criterion for intellectual disability under *Lott*. The court stated,

> With respect to the first criterion, significantly subaverage intellectual functioning is clinically defined as an IQ below 70. FN2

[9] The Court, therefore, will not consider any of the new evidence Hill submitted in support of his petition.

> FN2. More precisely, significantly subaverage intellectual functioning is defined as two standard deviations below the mean for the general population, i.e. an adjusted score of 100 on a standardized test. A single deviation is considered 15 points. Two deviations means a score of 70 or lower. It should also be noted that an IQ score below 70 is not determinative of a diagnosis of mental retardation. Cf. *Lott*, 97 Ohio St.3d 303, 2002-0hio-6625, 779 N.E.2d 1011, at 12 (holding "that there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70").
>
> Hill's IQ was measured nine times between 1973, when he was six years old, and 2000, when he was 33 years old. The scores range from 48 to 71, with the mean being 61.12. In April 2004, Hill scored a 58 on the Wechsler Adult Intelligence Scale. Drs. Hammer, Olley, and Huntsman all agreed that this result was unreliable due to Hill's intentionally trying to obtain a low score.

Hill, 177 Ohio App. 3d at 188-89, 894 N.E.2d at 121. Neither Hill nor Respondent challenges this determination. (*See* ECF No. 94, 21; ECF No. 98, 1.)

b. adaptive skills deficit

The Ohio appellate court also agreed with the trial court that Hill failed to meet, by a preponderance of the evidence, the second criterion for intellectual disability under *Lott*, which requires the offender to demonstrate "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction." *Lott*, 97 Ohio St. 3d at 305, 779 N.E.2d at 1014. It found "abundant competent and credible evidence" supporting the trial court's decision. *Hill*, 177 Ohio App. 3d at 194, 894 N.E.2d at 126.

Hill argues that the state appellate court's factual determination regarding his adaptive behavior was unreasonable. (ECF No. 94, 21.) In particular, he complains that the court failed to properly apply the clinical guidelines, and that, in the absence of reliable test results regarding adaptive functioning, the court "engaged in its own analysis of anecdotal evidence of Mr. Hill's deficits in adaptive behavior . . ., contrary to the record . . . ." (*Id*. at 37.)

The Supreme Court has defined "adaptive behavior" as "an individual's ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so." *Hall*, slip op. at 3. *See also* AAMR 2010 Manual, 43 (AAMR defining adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives"); DSM-V, 37 (APA defining it as "how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background"). The concept of adaptive behavior is considered "one of the most subjective essential elements of mental retardation," and was not added to the AAMR definition until 1959. *Holladay v. Campbell*, 463 F. Supp. 2d 1324, 1329 (N.D. Ala. 2006); *see also* AAMR 1992 Manual, 38. It, like the definition of intellectual disability itself, has undergone many revisions.

In its 1992 manual, the AAMR assessed adaptive behavior based on ten skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. AAMR 1992 Manual, 38. In 2002, the AAMR grouped these adaptive skills into three general categories: conceptual, social, and practical. "Conceptual skills" include language, reading and writing, money concepts, and self-direction. "Social skills" include interpersonal relationships, personal responsibility, self-esteem, gullibility and naivete, following rules, obeying laws, and avoiding victimization. And "practical skills" include daily activities such as eating, personal hygiene, dressing, meal preparation, housekeeping, transportation, taking medication, money management, and telephone use, as well as occupational skills and maintaining a safe environment. AAMR 2002 Manual, 82. Under this standard, a significant deficit in only one of these groups satisfied the adaptive behavior criteria

for intellectual disability. *Id*. at 78. The AAMR did not change its definition of adaptive behavior in the 2010 edition of its manual. *See* AAMR 2010 Manual, 43.

In the DSM-IV-TR, the APA also measured adaptive behavior based on various skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. DSM-IV-TR, 41. It revised the criteria in the DSM-V, closely following the AAMR's new construct of three broad skill groups. It now provides,

> Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical. The *conceptual (academic) domain* involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others.

DSM-V, 37.

In this case, the Ohio court of appeals quoted *Lott*'s standard for adaptive limitations – "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction" – under the definition of intellectual disability derived from the AAMR 1992 Manual and the DSM-IV-TR. *Hill*, 177 Ohio App. 3d at 189, 894 N.E.2d at 121. The court also cited the AAMR 2002 Manual's revised definition of adaptive functioning. *Id*. at n.3. It did not, however, identify which of these standards it was applying. And there is no precedent in Ohio law or from the Sixth Circuit regarding which definition of adaptive behavior should be applied

in this context. Nevertheless, despite minor differences between the standards,[10] courts generally have not distinguished between them. *See, e.g., Wiley v. Epps*, 625 F.3d 199, 216 n.13 (5th Cir. 2010) (noting that the two definitions "look at the same adaptive behavior"); *United States v. Davis*, 611 F. Supp. 2d 472, 490 (D. Md. 2009) (finding these classifications "essentially measure the same skills"); *Thomas v. Allen*, 614 F. Supp. 2d 1257, 1314-15 (N.D. Ala. 2009) (observing that the 1992 and 2002 AAMR definitions "share a common conceptual linkage"). This Court finds that, although the later guidelines provide useful clarification, the experts engaged in Hill's case most often referenced the 1992 AAMR standard for adaptive behavior cited in *Atkins* and *Lott*. *See Wiley*, 625 F.3d at 216; *Thomas*, 614 F. Supp. 2d at 1315. By that standard, therefore, Hill was required to show by a preponderance of the evidence deficits in at least two out of the ten skill areas of adaptive behavior listed above.

Significantly, the Ohio courts assessed Hill's adaptive skills as they existed at the time of the hearing. Hill had filed a pretrial motion with the trial court arguing that the correct time frame in which to analyze his intellectual disability for purposes of his *Atkins* claim was at the time of the offense. (Supp. App., Disc 1, 228-37.) The State countered that the court should focus on Hill's present mental status. (*Id*. at 217-23.) The court, in ruling on the matter, noted that neither *Atkins* nor *Lott* addresses the time frame at which a finding of metal retardation is relevant. It decided that it would determine whether Hill was intellectually disabled "at the time

[10] The experts in this case agreed that the AAMR 2002 Manual provided a slightly more stringent standard of adaptive deficiencies than the AAMR 1992 Manual. (Supp. App., Disc 1, Tr., 592-93; 1509-10.)

[he] filed [his] claim,"[11] although it stated that it would not "totally disregard, or even preclude testimony concerning [Hill's] mental status at the time of the offense . . . or . . . as to his childhood and adolescent development." (*Id*. at 249-50.) The state court of appeals did not address the temporal issue at all, and considered evidence from Hill's entire life. Hill does not contest the trial court's decision regarding this issue. (*See* ECF No. 94, 15.)

(1) adaptive skills testing

The Ohio court of appeals began its analysis of Hill's adaptive behavior by discussing the results of tests used to assess Hill's adaptive skills, both those performed during his childhood and those performed pursuant to his *Atkins* proceedings. *Hill*, 177 Ohio App. 3d at 189-91, 894 N.E.2d at 122-24. Indeed, the AAMR prefers that practitioners use standardized testing to assess adaptive skills, which measure the subject's functioning against the general population. AAMR 2002 Manual, 76. The court, however, rejected the results of the tests as unreliable. The experts retained to evaluate Hill agreed that the results of the tests they performed were unreliable, because, as Dr. Olley reported, Hill "did not give his best effort to the tests or . . . he made a planned effort to score low." (Supp. App., Disc 1, 1224.) They also agreed, and Hill concedes, that Hill's earlier test results were not valid.[12] (*See, e.g.,* ECF No. 94, 21.) Two psychologists tested Hill's adaptive functioning when he was a child, but deemed the results unreliable because

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[11] As noted above, Hill filed his *Atkins* claim in state court on January 17, 2003. (Supp. App., Disc 1, 31-32.) He was 36 years old. The hearing on his claim took place about two years later, beginning on October 4, 2004, and concluding on July 15, 2005. (*Id*. at 132, 1791.)

[12] This renders moot Hill's argument that the court of appeals incorrectly held that the trial court did not abuse its discretion in rejecting the rebuttal testimony of Dr. Sparrow that Hill's older adaptive test scores could be recalculated to reflect updated scores that would place him within the intellectually disabled range. (*Id*. at 33-35.)

the informant was Hill's mother, who also was intellectually disabled and, they believed, overstated Hill's abilities. (*Id*. at 515, 522, 527.) And Drs. Olley and Hammer agreed that the other early adaptive skills tests also were unreliable because the informant was not identified. (*Id*., Tr., 309, 431, 1779.)

The appellate court noted, therefore, that the trial court "[a]lternatively" favored "the more credible testimony of the other experts who concluded that Hill's adaptive capabilities are greater than those of a person with mental retardation." *Hill,* 177 Ohio App. 3d at 191, 894 N.E.2d at 123. But before it addressed the expert testimony, the court summarized the anecdotal evidence presented at Hill's hearing.

(2) anecdotal evidence

In reviewing the anecdotal evidence of Hill's adaptive functioning, the Ohio court first explained,

> Apart from the problematic standardized measurements of Hill's adaptive skills, the trial court and the expert witnesses had to rely on collateral, largely anecdotal evidence to determine the level of Hill's adaptive functioning. The trial court acknowledged that such evidence constituted a "thin reed" on which to make conclusions about Hill's diagnosis, but also recognized that this situation was the result of Hill's failure to cooperate with the experts retained to evaluate him.FN5 This court further emphasizes that the burden was on Hill to demonstrate that he is mentally retarded, not on the state to prove that he is not mentally retarded.
>
> FN5. Hill's own expert, Dr. Hammer, testified that the results of Hill's performance on the Test of Memory Malingering ("TOMM") "casts doubt on all the testing information collected from Mr. Hill during the evaluation process."

Id.

As a preliminary matter, the Court points out that the state-court record was hardly a "thin reed." At well over 6,000 pages, it was voluminous. The experts agreed that it was larger than

those in most capital cases in which intellectual disability is at issue. (*See* Supp. App., Disc 1, Tr., 468-69 (Hammer test.); 833-34 (Olley test.); 1196 (Huntsman test.); 1429-30 (testimony of Sara S. Sparrow, Ph.D. (hereinafter, "Sparrow test.")).) And while it is true that the record contains many subjective, "anecdotal" observations of Hill's academic performance, conduct, and behavior, much of that anecdotal information was provided in reports prepared by, and testimony of, 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. The Supreme Court in *Hall* described the "substantial and weighty evidence" of adaptive functioning that courts should consider in determining intellectual disability as "including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances." *Hall*, slip op. at 9. It noted that "the medical community accepts that all of this evidence can be probative of intellectual disability . . . ." *Id*. Indeed, the AAMR recognizes that some situations call for a retrospective diagnosis, in which "formal assessment is less than optimal." AAIDD, *User's Guide*, 17-18 (10th ed. 2007) (hereinafter, "AAIDD User's Guide").[13] It directs practitioners in those situations to conduct a thorough review of the subject's social history and school records, as the experts and court did here. AAIDD User's Guide, 18-20.

In fact, as will be explained in more detail below, the true "thin reed" in this case was the

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[13] None of the experts who testified in this case explicitly referred to the AAIDD User's Guide, but their reports and testimony substantially adhere to the AAMR/AAIDD guidelines.

information that was available concerning Hill's adaptive functioning at the time he filed his *Atkins* claim, the focus of the evaluation. Although Hill's malingering during the testing certainly contributed to this lack of evidence, it was the fact that Hill had been on death row for more than seventeen years, according to the experts, that made their evaluation particularly "unusual" and "challenging."[14] (*See, e.g.*, Supp. App., Disc 1, Tr., 647 (Olley test.) ("Our task is an unusual and a challenging one because the standards of our profession make no explicit statement about how to evaluate a person who has been in prison for a long time.").) *See also* AAMR 2002 Manual, 85 ("Observations made outside the context of community environments typical of the individual's age peers and culture warrant severely reduced weight.").

Nevertheless, the appellate court found "abundant competent and credible evidence" supporting the trial court's decision that Hill had not met his burden of proving that he possessed the requisite adaptive deficits to qualify as intellectually disabled. And, despite certain weak evidence and flawed analysis, this Court cannot say that the appellate court's determination was so clearly erroneous or unreasonable as to satisfy AEDPA's exacting standards.

(a) Hill's adaptive functioning during childhood: school and juvenile court records

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[14] Moreover, even if Hill had cooperated with the experts' testing, 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,

> Those who use most current adaptive behavior scales to gather information about typical behavior rely primarily on the recording of information obtained from a third person who is familiar with the individual being assessed. [T]he respondent [should be] a parent, teacher, or direct-service provider rather than from direct observation . . . or from self-report of typical behavior.

AAMR 2002 Manual, 85. The experts and court, therefore, would have had to review evidence from other sources in any event.

In summarizing the trial court's findings regarding Hill's adaptive behavior during childhood, the Ohio appellate court stated**:**

> *Public School Records*. Hill's public school records amply demonstrate a history of academic underachievement and behavioral problems. Hill is often described as a lazy, manipulative, and sometimes violent youth. Although there are references to Hill's being easily led or influenced by others, the trial court noted that much of Hill's serious misconduct, including two rapes committed prior to Fife's murder, occurred when he was acting alone. Hill knew how to write and was described by at least one of his special education teachers as "a bright, perceptive boy with high reasoning ability."

Hill, 177 Ohio App. 3d at 192, 894 N.E.2d at 124.

This characterization of Hill's school and juvenile court records is troubling. First, the state court cites evidence here that is irrelevant under the clinical guidelines. It implies that evidence of Hill's weak academic and other adaptive functioning as a child reflects only Hill's indolence and poor behavior, excluding intellectual disability as a cause or at least casting doubt on it. But the AAMR advises that "adaptive behavior refers to typical and actual functioning and not to capacity or maximum functioning." AAIDD User's Guide, 20. "Underachievement," therefore – whatever its cause – is irrelevant to adaptive functioning. Similarly, the AAMR cautions that "adaptive behavior and problem behavior are independent constructs and not opposite poles of a continuum." *Id*. *See also* DSM-IV-TR, 42 ("Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social or vocational opportunities, and the mental disorders and general medical conditions that may coexist with mental retardation."). Therefore, as the experts explained at Hill's hearing, the presence of a conduct disorder or other mental illness does not contradict a diagnosis of intellectual disability; intellectually disabled persons can, and often do, suffer from mental

illness.[15] (*See* Supp. App., Disc 1, Tr., 473 (Hammer test.); 1102 (Huntsman test.); 1537 (Sparrow test.).) *See also Black*, 664 F.3d at 99 ("[M]ental retardation and other mental disorders are not mutually exclusive. . . . Rather, mental retardation and any number of other factors may coexist as comorbid causes of a defendant's deficient adaptive functioning." (internal citations omitted)); *Holladay*, 463 F. Supp. 2d at 1345 ("This court rejects the argument that willful and [] anti-social behavior excludes a mental retardation determination. To the contrary, it suggests that a person whose IQ tests strongly indicate mental retardation has not adapted.").

Furthermore, the court's finding that Hill "underachieved" academically or in any other adaptive skill as a child is squarely contradicted by the record. This Court could not find one reference in Hill's school records by a teacher, school administrator, psychologist, psychiatrist, or anyone else suggesting that Hill was capable of performing at a substantially higher level but chose not to.[16] And the experts all agreed that there is no evidence in the school records that Hill

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[15] The AAMR states that mental health disorders are "much more prevalent" among intellectually disabled persons than the general population. AAMR 2002 Manual, 172. The DSM-IV-TR states, "Individuals with mental retardation have a prevalence of comorbid mental disorder that is estimated to be three to four times greater than in the general population." DSM-IV-TR, 45.

[16] The Court found only one express statement in the record that Hill could have performed better academically than he actually did. A teacher wrote in a "Progress Report" in 1980 that, according to Hill's IQ test results that year, he "should be reading at a mid-second grade level," but had "only demonstrated the ability to read on a first grade level." She speculated, "Possibly this is due to Danny's need for glasses, and his dislike for reading." (Supp. App., Disc 1, 568.) Whatever the cause for Hill's problems in reading that year, a year that he experienced serious difficulties across the board, a seventh grader's failure to read at a second-grade rather than a first-grade level does not qualify as the type of "underachievement" the Ohio court suggests, such that Hill could have read at a significantly higher level but chose not to. Even if Hill had read at a second-grade level when he was thirteen years old, he still would have been seriously impaired.

malingered, or pretended to be slower than he was.[17] (Supp. App., Disc 1, Tr., 272-73 (Hammer test.); 856 (Olley test.); 1110 (Huntsman test.); 1541 (Sparrow test.).) As Dr. Hammer noted, children normally do not wish to be placed in special education programs or to be labeled intellectually disabled because of the stigma attached. (*Id*. at 225-26, 231, 298.) In fact, if Hill's academic or other adaptive limitations could have been attributed to Hill's laziness or deception, as the court suggests, Drs. Hammer and Olley agreed that school psychologists would have reported that fact and Hill would not have been placed in special education programs and programs for intellectually disabled students. Both the social bias and the law at that time favored mainstreaming children in school as much as possible over the risk of stigmatizing them by labeling them intellectually disabled.[18] (*Id*. at 151, 218, 472 (Hammer test.); 828-34 (Olley test.).)

The Ohio court also discounted the repeated references in the school records to Hill being easily led by others[19] with the fact that Hill committed two rapes and other crimes on his own. Evidence of Hill's crimes, however, should be given little, if any, weight in determining

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[17] Dr. Huntsman did speculate in her report, however, without citing any evidentiary support, that the early formal assessments of Hill's cognitive abilities were invalid because "Mr. Hill has always been an unmotivated test taker, I think, since there have always been rewards associated with poor performance in the forms of attention and an easier curriculum. He had little academic interest for years . . . ." (Supp. App., Disc 1, 1140.)

[18] In elementary school, Hill was mainstreamed only in gym and music class. (Supp. App., Disc 1, 247-48, 554.) In junior high school, he also was mainstreamed in art and practical arts. (*Id*. at 558.)

[19] The court's acknowledgment that "there are references to Hill's being easily led or influenced by others" is a gross understatement. Psychologists, social workers and teachers almost uniformly commented on this trait, describing Hill, for example, as a "follower," "easily influenced," or "highly suggestible." (*See*, *e.g.*, Supp. App., Disc 1, 515, 519, 522, 527, 532, 533, 537, 557, 1976.)

his adaptive skills. The AAMR directs, "Do not use past criminal behavior . . . to infer level of adaptive behavior or about having MR/ID . . . . First, there is not enough available information; second, there is a lack of normative information." AAIDD User's Guide, 17-20. Isolated acts of criminal behavior, after all, contradict the essential meaning of adaptive behavior. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Supreme Court recognized that a defendant could be intellectually disabled and have sufficient insight and planning ability to deliberately kill a rape victim to avoid detection. Such acts, it found, may exemplify a reduced ability to control one's impulses and evaluate the consequences of one's conduct, rather than undermine a diagnosis of intellectual disability. *Id*. at 322. Numerous other courts also have acknowledged the problematic nature of this evidence. *See, e.g., Brumfield v. Cain*, 854 F. Supp. 2d 366, 395-96 (E.D. La. 2012) ("In assessing the weight to be given to criminal facts, this Court lends great credence to the clinical admonitions that using those facts to determine adaptive skills is at best a haphazard and risky business."); *Holladay*, 463 F. Supp. 2d at 1344 n.28 (rejecting argument that ability to commit crime and temporarily avoid capture forecloses a determination of intellectual disability and stating, "The State has repeatedly referred to Petitioner's crimes as 'complicated.' Apparently he came to harm, even kill, his ex-wife and killed all who were present. It was not 'complicated.' It was, perhaps, at least partly impulsive. The Respondent refers to Petitioner's 'criminal acumen.' He always got caught.").

Finally, this Court is most troubled by the Ohio court's finding that "Hill knew how to write and was described by 'at least' one of his special education teachers as 'a bright, perceptive boy with high reasoning ability.'" As to Hill's writing skills, the Court finds no evidence in the record that Hill could write much more than his name during his school years, and struggled even

with that. At eight years old, a school psychologist reported that Hill's motor-visual skills were so poor that he could not copy a diamond. She also noted, "[w]hen Danny printed his name, the reproduction was very poor and he spelled his last name Hlli." (Supp. App., Disc 1, 493.) At thirteen years old, a school psychologist reported Hill's weakness in "reproduc[ing] symbols using phchomotor [*sic*] speed and coordination" and that his handwriting was "immature for his chronological age." (*Id*. at 522; *see also id*. at 519 ("written expression is weak").) A teacher wrote that year that Hill could write "simple sentences . . . with assistance," but had "a great deal of difficulty thinking of sentences to accompany pictures." (*Id*. at 569.) At fourteen years old, Hill's teacher wrote that one of her goals for Hill was for him to "write [his] own signature." (*Id*. at 578.) One of Hill's counselors testified at Hill's mitigation hearing that when Hill was fifteen years old he could not read or write. (ECF No. 28, 78.)

In addition, the court's observation that "at least" one teacher found Hill to be "bright" and "perceptive," with "high reasoning ability," is almost cynical in its selective misrepresentation of the facts. *See, e.g., Holladay*, 463 F. Supp. 2d at 1343 ("It is important, in determining whether a person is or is not mentally retarded, not to pick and choose so as to over-emphasize certain characteristics."). This Court could not find one other reference to Hill as "bright," "perceptive" or in any way intellectually or academically talented from any educator or anyone else involved in Hill's education. Indeed, the experts all agreed that Hill's school records indicated significant limitations in functional academics. (*See* Supp. App., Disc 1, Tr., 69, 230 (Hammer test.); 783 (Olley test.); 1112 (Huntsman test.).) Moreover, the comment is belied by the document itself. It was written by a special education teacher at Fairhaven, a school for intellectually disabled children, on an individual educational plan ("IEP") form when Hill was

fourteen years old. (Supp. App., Disc 1, 578-79.) The teacher notes that Hill was reading at the first-grade level and doing math at the third-grade level. Among the goals she listed for Hill were: "develop appropriate behavior," such as "work[ing] without being disruptive[,] touch[ing] others in a manner suitable to school[, and] play[ing] cooperatively"; and "develop necessary self help [*sic*] skills," such as "shower[ing] regularly[,] us[ing] deodorant regularly[,] maintain[ing] a clean, neat appearance, mend[ing] torn clothing before wearing in public, eat[ing]/drink[ing] in a manner appropriate to school." (*Id*. at 578.) The teacher, by calling Hill "bright" and "perceptive," perhaps was attempting to set a positive tone for a student at a school for intellectually disabled children, but her goals for Hill clearly show that he was struggling to achieve academically and to behave appropriately and productively.

In fact, Hill's school and juvenile court records, which number hundreds of pages, are replete with evidence of Hill's limitations in adaptive functioning. They tell the story of a child who was raised primarily by an intellectually disabled mother, diagnosed as intellectually disabled in kindergarten, and identified and treated as such throughout his childhood. Hill was placed in special education classes for intellectually disabled students from the first grade on. At age thirteen, he was sent to a school for intellectually disabled children, and was transferred to another, similar school at fifteen because of poor academic achievement and behavior. At seventeen years old, after being arrested for, and pleading guilty to, two felony rape charges, the juvenile court placed Hill in a facility that housed mentally ill youth offenders.

Hill was born on January 6, 1967, in Warren, Ohio, to 18-year-old Vera Hill.[20] (*Id*. at

[20] Hill was Vera's maiden name. She later assumed the surnames of two husbands, Vaugn and Williams.

1973.) Hill's mother was intellectually disabled (*id*. at 515, 522, 527; ECF No. 31, 256-57), had attended school only through the eighth grade (ECF No. 31, 8), and lived primarily on public assistance while Hill was a child (*id*. at 9). Hill had no contact with his father. (*Id*. at 9-10.) He lived with his mother and three brothers, each from different fathers. He was second oldest. (*Id*. at 7.) Hill also lived for several years with a stepfather, Charles Williams, and for a period of time with three of Mr. Williams' children, until Mr. Williams died in 1985.[21] (*Id*. at 10-11.) Mr. Williams was kind to the children, but he abused alcohol and worked long hours, so he was not actively involved in parenting. (*Id*. at 12-13, 256.) Hill's mother testified that all four of her sons were "slow" in school, and they all had records of behavioral problems. (*Id*. at 12, 257-58.) She also testified that Hill was well-behaved at home, but he had few friends and stayed home most of the time. (*Id*. at 18-20.)

Hill entered kindergarten in the Warren City Schools in the fall of 1972, at the age of five. That spring, the school psychologist, Karen Weiselberg, evaluated Hill at the request of his kindergarten teacher, who was concerned about Hill's "present level of intellectual functioning," as he "appear[ed] to be very immature in comparison to the other students." (Supp. App., Disc 1, 489.) Dr. Weiselberg wrote that Hill's IQ score was 70, placing him in the third percentile of the general population. (*Id*. at 490.) He did not know his correct age (he thought he was nine) or his address, and his classmates "often pick[ed] on him." (*Id*. at 489.) He could not count dots, read numbers, or show a certain number of fingers when asked. And he could not match most letters of the alphabet. Dr. Weiselberg concluded that he possessed the visual-motor coordination of a

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[21] Hill's mother's previous marriage, to James Vaugn, ended in divorce, and it is unclear from her testimony whether Mr. Vaugn ever lived with her and her children. (*Id*. at 11.)

three-year-old and, overall, was functioning at the level of a four-year-old. (*Id*. at 490.) She recommended to the principal that Hill be placed in special education classes for "educable mentally retarded" ("EMR") children. (*Id*.)

Dr. Weiselberg tested Hill again at the beginning of third grade, in September of 1975; he was eight years and eight months old at the time. (*Id.* at 492-94.) She reported that Hill's IQ was 62, placing him within the first percentile of the general population. (*Id*. at 492.) His basic skills in reading, spelling and arithmetic ranged from mid-kindergarten to beginning first-grade level. For example, on a sight recognition word test, Hill could not read any words, and on the arithmetic subtest, he could not read double digit numbers or complete any simple addition or subtraction problems. (*Id*. at 493.) She advised that Hill "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." Dr. Weiselberg again diagnosed Hill as falling within the EMR classification, and found his functioning at the level of a five-year-old. (*Id*.)

In November of 1977, Hill again was placed in a special education class for fifth grade. (*Id*. at 554-55.) His goals for the year included "us[ing] the short a and short I vowel sounds to sound out words," and "[g]iven multiple choice, [to] be able to choose the main idea of the story." (*Id*. at 554.) The following year, in sixth grade, Hill was "introduced to addition . . . ." (*Id*. at 561.)

In 1980, when Hill was thirteen years old and in seventh grade, he again was evaluated by a school psychologist, Annette Campbell, because he was "unable to achieve academically and [had] been having behavioral problems in the school." (*Id*. at 520.) Hill had an F in his special-education classroom work. (*Id*.) His IQ score was 49. (*Id*. at 521.) Dr. Campbell reported that

Hill did not know his address or phone number, and that she observed during the testing behaviors such as "an immature pencil grip, making noises, being restless and tired, rolling his eyes back into his head, making faces when he talks, [and] working with his pencil hanging straight out of his mouth." (*Id*. at 520.) But she stated that he "did cooperate and accepted all tasks presented to him." (*Id*.) Dr. Campbell diagnosed Hill as intellectually disabled, finding 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 phychomotor [*sic*] speed and coordination." (*Id*. at 522.) She also reported that Hill exhibited "a great deal of impulsivity." She explained,

> This means 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*.) She concluded, "Danny is a child who is not functioning academically in his present placement. He also is extremely immature and is easily led by others into trouble around school." (*Id*.) Dr. Campbell recommended that Hill be placed in the smaller, more confined "Behavioral Improvement" unit where he would receive more individualized help "both academically and socially." And if that did not work, she recommended he be placed in the Fairhaven Program in Niles, Ohio, for the trainable mentally retarded ("TMR"). She also recommended a neurological examination to "help to explain the continuous drop in I.Q. points." (*Id*.)

Dr. Campbell repeated Hill's testing less than four months later. This time, Hill's IQ was

48. (*Id*. at 513.) She now recommended placement in the Fairhaven Program. (*Id*. at 515.) Hill's academic and social functioning continued to deteriorate that year. One of his teachers wrote that his "academic ability seems to be at a first grade level, as do his social skills." (*Id.* at 568.) She explained,

> Danny usually is very sleepy and has fallen asleep in class. He is always unprepared for class (without paper and pencil), and when these are provided for him, he usually looses [*sic*] them between classes. Often Danny wanders through the halls and for this reason is late for classes.
>
> Danny is unable to complete his lessons, which are on a first grade level, without assistance. If Danny is left unattended, he strays from his task and begins to display immature behaviors, or falls asleep. These behaviors include making noises, throwing small objects, verbally antagonizing others, taking things that do not belong to him, and wandering around the class room.
>
> . . .
>
> Danny is a very affectionate child. He often expresses the desire to be hugged and will often rest his head on the teachers [*sic*] shoulder. On occassion [*sic*], Danny has kissed the teacher indicating a desire to receive attention.

(*Id*.) Hill was just beginning to learn subtraction and had "a great deal of difficulty subtracting with numbers larger than 10." (*Id*.) That May, Dr. Campbell completed a psychological evaluation form for the County Board of Mental Retardation to request Hill's placement at Fairhaven School. (*Id*. at 516-19.) She listed his "developmental disability areas" as "communication and self-help general." (*Id*. at 516.) Her "special instructional recommendations" were: "1. Teach address and phone number. 2. Teach functional words in reading. 3. Teach telling time." (*Id*.) Regarding Hill's academic skills, she wrote: "First and second grade levels academically, extremely immature and dependent, responds like a five year old . . . needs constant supervision." (*Id*. at 519.) Regarding his adaptive behavior, she wrote: "He is weak in communication and self-help general. Observations show weaknesses in

socialization and fine-motor skills." (*Id.*)

Hill attended the Fairhaven Program for the 1980/81 and 1981/82 school years, but he continued to struggle academically and socially. Hill's mother testified at his mitigation hearing that the Fairhaven students teased Hill, "call[ing] him dumb and stuff like that," and Hill often skipped school because of that. (ECF No. 31, 15.) His reading skills remained at the first-grade level, and his math skills advanced only to the third-grade level. (*Id.* at 575, 578.) The program also continued to work with him on self-help skills, such as personal hygiene, and social skills, such as controlling his temper and respecting authority. (*Id.*) In April 1982, Dr. Campbell again evaluated Hill. (*Id.* at 511-12.) His IQ score was 63. (*Id.* at 511.) Her testing indicated a social maturity of a twelve-year-old, with "much impulsivity" and "much hostility and aggression." (*Id.*) She further noted that Hill "seem[ed] to feel insecure, immature, and inadequate needing much emotional support," had "severe problems" at school that year, and exhibited "weaknesses in the areas of communications, self-direction, socialization and occupation." (*Id.* at 511-12.)

At this time, Hill began to get into trouble with the police, mainly for theft-related crimes and truancy. In August 1982, the court placed him in a group home in a rural, farm setting operated by Brinkhaven Enterprises, Inc. ("Brinkhaven"), in North Lawrence, Ohio. (*Id.* at 526.) Hill did well there. (*Id.* at 524, 1973.) In January of 1983, Brinkhaven's court liaison officer wrote of Hill, "Dan is improving in his personal hygiene. While he needs constant reminder[s] to shower, brush his teeth, etc., he does attempt to do a [more] thorough job than when he first came to the program." He also noted that "Dan receives tutoring in basic skills, as well as requiring a lot of one-on-one teaching within the classroom itself." (*Id.* at 524.) His tutor at Brinkhaven reported that Hill worked at the first-grade level in reading and the second-grade level in math.

(*Id*. at 525.) Mark Brink, one of Hill's youth workers, and later the vice president and court liaison officer at Brinkhaven, testified at Hill's mitigation hearing that Hill needed twenty-four hour supervision, because:

> 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.

(ECF No. 31, 87.) He also commented that Hill often was teased for being heavy and "one of the slower kids that we had there," and was a follower. (*Id*. at 84-86.) Hill left Brinkhaven in February of 1983 because of a lack of funds at the county level. (*Id*. at 83; Supp. App., Disc 1, 526.) He enrolled in the tenth grade at Warren Western Reserve High School. (Supp. App., Disc 1, 1973.)

Hill rarely attended school, however, and continued to get into trouble. By December 1983, Hill had amassed four felony and eight misdemeanor juvenile convictions, all related to theft. (*Id*. at 1936-38, 1947-69.) Hill told a Department of Youth Services employee that he did not attend school because students there repeatedly threatened to hurt him. (*Id*. at 532.) His mother told the same employee that she blamed Hill's troubles on three boys and "some adults" who threatened him and "got Danny to steal for them. What they told him he would do." (*Id*.) Hill was expelled from school for the remainder of the year in February 1984. Neither Hill nor his mother attended the expulsion hearing. (*Id*. at 618, 1973.)

In January 1984, the juvenile court asked psychologist Douglas Darnall to evaluate Hill for a bind over proceeding. Dr. Darnall reported to the court that Hill fell in the "mildly retarded range." (*Id*. at 527.) His IQ was 55. (*Id*.) Dr. Darnall discounted the adaptive skills test because

Hill's mother served as the informant, and wrote, "it is reasonable to conclude that Danny's overall functioning is within the mildly retarded range." He opined that Hill's level of adaptive functioning was "[v]ery [p]oor." He explained, "His judgement [*sic*] is poor and he does not think of consequences. He is highly suggestible." He also stated, "Danny does not comprehend the seriousness of his offenses." (*Id*.) Dr. Darnall did not recommend bind over to an adult facility. He felt Hill would not benefit from rehabilitation in an adult facility and was "likely to be exploited" because of his "passivity and limited intellectual ability." (*Id*. at 528.) Although Dr. Darnall considered Hill's prognosis "poor regardless of where [Hill was] placed," he recommended that if convicted, Hill "be placed in a juvenile facility that is highly structured and can provide programming for mentally retarded youth." (*Id*.) He "further anticipate[d] that Danny will in time need to live in an adult halfway house which would be able to provide both social as well as vocational habilitation." (*Id*.) The Probation Department agreed with Dr. Darnell and recommended that Hill be returned to Brinkhaven, where he would get the "intensive, individual attention" he needed, rather than an adult facility, where "he would only be exploited by older, more hardened criminals." (*Id*. at 529.) The bind over was denied on March 5, 1984, and Hill was again committed to Brinkhaven. (*Id*. at 1952.)

Three days later, however, Hill was back in court, this time charged with two counts of rape. (*Id*. at 1923, 1936, 1975.) He pleaded guilty to both counts and was sentenced to serve a minimum of one year and a maximum period not to exceed Hill's twenty-first birth date at the Training Center for Youth ("TCY"), a secure facility for youth offenders with psychological problems. (*Id*. at 531, 1939.) On April 25, 1984, Hill was evaluated by the head psychologist at TCY, R.W. Jackson. (*Id*. at 530.) Hill's IQ was 65. (*Id*.) Dr. Jackson wrote that Hill was an

"[i]ntellectually limited, socially constricted youth with very few interpersonal coping skills. Rather immature and self-centered with needs for attention and approval of others." (*Id.*) A TCY social worker stated in a treatment plan that Hill was "a very limited, mildly retarded youth who has no insight into the seriousness of his delinquent activities. He shows no remorse for his victims nor . . . shame . . . ." (*Id.* at 1975-76.) She further stated that Hill was "very easily influenced or intimidated by more mature and aggressive youths," and "appear[ed] to be becoming a very dangerous youth if not rehabilitated or given the proper amount of structure, supervision, and guidance." (*Id.* at 1976.)

TCY employees testified at Hill's mitigation hearing that the older boys frequently beat Hill, so he was moved to a smaller unit with younger, less "hostile" boys. (ECF No. 31, 100, 122, 150, 166-67.) They all agreed that Hill was a "loner" and a "follower" while there. (*Id.* at 105, 122, 124, 147, 151, 166.) One youth worker testified that "with [Hill] being so limited," he would often forget her instructions. She added, "And so, when you tell Danny to do something, then you would have to follow him through that. You just couldn't say, 'Well, Danny, I want you to go and mop the bathroom,' because he wouldn't do it." (*Id.* at 172-73.)

Hill completed the ninth grade in special education classes while at TCY in January 1985, at age eighteen. (*Id.* at 533.) He was released from TCY that March, and returned to high school in Warren.[22] (*Id.* at 537.) The goal was for him to "stay away from negative peers" because he

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[22] The record relating to Hill's release from TCY is chilling. An employee of the Ohio Department of Youth Services wrote in an admission report when Hill entered TCY,

> Because of his limited ability to control his behavior and [because he] follows the dictates of those with whom he chooses to associate[,] Danny's prognosis would appear to be quite guarded. In a well-structured program, Danny could no doubt function quite well. The area to which he will return is not at all

"continues to be a follower," and enroll in vocational training and attend community counseling after completing high school. (*Id.*) Fife's murder occurred six months later.

(b) Hill's adaptive functioning at the time of the offense: police and court records

The state appellate court summarized the trial court's findings concerning Hill's adaptive skills at the time of the offense as follows:

> *Hill's Trial for the Murder of Raymond Fife*. The trial court observed that the record of Hill's murder trial provided evidence of Hill's ability concerning self-direction and self-preservation. In particular, the court noted Hill's initiative in coming to the police in order to misdirect the focus of the investigation by implicating others and Hill's ability to adapt his alibi to changing circumstances in the course of police interrogation. This last point was also noted by Dr. Olley in his hearing testimony: Hill "stood his ground during that interrogation very, very strongly. * * * He not only modified his story a little bit when he was faced with evidence that couldn't possibly have avoided. * * * That to me is a kind of thinking and planning and integrating complex information that is a higher level than I have seen people with mental retardation able to do."

Hill, 177 Ohio App. 3d at 192, 894 N.E.2d at 124.

> conducive to his making a positive adjustment. No doubt the community would have some very strong reactions to his return because of the nature of his offenses. Yet in view of the fact that he will be 18 years of age at the time his sentence terminates, and the mother wants him home, placement will be made with her.

(Supp. App., Disc 1, 532.) And Cheryl West, Hill's youth leader at TCY, testified at Hill's mitigation hearing that when Hill was released,

> he wasn't ready to leave. I brought it to quite a few people's attention. One in particular was Mrs. Ann Swilger. At the time, she was the deputy superintendent. And I brought it to her attention that Danny was not ready to be released. And Danny was standing there with me, and Danny said, "I would prefer to go to a group home until I get myself together. And now you're going to send me home, and if I go back home, I'm going to get in more trouble." Mrs. Swilger at that time said, "Danny, you're a hopeless case. We're going to release you as a hopeless case. Hopefully, you'll get in more trouble and you'll just do more time."

(ECF No. 31, 173.)

This Court also questions these findings. "Self-preservation" is not among the adaptive skills measured under the clinical definitions of intellectual disability. (*See supra* Section V.A.3.b.) And neither is it clear that this evidence demonstrates a strength in "self-direction" under the clinical guidelines, which define "self-direction" as more than a volitional act of self-interest. The AAMR defines it as:

> skills related to making choices; learning and following a schedule; initiating activities appropriate to the setting, conditions, schedule, and personal interests; completing necessary or required tasks; seeking assistance when needed; resolving problems confronted in familiar and novel situations; and demonstrating appropriate assertiveness and self-advocacy skills.

AAMR 1992 Manual, 40. Hill's decision to go to the police voluntarily two days after committing a murder to try to collect a reward for information about the crime is not an example of "appropriate assertiveness and self-advocacy," or an activity "appropriate to the setting" or his "personal interests"; nor is lying about, or blaming others for, your own transgressions to avoid getting into trouble – a classic tactic employed by even the youngest of children.

In fact, one could argue that Hill's actions were quite the opposite of adaptive. Instead of helping to "resolve his problems," Hill's choices consistently worked against him. Going to the police with information about the murder succeeded only in immediately drawing the police's attention to himself. Sgt. Steinbeck testified at Hill's trial that it was only after Hill showed up at the police station and told Sgt. Stewart details about the murder that most people did not know, that the police began to "pursue" Hill as a suspect. (ECF No. 24, 285-86, 301.) And Hill's confused and outlandish stories about other suspects made him appear even more guilty. For example, when Hill first went to the police, he told Sgt. Stewart that he saw a boy named Maurice Lowery riding Fife's bicycle. When Sgt. Stewart asked him if Lowery still had the

bicycle, he said Lowery "might have put it back in the woods by now." Then a bit later in their conversation, Hill added that he had seen Lowery and another boy from his apartment window at one o'clock in the morning "coming through the field," even though it was dark and that area was at least a mile away. (ECF No. 25, 504-08.) Similarly, Hill readily lead the police to his accomplice, Tim Combs. When Sgt. Stewart asked Hill if he knew Tim Combs, Hill replied that he knew him and he also might have assaulted Fife, since "'[h]e likes to do that to white boys, too.'" Hill then literally lead Sgt. Stewart right to Combs' door. (*Id*. at 509-11.)

After carefully reviewing the transcript of Hill's final statement to police and the trial testimony of the police officers involved, the Court finds that during the police interrogations, Hill did in fact stand his ground, but otherwise, his performance was childlike, confused, often irrational, and primarily self-defeating. Hill's second interrogation took place the day after he voluntarily went to the police. This time, Sgt. Steinbeck went to Hill's house and Hill agreed to accompany him back to the station for further questioning. (ECF No. 24, 204.) During the three-hour interrogation, Hill repeatedly changed his story, but not in a way that skillfully hid his part in the crime. Sgt. Steinbeck testified at Hill's trial,

> He contradicted himself so many times; told me so many different stories, that it took that long to find out exactly what was going on. . . . Well, I said that he told me he saw different people at different time, places. Even his own whereabouts he was confused. I felt he was keeping something from me about where he was and what he did in those time periods of those different days.

(*Id.* at 250.) Hill also agreed to go to the police station with Sgt. Steinbeck and Det. Hill, his uncle, for his third and final interrogation, at which he confessed to being at the scene of the crime after an hour and a half of questioning and gave a recorded statement without counsel present. Again, Hill's stories were confusing and contradictory. Sgt. Steinbeck testified,

> We're talking about the same things we did Friday, telling him we believe he's lying to us. There's too many inconsistencies in his story. "We believe you know more than you're telling us. We think you're involved or know about what took place Tuesday behind the Valu-King."

(*Id*. at 271-72.)

Hill also often changed or embellished his statement at the slightest suggestion by the police, even when the information at issue was irrelevant or incriminating. At trial, Sgt. Stewart recalled saying to Hill, "'Everytime [*sic*] we suggest something to you, you have a tendency to agree with us.'" (ECF No. 26, 646.) During Hill's statement, for example, Hill first said that Fife's shorts were gray. (Supp. App., Disc 1, 2459.) Later, Sgt. Stewart asked him, "Now when he pulled his shorts off, they were blue shorts, they were yellow." Hill replied, "They were yellow." Sgt. Stewart asked, "The shorts were yellow, are you sure?" Hill answered, "Yea, because they looked like Reserve color like . . . gym shorts." When the police told Hill he had previously said the shorts were gray, Hill then claimed he did not know the color of the shorts at all; he saw only Fife's underwear. (*Id*. at 2473-74.)[23] While making his statement to the police, Hill more often seemed to be making things up as he went along to conform to the police's questions and expectations than adroitly hiding information or planting false information to

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[23] Other examples of Hill's extemporaneous changes to his story at the suggestion of the police officers include telling the police: first Combs threw all the physical evidence "in the field," then Combs took the can of lighter fluid with him out of the field (*id*. at 2501-02); first they left Fife on his stomach, then Hill turned Fife over on his back to see if he was breathing (by checking his neck), then he turned him over twice, putting him back onto his stomach again to help him (*id*. at 2466-67, 2510-11); first he saw Combs twice since Combs was released from the penitentiary, then only once (*id*. at 2479); alternating between Combs throwing Fife's bicycle into the bushes and placing it in the bushes (*id*. at 2463, 2467-68, 2503); first Combs threw his cigarette lighter into the bushes and came back later to find it, then he kept it with him, then he left it at the scene and used matches to light a cigarette after the murder (*id*. at 2503).

protect himself.

Indeed, although he never admitted to harming Fife, Hill often changed his story during the interrogations and his statement in a way that only further incriminated himself. The best example of this is that after admitting to police that he was at the scene of the crime, his proximity to, and involvement in, the assault increased with each account. His descriptions of the events did not always flow logically, and they often contained language that is difficult to decipher, but a summary of Hill's different versions of how the murder occurred is as follows:

At first, Hill told police that after he and Combs had a general conversation near the Valu King store, he saw Combs walk into the woods. He did not follow Combs, but a short time later hid behind some bushes in the woods and watched Combs murder Fife from a distance. Combs didn't say anything to Hill; he ran away when he noticed Hill watching him. Hill said he also ran away after Combs left to get lighter fluid from the back of the store, returned, and Hill saw "some smoke." (*Id*. at 2457-60, 2462.) In his next account, Hill saw Combs grab Fife off his bicycle from a hill that overlooked the field. He then went to the Valu King parking lot and grabbed a board to hit Combs and get him off Fife. He walked up to Combs and Fife, but Combs told him to get back up the hill or he would blame him for the crime. (*Id*. at 2469-71.) In Hill's final account, he told the officers that he ran into Combs a short distance from Valu King, and he and Combs walked to the back of Valu King together. There, they saw Fife coming up the path through the woods on his bicycle, and Combs told Hill he wanted to steal Fife's bike. Combs asked Hill to help him, but Hill refused. Hill then followed Combs into the woods.[24] (*Id*. at

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[24] At this point Hill's story gets confused and convoluted in a way that was typical of Hill during his statement. Hill first said, "So then I seen him go back there in the path way so I started coming around and around about that time that's when I seen him knock the boy off the

2480-83.) Hill said he was just about ten feet away from Combs during the assault, but did nothing to stop it. (*Id*. at 2485-86, 2490.) He remained there even when Combs left to get the lighter fluid. (*Id*. at 2492.) Hill told police that when Combs returned, however, he was back up the hill. He said he "had looked down there [Combs] had already seen me and [Hill] said now look what you done." (*Id*.) And when Combs lit the "cloth," he "had came down there" and "was trying to sneak up on him and hit him with the board." (*Id*. at 2492-93.) Combs told him to get back up the hill, and Hill says he took the board back behind the store. (*Id*. at 2943.) He then followed Combs out of the field. (*Id*. at 2499.)

Finally, far from being "planned" and "complex," many of the stories Hill concocted for the police appeared spontaneous, and were completely unbelievable. This exchange demonstrates the confused, ad hoc nature of Hill's statement:

Sgt. Steinbeck: . . . [D]id Tim Combs walk with the gray shorts?

Danny: Yea. Yea he had them up under his own shirt, he had them up under his shirt and the next day, and I seen him the next day, he was hurrying right back there and then that's when he was looking, he had threw, he had pinned the bike up under some weeds like and threw them shorts up under there.

Sgt. Steinbeck: So you say Tim Combs come back to the field the very next day carrying the boy's shorts and he hid the shorts and he hid the bike. Yes?

Danny: Yes.

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bike." (*Id*. at 2481.) When asked to clarify, he said he did not follow Combs but "walked to the other side. Like there is this side street that you can go down." And then, because he "kn[ew] how Tim Coomb's [*sic*] is," he "circled back" to where Combs was with Fife, and Combs "had the little boy on the ground." When asked, "Did you see him knock him off the bike?" Hill responded, "He had him in a headlock." (*Id*. at 2482-83.) Later, Hill said he did see Combs knock Fife off his bike. (*Id*. at 2488.)

Sgt. Steinbeck:	Have you talked to Tim Combs about this after, since it happened?
Sgt. Stewart:	Not at all?
Danny:	I ain't even seen him.
Sgt. Steinbeck:	Danny, you said the next day you saw him bring the shorts back, how did it happen that you and him would be at the same place, at the same time the very next day?
Danny:	Because he came past the house and like where my house is at you can, you know, look right down there by the field when the door is open, so you saw him go past the door.
Sgt. Steinbeck:	You saw him walking past.
Danny:	Past my door.
Sgt. Steinbeck:	So you walked with him?
Danny:	No I waited until he went down the hill and I circled, I took this other path when he came down and walked down towards there he was going across the street. Around about the time he went down across the street towards that pathway where that little boy was laying, I was coming straight down there and I turned up in Valu King building and that's when I seen him stick the bike up in some bushes and he threw those shorts up on top of the bike.
Det. Hill:	That ain't true now, you got to find exactly what he did with those shorts?
Sgt. Steinbeck:	That ain't true man.

(*Id*. at 2467-68.) Hill also claimed that the attack occurred over two hours (*id*. at 2496), and that garbage men may have removed some evidence left in the woods (*id*. at 2521).

Perhaps most troubling, and also in contravention of the clinical guidelines, the Ohio court emphasized Hill's strength in the one area of "self-direction" while ignoring the significant

evidence from the time of the crime demonstrating Hill's adaptive deficits. The Ohio Supreme Court has recognized that an overriding consideration in assessing adaptive skills is that "one must focus on those adaptive skills the person lacks, not on those he possesses." *State v. White*, 118 Ohio St. 3d 12, 22, 885 N.E.2d 905, 914 (Ohio 2008). *See also Black v. Bell*, 664 F.3d 81, 99 (6th Cir. 2011) ("[A] court reviewing whether a defendant is mentally retarded 'must focus on Defendant's deficits, not his abilities.'" (quoting *United States v. Lewis*, No. 1:08 CR 404, 2010 WL 5418901, at *30 (N.D. Ohio Dec. 23, 2010))); *Sasser v. Hobbs*, 735 F.3d 833, 848 (8th Cir. 2013) (the adaptive skills prong of the clinical intellectual disability definition "does not involve balancing strengths against limitations. It simply requires deciding whether the evidence establishes significant limitations in two of the listed skill areas."). The AAMR stresses that "[w]ithin any individual, limitations often coexist with strengths," an assumption "essential to the application" of the intellectual disability definition. AAMR 1992 Manual, 1. It explains,

> This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.

Id. at 8-9. "Thus, in the process of diagnosing [intellectual disability], significant limitations in conceptual, social, or practical adaptive skills is not outweighed by the potential strengths in some adaptive skills." *Id*. at 47. For example, some mildly intellectually disabled persons can read up to the fifth-grade level (Supp. App., Disc 1, Tr., 1783 (testimony of J. Gregory Olley, Ph.D. (hereinafter, "Olley test."))), hold a job with limited responsibilities (*id*. at 871 (Olley test.)), play cards (*id*. at 1136 (testimony of Nancy J. Huntsman, Ph.D. (hereinafter, "Huntsman

test."))), or obtain a driver's license (*id*. at 375 (testimony of David Hammer, Ph.D. (hereinafter, "Hammer test."))).

This assumption arises from the concern that if evaluators accord dispositive weight to perceived strengths, rather than focusing on actual limitations, their findings will "reflect the stereotypical view [of] mentally retarded individuals [as] utterly incapable of caring for themselves." P. White, *Treated Differently in Life But Not in Death: The Execution of the Intellectually Disabled After Atkins v. Virginia*, 76 Tenn. L. Rev. 685, 703 (2009) (internal citations and quotation marks omitted). As Dr. Hammer testified, "When most people think of mental retardation they tend to think more of the moderate, severe and profound," (Supp. App., Disc 1, Tr., 185), but persons with mild intellectual disability "are not very obvious" (*id*. at 188). Dr. Sparrow explained it this way:

> I think one of the fallacies . . . in the general public is that you can tell by talking to somebody or looking at them that they have mental retardation and you cannot. In mild mental retardation often you cannot tell by talking to somebody or looking at somebody that they have mild mental retardation. That's why we have to have tests.

(*Id*. at 1627.)

Indeed, three psychologists testified at Hill's mitigation hearing that Hill was intellectually disabled at that time and had extremely poor adaptive functioning. (ECF No. 31, 194-96 (Dr. Darnell opining that Hill's adaptive functioning was "very poor"); 263-66, 278-79, 283 (Dr. Schmidtgoessling testifying to Hill's "incapability of managing life more effectively"); 303, 336 (Dr. Crush finding "severe impairment," including functioning).) Significantly, although they rejected his claims based upon his mental status, the Ohio Supreme Court and Eleventh District Court of Appeals found these psychologists' testimony credible and concluded

that Hill was intellectually disabled. *See Hill*, 64 Ohio St. 3d at 335, 595 N.E.2d at 901 ("[W]e find that [Hill's] mental retardation is a possible mitigating factor."); *Hill*, 1989 WL 142761, at **6, 32 (Hill "admittedly suffers from some mental retardation . . . ."; "The record is replete with competent, credible evidence which states that [Hill] has a diminished mental capacity. He is essentially illiterate, displays poor word and concept recognition and, allegedly, has deficient motor skills. [Hill] is characterized as being mildly to moderately retarded. There is some suggestion that [Hill's] "mental age" is that of a seven to nine year old boy.").

The psychologists noted Hill's adaptive deficits particularly in functional academics and social skills. As discussed above, Hill's school and juvenile court records from the time period shortly before his arrest reflect his significant limitations in academic functioning. Moreover, there was considerable testimony at both the suppression hearing and the mitigation hearing that Hill could not read and could only write his name. Hill himself testified at the suppression hearing that he could not read and could write only his name. (ECF No. 29, 358-59.) Dr. Schmidtgoessling testified at that hearing that Hill could not read and still did not consistently spell his name correctly. (*Id*. at 482, 507.) Dr. Crush also testified at the mitigation hearing that Hill was "illiterate." (ECF No. 31, 308.) Mark Brink, the vice president of Brinkhaven, testified at the mitigation hearing that Hill could not read or write while he was at the institution and needed special, individual tutoring. (*Id*. at 78.) In addition, shortly after Hill's trial, the prison psychiatrist and social workers were concerned about Hill's "illiteracy" and resulting difficulties. Similarly, the social program specialist at Hill's prison wrote to the director of the Education Department a year after Hill was convicted that Hill was "illiterate" and needed "remedial action." (Supp. App., Disc 1, 1512.)

The psychologists also testified about Hill's lack of social skills. Dr. Darnall spoke of Hill's poor self-esteem, inability to interpret social situations and create positive relationships, and that he was easily influenced by people, gravitated toward an antisocial peer group, and did not respond appropriately to authority figures. (ECF No. 31, 189-90, 192, 197-98.) Dr. Schmidtgoessling explained that Hill

> doesn't realize the impact that he has on other people. I think because he's not reflective, because he can't examine his own life, because he really can't appreciate how other people feel, yeah, if he had those feelings, then it would – it would inhibit. That's what we mean by a lack of internal controls.

(*Id*. at 281.)

(c) Hill's adaptive functioning at the time he filed his *Atkins* claim: prison records and statements to reporter and court

The Ohio court of appeals next discussed the trial court's findings regarding Hill's mental status near the time he filed his *Atkins* claim in January 2003, when Hill was 36 years old and had been on death row for seventeen years. It stated:

> *Death Row Records*. At the time of the evidentiary hearing, Hill had been incarcerated on death row for 20 years. From this period of time, the trial court considered audiotaped interviews of Hill by Warren's Tribune Chronicle reporter Andrew Gray in the year 2000. These interviews were arranged on Hill's initiative in order to generate publicity for his case. The trial court found Hill's performance on these tapes demonstrated a high level of functional ability with respect to Hill's use of language and vocabulary, understanding of legal processes, ability to read and write, and ability to reason independently.
>
> The trial court considered the evidence of the various prison officials who testified at the evidentiary hearing. These witnesses consistently testified that Hill was an "average" prisoner with respect to his abilities in comparison with other death row inmates. They testified that Hill interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules. Prison officials offered further testimony in their interviews with the expert psychologists. One official opined

> that Hill began to behave differently after *Atkins* was decided, and he believed that Hill was "playing a game" to make others think he is retarded. Another official reported that Hill's self-care was "poor but not terrible" and that Hill had to be reminded sometimes about his hygiene.
>
> *Hill's Appearances in Court*. The trial court stated that it had "many opportunities" to observe Hill over an extended period of time and, as a lay observer, did not perceive anything about Hill's conduct or demeanor suggesting that he suffers from mental retardation.

Hill, 177 Ohio App. 3d at 192-93, 894 N.E.2d at 124-25.

(I) Hill statements and reading

The Court finds, after reviewing Hill's taped interviews with Gray, that Hill did indeed demonstrate certain verbal skills, and he clearly read with a certain speed, accuracy and emphasis. (*See* Supp. App., Disc. 5.) Hill's statements in court displayed similar strengths. This excerpt from the transcript of a pre-trial hearing held on April 15, 2004, illustrates Hill's assertiveness and composure, as well as his articulateness, measured by the fluidity of his prose, the organization of his story, the sophistication of the vocabulary, the complexity of his sentence structure, and the level of detail. Hill stated to the Judge:

> I'm gonna tell you exactly what happened, Your Honor. Dennis Watkins used to come over to my aunt's house, which is my Uncle Morris Hill's wife. Her name is Q.T. Hill. My uncle had a patio that was built onto the back of the house. I guess the police department or whoever allowed him to store evidence in the back of this patio. Every weekend, either Saturday or Sunday, it would either be Dennis Watkins, Peter Kontos or James Teeples that would come and inventory the stuff that was inside of this patio. Morma [*sic*] Fife's son, me, Timothy Combs and his brother broke into my aunt's house. We went in through the patio area of the house. We took money, drugs and guns from out of the boxes that was inside of the patio. A week or two later, Morma [*sic*] Fife's son came to me. He was supposed to give me some bullets for the guns that he helped us put together. He told me that some police officers came to him, asked him about the break-in of my aunt's house. He told me that they used a night stick on him and told me, "Well, you're gonna need these. You're gonna need these bullets."

> Later on, I found out that he hung himself in the basement of her house and that her husband was accused of assaultin' him. When I told this to Maridee Costanzo, she told me that she had heard a lot of rumors circulating around about my case and that one of those rumors was about Morma [*sic*] Fife's son. I never thought that the affidavit that I gave Maridee Costanzo said everything in there. I told her to give it to the FBI so that the FBI could see it. My uncle, from what I know about, was placed up under investigation for money laundering. He was suspected as being involved in organized crime, which led to him being demoted from a police narcotics officer to a traffic cop. And I guess now he's an investigator for their office, the Public Defender's Office. Maridee, as Greg Meyers know, sat there and told him that she knew these people and that she remembered these different things. And she said that she was going to file an actual innocence claim in my case because of it. All I know was that the reason why they tricked me to sign that waiver was so that Greg Meyers could come on to be my attorney. . . . And when I told my attorney, my federal attorney what happened, this is what he said, the papers here. Would you give this to him?

(Supp. App., Disc 1, Tr. 59-61.)

Nevertheless, the Court again is troubled by some of the state court's conclusions regarding this evidence. First, the court once more improperly focuses on an apparent adaptive strength of Hill's rather than analyzing his limitations as required. As noted above, intellectually disabled individuals can read up to a fifth-grade level. Furthermore, the AAMR admonishes, "Do not use . . . verbal behavior to infer level of adaptive behavior or about having [intellectual disability]." AAIDD User's Guide, 22. As Dr. Sparrow testified, the size or sophistication of a person's vocabulary, or the "quality" of one's language, relates to cognitive, rather than adaptive, skills under the intellectual disability definition. She explained,

> Size of vocabulary is definitely intellectual – the adaptive behavior measures say nothing about how good your language is in terms of how many words you know or how complicated the words you know. It just says, can you take the words you know and communicate effectively? . . . Adaptive behavior communication does not measure level of vocabulary in any way.

(Supp. App., Disc 1, Tr., 1530.)

Moreover, the experts agreed that Hill's explanation of his "actual innocence" claim, whether to Gray, to the trial court during his *Atkins* proceedings, or to them directly, although articulate, was neither logical nor plausible. Dr. Olley testified, "It did not strike me as being entirely plausible . . . ." (*Id*. at 744.) He also stated, "This was a very long and I have to say rambling story. Because I was writing for all I was worth but I was still having quite a hard time following it all." (*Id*. at 771.) Dr. Hammer testified,

> It was quite rambling and incoherent in many places. He jumped around. And I admit that . . . the examiners kind of looked at each other and . . . shook our heads like we couldn't follow what was being said. . . . And we tried to communicate that to Danny, but he was not able to kind of change the course or back up and explain or anything like that. He just kind of started this. And in fact it was, it wasn't based on something we asked him. He just kind of started into it.

(*Id*. at 412.) Dr. Huntsman wrote in her report that after listening to the first fifteen to twenty minutes of Hill's explanation of his "actual innocence" claim, she "revealed [her] utter confusion." (Supp. App., Disc 1, 1131.) She testified that Hill's account of the claim was "incredibly complex," but had no "logic to it." (Supp. App., Disc 1, Tr., 1031.) Dr. Sparrow opined, "The fact that it was very difficult to follow him and figure out what it was he was trying to say and where he was going means he was not doing a very good job of communicating, although he was using very nice words to do that." (*Id*. at 1532.) *See Holladay v. Allen*, 555 F.3d 1346, 1363 (11th Cir. 2009) (rejecting expert's opinion that petitioner's testimony at trial and in deposition was inconsistent with mild intellectual disability due to his vocabulary and "advanced" memory because the testimony was implausible and showed poor judgment).

It is possible that Hill had almost memorized his "actual innocence" story and was "parroting" it, like a well-rehearsed script, for the reporter and court. (*See id.* at 92-93 (Hammer

test.).) When interviewing Hill, Dr. Olley noted that Hill's account of his claim was "very similar" to the "soliloquy" Hill made in court. (*Id*. at 770.) He testified, "With the ability to look back upon the tape that we just heard a few moments ago, I could see that he was recounting basically the same story spontaneously." (*Id*. at 771.) At the same time, Dr. Olley conceded that he did not know if Hill's story was true or fantasy (*id*. at 923); if Hill understood the meaning of the legal terms he used (*id*. at 925-26); or how often Hill had told that story (*id*. at 926). Dr. Hammer testified that intellectually disabled persons often develop a strong skill like this as a "cloak of competence" to hide their limitations. He explained,

> The cloak of competence is, is a concept that is talked about primarily with people with mild retardation. The idea is that many people with mild retardation are quite aware of their deficits in learning and functioning and are somewhat worried that other people will find that also. So they oftentimes will develop certain skill areas that they can hold out as indicating they have a competence in a certain area and, therefore, are trying to mask . . . what their deficits actually are[,] . . . wishing to avoid that stigmatization.

(*Id*. at 191-92.)

(ii) Hill's prison behavior

The evidence the Ohio court cites from Hill's prison records and the testimony of prison officials also is problematic. The AAMR prohibits the assessment of adaptive skills in atypical environments like prison. Its 2002 Manual instructs, "Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture." AAMR 2002 Manual, 13. It explains, "This means that the standards against which the individual's functioning must be measured are typical community-based environments, not environments that are isolated or segregated by ability." *Id*. at 8. Death row is a segregated, highly structured and regulated environment. The prison officials' description of Hill as an

"average" death row inmate illustrates the problem with this evidence: what does average in this context even mean, and how does that assessment relate to the clinical definition of intellectual disability?

The experts agreed that evidence of adaptive functioning in prison, particularly death row, is of limited value because the highly structured environment limits inmates' opportunities to gain new skills or demonstrate weaknesses in existing skills. Dr. Olley wrote in his report, "Evidence of adaptive behavior in prison is limited by the confined nature of prison life. It is impossible to assess all of Mr. Hill's adaptive behavior while he is in prison." (Supp. App., Disc 1, 1124.) He testified, "Our task is an unusual and a challenging one because the standards of our profession make no explicit statement about how to evaluate a person who has been in prison for a long time." (*Id*., Tr., 647.) Dr. Huntsman testified that formal assessments of adaptive behavior under the AAMR guidelines are "just not relevant to [the prison] setting." (*Id*. at 1130.) Dr. Hammer testified, "[Y]ou need to assess adaptive skills relative to the person functioning within the community . . . . And in this case he's obviously not functioning within the community and hasn't been functioning within the community for 20 years." (*Id*. at 407-08.)

Federal courts similarly have discounted this type of evidence as an unreliable measurement of adaptive functioning. *See, e.g., Holladay*, 55 F.3d at 1358 n.16 ("Both experts agreed that Holladay's adaptive functioning cannot be accurately assessed now because he has spent over 17 years in prison, a highly restricted and restrictive environment."); *Thomas*, 614 F. Supp. 2d at 1284 n.67 ("The constraints of a maximum-security prison environment also limit the diagnostician's ability to assess the subject's adaptive skills consistently within the AAMR definition."); *Rodriguez v. Quarterman*, No. Civ. SA-05-CA-659-RF, 2006 WL 1900630, at *11

(W.D. Tex. 2006) ("there is considerable debate within the professional literature over whether it is even possible to perform an adaptive skills deficit evaluation in a prison setting").

Moreover, courts have questioned the credibility and veracity of testimony offered by prison employees regarding a death row inmate's intellectual disability. In *Hall v. Quarterman*, 534 F.3d 365 (5th Cir. 2008), the Fifth Circuit observed,

> These witnesses, given the nature of their job and its accompanying dangers, may not be inclined to volunteer evidence of mental retardation to state prosecutors. Additionally, . . . the guards demonstrated only vague and largely irrelevant understandings of mental retardation while simultaneously asserting that Hall appeared normal.

Id. at 395. Commentators have noted particularly that prison officials may feel bias against inmates or pressured by peers or supervisors to report a high level of functioning. *See, e.g.,* John M. Fabian, *Life, Death, and IQ; It's Much More Than Just a Score: The Dilemma of the Mentally Retarded on Death Row*, 5(4) J. Forensic Psychol. 13-14 (2005) (noting problems with correctional staff as source of information about adaptive functioning because they "may be plagued by certain biases for or against the defendant," "officers may have their own lay opinions on what retardation is and may also not believe these defendants are retarded because they are criminals and function fairly well in some areas," and some officers are "more likely to have experienced conflicts with the defendants which may cause bias against the defendant in an evaluative setting").[25]

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[25] For this reason, it is worth questioning whether any inmate who asserts an *Atkins* claim after being incarcerated for a long period of time can prevail on the claim once a court chooses to evaluate the petitioner's current rather than past intellectual abilities, assessing adaptive behavior while on death row and according great weight to the testimony of prison officials.

Aside from potential biases, the prison officials' testimony at Hill's hearing was rife with contradictions, with themselves and each other. Risinger told the experts during her interview that she saw Hill print out kites, or internal communications between prison inmates and employees, "with speed one to two times." (Supp. App., Disc 1, 1113; *see also id.* at 1123, 1137.) But she admitted during her testimony at the hearing that she did not actually see Hill write any kites. (Supp. App., Disc 1, Tr., 1339, 1347.) Risinger also acknowledged on cross-examination that the handwriting in Hill's kites varied and may have been written by other inmates, which was a common practice. (*Id*. at 1348-50.) Similarly, Morrow testified first that Hill could read and write his kites, but later admitted that he had never seen Hill write a kite. (*Id*. at 1254, 1265.)

Regarding Hill's hygiene, the appellate court cited Risinger's observation that Hill's self-care was "poor but not terrible," but also that Hill had to be reminded at times about his hygiene. (Supp. App., Disc 1, 1113.) However, Spicer reported that Hill "didn't like to shower or clean his cell." (*Id*. at 1114.) Morrow described Hill's hygiene as "poor" during his interview but later testified that Hill never had a "hygiene issue" and kept his cell "clean." (*Id*. at 1114, 1123; Tr., 1251.)

As to Hill's card playing, Spicer believed that the other inmates might have let Hill play cards with them because he would lose money to them. (Supp. App., Disc 1, 1114.) Risinger also said that Hill lost money playing cards. (*Id*. at 1123.) Dr. Huntsman reported that Glenn said Hill "augmented his monthly earnings by winning at card games."[26] (*Id*. at 1138.) But

[26] Interestingly, Dr. Hammer reported that Glenn stated that "Danny wasn't exploited [at cards] and he never lost that much." (*Id*. at 1115.) Dr. Olley did not mention Glenn's observation of Hill's card playing at all.

Glenn testified at the hearing that he did not observe the betting and could not prove the inmates were even betting at all. (Supp. App., Disc 1, Tr., 789-90.)

Also contrary to the guidelines, aside from noting Risinger's observation about Hill's "poor but not terrible" hygiene, the court again focused exclusively on the prison officials' observations of Hill's adaptive strengths rather than limitations. Furthermore, their testimony that Hill "interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules" does not describe behaviors that are necessarily inconsistent with intellectual disability. As explained above, intellectually disabled persons can "interact" with others, play simple games, perform menial jobs, keep track of a small amount of money, and obey clear rules. There was no evidence that Hill's relationships with other inmates were anything more than superficial, or that the games he played required any skill. The prison officials acknowledged that his prison job required minimum skills, the prison rules were clear and straightforward, and that he never had more than a minimal amount of money to keep track of in his account at any given time.[27] (Supp. App., Disc 1, 1115, 1123; Tr., 1207, 1272, 1273.) *See also* DSM-IV-TR, 43 ("During their adult years, [mildly intellectually disabled persons] usually achieve social and vocational skills adequate for minimum self-support.").

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[27] Hill's prison jobs included emptying trash cans and distributing color-coded cleaning supplies to inmates' cells. (Supp. App., Disc 1, Tr., 1340, 1372-33, 1381, 1265, 810-12.) Spicer and Morrow noted that Hill needed simple and specific instructions to perform even these duties. (Supp. App., Disc 1, 1114.) As to Hill's account with the cashier's office, he received between $3 and $16 monthly pay and rarely had more than a small amount in his account at any given time. (*Id*. at 1556, 1559, 1560, 1568, 1570, 1571, 1575, 1577; Tr., 1207-09.) Morrow's example of Hill's skill dealing with his account is that Hill realized a mistake was made when he received $3 instead of the $16 in monthly wages – hardly a sophisticated observation of a complex financial transaction. (*Id*. at 1114; Tr., 1252-53.)

This Court's review of Hill's prison records indicates that Hill struggled to adjust to life on death row and exhibited adaptive deficits during his early years in prison. A prison psychiatrist wrote less than a year after Hill was convicted:

> Hill is not doing too well. He has a hard time putting up with all the aggravation and teasing and threatening that goes on on K-4. . . . He is very difficult to follow and apparently has some serious identity problems in that he doesn't know who his kin is and then also has some strange beliefs, as when he tells me that various so-called kin have told him things and subsequently died and he somehow establishes a connection between the two. He isn't hearing from anybody, is not getting any visitors, cannot read or write, so has had no contact with his lawyer and is very concerned that he should have been in a mental hospital . . .
>
> All in all, it is a very confusing situation . . . .

(Supp. App., Disc 1, 996.) This psychiatrist considered Hill intellectually disabled during this time. (*Id*. at 992, 998-99.) He wrote in his notes on April 9, 1987,

> We did get the report in from TCY which shows [Hill] to be actually retarded. I plan to call Dennis Watkins in Warren to see if he has more information because it is rather puzzling that somebody with his retardation would end up on death row.

(*Id*. at 998-90.)

Hill routinely requested help with his commissary account and was confused about its balance and the status of checks sent to him from family members. (Supp. App., Disc 1, 1484, 1485, 1556, 1557, 1560, 1571, 1565, 1568.) He repeatedly violated prison rules. (*See id*. at 1343, 1351-1425.) There also is ample evidence that Hill's social skills were poor. Prison records show that Hill was "passive" and "easily led," harassed by other inmates, found unsuitable to share a cell, was afraid of other inmates and frequently requested to move to another cell to avoid them, and often fought with other inmates. (Supp. App., Disc 1, 980, 1318,

1343, 1389, 1390, 1393, 1394, 1419, 1462, 1465, 1466-68, 1482-84, 1557, 1567.) And the records show that Hill was reprimanded for refusing to take a shower and often had to be provided a toothbrush and toothpaste. (Supp. App., Disc 1, 1396, 1573, 1568.) A prison sergeant reported in 1988 that Hill "[s]eems dull and unintelligent, . . . [s]luggish and drowsy," "[t]ries, but cannot seem to follow directions," "[c]ontinually asks for help from staff," and "[n]eeds constant supervision." (*Id*. at 1343.)

But the evidence also demonstrates that Hill's adaptive skills improved by 1994. A mental health evaluation form from 2001 stated that Hill's institutional adjustment was "[p]oor at first but appears to have adjusted well after 1994." (Supp. App., Disc 1, 1005.) Also in 2001, a psychiatrist also noted that Hill's "conversation to [him] was very brief but [he] noted no gross abnormalities. His speech was simple but clear, logical and coherent." (*Id*. at 993.) After 1994, Hill was charged with only one offense in prison, stemming from a fight with another inmates in 1996. (*Id*. at 1352-54.) He also received good evaluations on his job performance from 1992 to 1994. (*Id*. at 1328-32.) One evaluator reported, "Inmate Hill does an excellent job on keeping the range clean. He didn't need to have [*sic*] told what to do he would just do it." (*Id*. at 1332.)

Notably, Hill told the experts that Officer Glenn, who supervised Hill and other death row inmates for seven years, knew him best. (*Id*., Tr., 786, 1042.) And Officer Glenn testified that Hill performed his job as a material handler well with minimal assistance and no modifications, handled his money well, sought medical care when he needed it, kept track of his time allotted with his attorneys, and that "Danny [was] slow when he want[ed] to be slow." (*Id*. at 787-89, 792, 793, 794-95, 815.) Except for his account of Hill's card playing, as noted above, Officer Glenn's testimony was similar to the other prison officials and to his interview with the experts.

He found Hill "typical in most areas of skills compared to other inmates" (Hammer report, Supp. App., Disc 1, 1155); "social with other inmates" (Huntsman report, *id*. at 1138); and "better than most" at keeping track of his commissary (*id*.).

The clinical guidelines account for such improvements in adaptive behavior, acknowledging that it is possible for an intellectually disabled person to improve in adaptive skills such that the diagnosis will no longer apply, although it is rare and generally occurs with considerable interventions and supports. The APA explains,

> After early childhood, the disorder is generally lifelong, although severity levels may change over time. . . . Early and ongoing interventions may improve adaptive functioning throughout childhood and adulthood. In some cases, these result in significant improvement of intellectual functioning, such that the diagnosis of intellectual disability is no longer appropriate. . . . Diagnostic assessments must determine whether improved adaptive skills are the result of a stable, generalized new skill acquisition (in which case the diagnosis of intellectual disability may no longer be appropriate) or whether the improvement is contingent on the presence of supports and ongoing interventions (in which case the diagnosis of intellectual disability may still be appropriate).

DSM-V, 39. *See also* AAMR 2002 Manual, 9 (although intellectual disability is a static condition, improved functioning in adulthood is expected "with appropriate personalized supports over a sustained period").

(3) expert opinions

The court of appeals stressed that the trial court ultimately was persuaded by the State's expert, Dr. Olley, and the independent expert, Dr. Huntsman. The court explained:

> Finally, the trial court relied on the expert opinions of Drs. Olley and Huntsman that, with reasonable psychological certainty, Hill's adaptive skill deficiencies do not meet the second criterion for mental retardation set forth in *Lott*. Both doctors relied, in part, on the same anecdotal evidence considered by the trial court. The doctors also conducted interviews with Hill and particularly noted Hill's memory of events surrounding Fife's murder 20 years before and his

> ability to recount the narrative of the events and the complex legal history of his case since that time.

Hill, 177 Ohio App. 3d at 193, 894 N.E.2d at 125.

As already discussed, both the United States and Ohio supreme courts have emphasized the critical role the medical community and its clinical standards play in defining and determining intellectual disability when considering eligibility for the death penalty. In *Hall v. Florida*, the Supreme Court explained,

> That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue. And the definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty: for it is relevant to education, access to social programs, and medical treatment plans. In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions.

Hall, slip op. at 7-8. And Ohio's highest court expressly mandated in *Lott* that courts "rely on professional evaluations of [a defendant's] mental status, and consider expert testimony, appointing experts if necessary, in deciding this matter." *Lott*, 97 Ohio St. 3d at 306, 779 N.E.2d at 1015.

The AAMR, in turn, emphasizes the importance of the practitioner's critical judgment in assessing intellectual disability. It states, "Judgments made by conscientious, capable, and objective individuals can be an invaluable aid in the assessment process."[28] AAMR 2002

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[28] It also cautioned, "Inaccurate, biased, subjective judgment can be misleading at best and harmful at worst." *Id.* Clinical judgment must not be "(a) a justification for abbreviated evaluations, (b) a vehicle for stereotypes or prejudices, (c) a substitute for insufficiently explained questions, (d) an excuse for incomplete or missing data, or (e) a way to solve political problems."

Manual, 94 (internal quotation marks and citations omitted). It defines clinical judgment as "a special type of judgment that emerges directly from extensive data and is rooted in a high level of clinical expertise and experience. . . . [I]ts use enhances the precision, accuracy, and integrity of the clinician's decisions and recommendations." AAIDD User's Guide, 23. And notes that "it is crucial that clinicians conduct a thorough social history and align data and data collection to the critical question(s) at hand." *Id.*

Thus, habeas courts must defer to state-court determinations of the credibility of expert witnesses in determining intellectual disability under *Atkins* – especially in such a highly subjective area as adaptive behavior. The Sixth Circuit, in denying a habeas petitioner's *Atkins* claim, recently concluded that two expert opinions

> provided a basis for the state court to reasonably determine that O'Neal does not suffer from significantly subaverage intellectual functioning. And without clear and convincing evidence undermining the credibility of [those experts], we are not persuaded by O'Neal's attempts to emphasize solely the portions of [his expert's] testimony that support his claim. For better or worse, as a habeas court, we are not in a position to pick and choose which evidence we think is best so long as the presumption of correctness remains unrebutted. *See* 28 U.S.C. § 2254(e)(1).

O'Neal v. Bagley, 743 F.3d 1010, 1022 (6th Cir. 2013). The court stressed, "With expert testimony split, as it often is, the state court chose to credit [the two experts] over [petitioner's expert], and we cannot say from this vantage that it was unreasonable to do so." *Id.* at 1023.

(a) Drs. Olley and Huntsman's opinions

As explained above, three psychologists provided opinions on Hill's mental status for the

AAIDD User's Guide, 23.

state trial court: Dr. Olley for Respondent, Dr. Hammer for Hill, and Dr. Huntsman, who was appointed by the court.[29] At the time of the hearing, Dr. Olley was a psychologist and associate director of the Clinical Center for the Study of Development and Learning and clinical professor in the Department of Allied Health Sciences at the University of North Carolina at Chapel Hill. He had been a clinical psychologist for more than thirty years and affiliated with the university for about twenty-five of those years. He had worked almost exclusively in the specialty of intellectual and related disabilities and was a fellow of the American Association on Mental Retardation. (Supp. App., Disc 1, Tr., 636-37.) Dr. Olley had testified in nine capital cases regarding defendants' intellectual abilities, each time on behalf of the defendant. (*Id*. at 643-44.) Dr. Hammer had similarly impressive credentials. He was a clinical psychologist, director of psychology services at the Nisonger Center of The Ohio State University, and an adjunct associate professor of psychology at that university. He had been a clinical psychologist for about twenty years, specializing in the area of intellectual disability. (*Id*. at 142-44.) Dr. Huntsman was a forensic psychologist at the Forensic Psychiatric Center of Northeast Ohio, Inc. Her primary focus was on court-ordered evaluations for competency, which are not performed under the AAMR or APA guidelines. (*Id*. at 992-94.) When she did evaluate for intellectual disability, she testified that she relied only on IQ scores, and had assessed adaptive skills only "maybe a handful of times." (*Id*. at 980-81.)

The three experts agreed on the procedures to be followed in evaluating Hill, and observed each other's interviewing and test administration. (*Id*. at 929; Supp. App., Disc 1,

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[29] Two additional psychologists testified at the hearing, Drs. Sparrow and Hancock. Their testimony, however, was admitted only to clarify issues related to adaptive skills testing.

1118.) They each tested Hill, interviewed Hill and others, visited the prison, and reviewed Hill's school, court and prison records. Dr. Olley testified that it was the "most thorough examination of a death row inmate that [he had] been involved with." (Supp. App., Disc 1, Tr., 773.)

The trial court found the opinions of Drs. Olley and Huntsman most persuasive. They both testified that, *at the time of the hearing*, which was the focus of their evaluations, Hill did not demonstrate the requisite level of adaptive limitations to meet the standard of intellectual disability. Dr. Olley was circumspect in his opinion, careful to note the limited amount of information regarding Hill's present adaptive functioning. He wrote in his report, "The available information on Mr. Hill's current functioning does not allow a diagnosis of mental retardation."[30] (Supp. App., Disc 1, 1124-25.) Dr. Huntsman was more categorical. She opined, "Mr. Hill's level of adaptive behavior certainly exceeds the level expected of a mildly mentally retarded individual." (*Id*. at 1141.)

Drs. Olley and Huntsman both found Hill's statements to the court and interviews with the reporter and themselves to be very significant. Dr. Olley specifically was impressed by Hill's ability to recall details of past events and "to express a complex explanation of the crime in order to support his claim of innocence." (*Id*. at 1125.) He testified that Hill's reading during his Gray interview "sounded substantially above the abilities that I would associate with a person with

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[30] Dr. Olley elaborated on stand:

I stated earlier that any evaluation that involves retrospective information is not perfect. And in order to compensate for missing information or partial information it's important to gather information from as many sources as possible over as many years as possible.

So with that caution in mind, I felt that my conclusion was that since in this format the burden is upon the defense to show that mental retardation exists, that I had not seen sufficient information in, particularly in the areas of adaptive behavior to find that I could support a diagnosis of mental retardation.

(*Id*., Tr., 774.)

mental retardation" because he read with speed, accuracy and intonation. (App. Supp., Disc 1, Tr., 1764.) He also stated that he did not believe an intellectually disabled person could recite that much information from memory, particularly when he spoke for such a long period of time. (*Id*.) He explained that Hill's ability "to put the emphasis on just the right word to make a point effectively, that I have not seen in people with mental retardation who memorize things or have, say things because they've said it many times before." (*Id*. at 1783.) He testified that Hill's reading and recitation of his innocence claim just "hit[him] between the eyeballs that this is not a man with mental retardation. So it's just a judgment." (*Id*. at 1785.) Similarly, Dr. Huntsman testified that Hill's statements displayed "energy and organization and directedness in terms of having a story to tell." (*Id*. at 1027.) She also described her interview with Hill as "remarkable for how rich in content it was and rich in the use of language and rich in the memory for people and events. And also rich in the sense . . . of the way he volunteered and initiated giving me, you know, he didn't just say a sentence and stop. He kept going. It was incredibly spontaneous." (*Id*. at 1032.)

Both experts also cited the testimony of the prison officials as persuasive, although Dr. Olley was careful to acknowledge the limitations of assessing adaptive behavior in prison. (App. Supp., Disc 1, 1124.) They placed significance on the fact that the six prison officials reported consistent information about Hill's behavior on death row, and each witness described Hill as an "average" inmate. (*Id*. at 1124, 1141; *see also* Supp. App., Disc 1, Tr., 772-73.)

Finally, both experts stressed that Hill's malingering on their tests and during their interviews was an important factor in forming their opinions. Dr. Olley testified, "[I]n my experience I had never encountered a person with mental retardation who was able to malinger or

fake bad as consistently as Mr. Hill did in the evaluation that we performed . . . ." (Supp. App., Disc 1, Tr., 781; *see also* Supp. App., Disc 1, 1124-25, 1140 .)

As to Hill's adaptive functioning in childhood and at the time of the offense, Dr. Olley stated in his report that "[t]oo little information is available about adaptive behavior in childhood to make a confident retrospective diagnosis of mental retardation." (Supp. App., Disc 1, Tr., 780, 783.) He conceded on stand that Hill "did function low in academic skills" and "his school personnel regarded him as a person with mental retardation and labeled him as such," but explained that educators had an interest in diagnosing intellectual disability to obtain benefits for children as well as an interest in avoiding the possible stigma of labeling them. (*Id*. at 783, 828-29.)

Dr. Huntsman did not provide an opinion as to whether Hill was intellectually disabled during those time periods in her report, but testified at the hearing that he "probably" was not. (*Id*. at 1052-53.) Although she acknowledged on cross-examination that Hill's school records showed academic deficits and some limitations in communication, self-direction and social skills, she agreed with Dr. Olley that there was insufficient information from which to draw a conclusion about Hill's adaptive behavior during those time periods. (*Id*. at 1098-1100, 1112.) Dr. Huntsman specifically discounted the diagnoses of Hill rendered by school and juvenile court psychologists because the tests were conducted for a different purpose and the psychologists' "tendency of diagnostic overinclusion." (*Id*. at 1046, 1105.)

Dr. Olley acknowledged that Hill presented a "close call." (*Id*. at 861.) He testified that Hill's case may be one of the rare instances of a person's skills improving in adulthood to such a degree that he or she does not meet the second prong of adaptive behavior and no longer can be

diagnosed as intellectually disabled. (*Id*. at 861-62.)

(b) *State v. White*

The Ohio appellate court finished its analysis of Hill's adaptive skills by distinguishing Hill's case from the Ohio Supreme Court case *State v. White*, 118 Ohio St. 3d 12, 885 N.E.2d 905 (Ohio 2008). It explained:

> It is important to note that the trial court's use of anecdotal evidence in the present case is distinguishable from the use of such evidence in *White*, 118 Ohio St.3d 12, 2008-0hio-1623, 885 N.E.2d 905. In *White*, the Ohio Supreme Court reversed a trial court's finding that an *Atkins* petitioner is not mentally retarded where the trial court had relied on anecdotal evidence, such as the fact that the petitioner had a driver's license and could play video games, to support its finding that the petitioner did not demonstrate significant deficits in adaptive skills.
>
> In the present case and in *White*, the trial court relied upon its own perceptions and other lay testimony that the petitioner appeared to function normally. The Supreme Court held that this reliance constituted an abuse of discretion in light of expert testimony that "retarded individuals 'may look relatively normal in some areas and have * * * significant limitations in other areas.'" (Emphasis sic.) *Id*. at ¶ 69.
>
> The difference between the two cases lies in the fact that in the present case, two of the expert psychologists considered the same anecdotal evidence as the trial court and concluded that Hill was not mentally retarded. The trial court's conclusions were consistent with and supported by the expert opinion testimony. In *White*, the two psychologists who examined the petitioner concluded that there were significant deficiencies in two or more areas of adaptive functioning. *Id.* at ¶ 21. Thus, the trial court in *White* had substituted its judgment for that of the qualified experts. "While the trial court is the trier of fact, it may not disregard credible and uncontradicted expert testimony in favor of either the perceptions of law witnesses or of the court's own expectations of how a mentally retarded person would behave. Doing so takes an arbitrary, unreasonable attitude to the evidence before the court and [results] in an abuse of discretion." *Id*. at ¶ 74.
>
> Another difference is that in *White*, the experts were able to administer the SIB-R to the petitioner and obtain a psychometrically reliable measurement of his adaptive functioning. *Id*. at ¶ 14-20. In the present case, the only qualitative measurement of Hill's adaptive functioning, the Vineland I test administered when Hill was 17, indicated that Hill functioned at a level above that of the

> mentally retarded. Apart from this test, the trial court in the present case had no choice but to rely on anecdotal evidence and/or Drs. Olley and Sparrow's doubtful extrapolations of Hill's adaptive ability.

Hill, 177 Ohio App. 3d at 193-94, 894 N.E.2d at 125-26.

Hill claims that the court ignored *White*'s holding "when it substituted its own judgment based on its own observations for the overwhelming historical data available regarding Danny Hill's mental retardation." (ECF No. 94, 21.) But that argument fails, since the court here did rely on facts from the record to support its conclusion. Moreover, as the court of appeals stated, the trial court here also relied on the expert opinions of Drs. Olley and Huntsman.

(4) conclusion

The Ohio appellate court concluded, "In light of the foregoing, there is abundant competent and credible evidence to support the trial court's conclusion that Hill does not meet the second criterion for mental retardation." *Id*. at 194, 894 N.E.2d at 126. Based on its review of the entire record, this Court finds that Hill has not carried his burden of rebutting by clear and convincing evidence the presumed correctness of the Ohio appellate court's decision. The court's conclusion regarding Hill's adaptive behavior *at the time he filed his* Atkins *claim* was supported by sufficient credible evidence and, most importantly, the opinions of two experts. Although "[r]easonable minds reviewing the record might disagree" about some of the Ohio court's findings on this issue, and certain "evidence . . . may plausibly be read as inconsistent with the [state-court] finding," for this Court, "on habeas review[,] that does not suffice to supersede the trial court's . . . determination." *Wood*, 558 U.S. at 301-02 (internal quotation marks and citations omitted).

c. onset before age 18

Finally, the state court of appeals agreed with the trial court that Hill did not meet the third criterion for intellectual disability under *Lott*. It stated:

> With respect to the third criterion, the trial court found that Hill had failed to demonstrate the onset of mental retardation before the age of 18. The trial court's conclusion mirrors its findings under the first two criteria: Hill demonstrated, by a preponderance of the evidence, significantly subaverage intellectual functioning prior to the age of 18, but failed to demonstrate significant limitations in two or more adaptive skills. The evidence supporting the trial court's conclusions is discussed above.

Hill, 177 Ohio App. 3d at 194, 894 N.E.2d at 126. As noted above, a reasonable trial-court judge may have concluded that, based on the record, Hill had severe adaptive deficits in childhood and therefore met this prong of the intellectual disability definition. But the state court did not so determine in this case, and Hill has not met his burden of proving that the state court's determination was erroneous or unreasonable.

4. Conclusion

Atkins holds that "the mentally retarded should be categorically excluded from execution," and that "death is not a suitable punishment for a mentally retarded criminal." *Atkins*, 536 U.S. at 318, 321. But the Supreme Court also repeatedly has made it clear that AEDPA imposes a "formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt*, 134 S. Ct. at 15. Although the Court recognizes that a reasonable trial-court judge may have come to a different conclusion based on the evidence presented at Hill's *Atkins* hearing, given the extremely deferential standard for relief under AEDPA, this Court cannot hold that Hill has rebutted with clear and convincing evidence the presumed correctness of the Ohio appellate court's factual determination that Hill is not intellectually disabled. *See* 28 U.S.C. § 2254(e)(1). Nor can this Court conclude that the state-

court decision denying Hill's *Atkins* claim was unreasonable "beyond any possibility for fairminded disagreement." *Harrington*, 131 S. Ct. at 787. Accordingly, this claim is denied.

B. *Second Ground for Relief: Ineffective Assistance of* Atkins *Counsel*

Hill's second claim for relief is that he was deprived of his constitutional right to the effective assistance of counsel in his post-conviction *Atkins* hearing. Respondent argues that this claim is not cognizable on habeas and lacks merit. (ECF No. 98, 6.) Hill counters that his *Atkins*-related ineffective-assistance claim should be recognized based on the United States Supreme Court's Sixth and Fourteenth Amendment jurisprudence. (ECF Nos. 94 and 102.)

1. Procedural Posture

Respondent contends that Hill's *Atkins*-related ineffective-assistance claim is unexhausted. (ECF No. 98, 6.) Hill replies that it is not, because no mechanism exists in Ohio for such a claim. Hill explains that, because *Atkins* was decided after his trial, under *Lott*, he had to raise his *Atkins* claim for the first time on post-conviction, and Ohio limits post-conviction relief to constitutional claims, which does not include ineffective assistance of post-conviction counsel. (ECF No. 102, 23-24.) The Court agrees. A habeas court need not wait for exhaustion if it determines that a return to state court would be futile. *Lott v. Coyle*, 261 F.3d 594, 608 (6th Cir. 2001).

2. Viability of *Atkins*-related ineffective-assistance claims in habeas corpus

Respondent's stronger argument is that Hill's ineffective-assistance claim is barred by AEDPA's § 2254(I). It provides: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a

proceeding arising under section 2254." 28 U.S.C. § 2254(I). This provision is grounded in the well-settled rule that the constitutional right to appointed counsel extends to the first appeal of right and no further. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Accordingly, there is no constitutional right to appointed counsel in habeas cases, *McCleskey v. Zant*, 499 U.S. 467, 494 (1991), or during state post-conviction collateral review, *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991). And, as there is no constitutional right to an attorney in post-conviction proceedings, a habeas petitioner cannot claim unconstitutional deprivation of effective assistance of counsel in such proceedings. *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415, 425 (6th Cir. 2003) (citing *Coleman*, 501 U.S. at 752-53).

Hill strenuously argues that, in accordance with his Sixth Amendment right to effective representation and his Fourteenth Amendment rights to due process and equal protection, he should have the same opportunity to assert an ineffective-assistance claim related to representation during an *Atkins* hearing held post-conviction under *Lott*, as a defendant does who was convicted and sentenced after *Atkins* was decided and therefore could assert his *Atkins* claim at trial. (ECF No. 102, 23-47.) As support, he points to the Tenth Circuit's decision in *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012). (ECF No. 149.) In that case, the court held that there is a constitutional right to effective assistance of counsel in *Atkins* proceedings. It grounded its decision in the Sixth and Fourteenth Amendments, and further concluded that "the right to counsel flows directly from, and is a necessary corollary to, the clearly established law of *Atkins*." *Id*. at 1184. The Tenth Circuit did not address § 2254(I) at all, however, or identify any other court that reached the same decision. Nor does Hill identify any court that has followed *Hooks*. Indeed, another judge in this district and a judge in the Southern District of Ohio

expressly have rejected these arguments. *See Bays v. Warden, Ohio State Penitentiary*, No. 3:08 CV 076, 2014 WL 29564, at **3-4 (S.D. Ohio Jan. 3, 2014) (Rose, J.); *Williams v. Mitchell*, No. 1:09 CV 2246, 2012 WL 4505774, at **22- 28 (N.D. Ohio Sept. 28, 2012) (Nugent, J.).

Despite the equitable appeal of Hill's arguments, there is no Supreme Court or Sixth Circuit authority holding that § 2254(I) is unconstitutional or otherwise not controlling in this case. *See Post v. Bradshaw*, 422 F.3d 419, 423-24 (6th Cir. 2005) (finding § 2254(I) "clear" and "expansive in its prohibition" and holding that Rule 60(b) cannot therefore be used to bring claims of ineffective assistance of habeas counsel). Section 2254(I), therefore, bars Hill's *Atkins*-related ineffective-assistance claim.

3. Merits

Even if Hill's ineffective-assistance claim were cognizable in habeas, it would fail. Hill claims that his counsel:

1. failed to argue or bring to the court's attention material and substantive facts from the record that established adaptive skill deficits;

2. failed to intervene or object when Detective James Teeples ("Teeples") videotaped Hill's *Atkins* testing;

3. failed to properly investigate by not contacting school and prison psychologists and death row inmates;

4. failed to object to the proceedings on competency grounds;

5. "was forced to" proceed despite his antagonistic relationship with Hill; and

6. failed to object to "the fanatical prosecution" of Hill's claim.

(ECF No. 94, 50-51.) Respondent replies, without any support or analysis, that the claim should be "denied as without merit . . . and frivolous, where Hill's trial counsel Meyers demonstrated a

national level performance that few, if any, career capital defenders could meet, and none could exceed." (ECF No. 98, 6.)

a. legal standards

To succeed on a claim of ineffective assistance of counsel, a petitioner must satisfy the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id* at 687. To determine if counsel's performance was "deficient" pursuant to *Strickland*, a reviewing court must find that the representation fell "below an objective standard of reasonableness." *Id.* at 688. It must "reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time." *Id*. at 689.

Second, the petitioner must show that he or she was prejudiced by counsel's errors. To do this, a petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Id*. at 693 (citation omitted). Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687.

If a petitioner fails to prove either deficiency or prejudice, his ineffective-assistance claim will fail. *See Lundgren v. Mitchell*, 440 F.3d 754, 770 (6th Cir. 2006) (citing *Strickland*, 466 U.S. at 697). The Supreme Court recently explained, "Surmounting *Strickland*'s high bar is never an easy task. . . . An ineffective-assistance claim can function as a way to escape rules of

waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington v. Richter,* 131 S. Ct. 770, 788 (2011) (citations and internal quotation marks omitted).

Thus, as the Supreme Court often has repeated, "[j]udicial scrutiny of a counsel's performance must be highly deferential'" and "every effort [must] be made to eliminate the distorting effects of hindsight . . . ." *Strickland*, 466 U.S. at 689. The Court recently emphasized, "*Strickland* specifically commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment,'" recognizing "the constitutionally protected independence of counsel and . . . the wide latitude counsel must have in making tactical decisions." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1406-07 (2011) (quoting *Strickland*, 466 U.S. at 689-90).

Under AEDPA, a habeas court is limited to determining whether a state-court decision regarding an ineffective-assistance claim was contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1); *Mitchell v. Mason*, 325 F.3d 732, 737-38 (6th Cir. 2003) (holding ineffective assistance of counsel is mixed question of law and fact to which the unreasonable application prong of § 2254(d)(1) applies). The Supreme Court recently observed that the standards imposed by *Strickland* and § 2254(d) are both "highly deferential," so that in applying them together, "review is 'doubly' so." *Harrington*, 131 S. Ct. at 788. Therefore, "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id*.

b. analysis

(1) failure to investigate and present evidence

Hill claims that his *Atkins* counsel was ineffective for failing to investigate and present material evidence that established his adaptive skills deficits. (ECF No. 94, 52-60.) Specifically, he asserts that his counsel should have contacted school psychologists Karen Weiselberg and Annette Campbell, prison psychiatrist John Vermeulen, a psychologist who tested Hill for the prison in 2000, and other death row inmates. He also argues that counsel should have presented the testimony of Hill's family members, such as his mother and "other aunts and uncles who lived in the area." The Court disagrees.

A defendant's attorney is responsible for making tactical decisions of trial strategy. A petitioner claiming ineffective counsel, therefore, must show that his or her counsel's actions were not supported by a reasonable strategy. *Strickland*, 466 U.S. at 689. The Supreme Court has made clear, however, that merely labeling an attorney's decision "trial strategy" does not end the inquiry; the strategic decision itself must be the product of a reasonable investigation. The *Strickland* Court set forth this duty to investigate, explaining:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690-91. The Sixth Circuit has found ineffective assistance in numerous cases where counsel failed to conduct an adequate investigation, including interviewing potentially important witnesses, or did not present important testimony or evidence at trial. *See,*

e.g., Ramonez v. Berghuis, 490 F.3d 482, 491 (6th Cir. 2007) (finding ineffectiveness where counsel decided not to interview three potential witnesses who could have corroborated defendant's testimony and contradicted complaining witness' testimony); *Towns v. Smith*, 395 F.3d 251 (6th Cir. 2005) (finding ineffectiveness where counsel decided not to interview a potentially important witness); *Combs v. Coyle*, 205 F.3d 269, 278 (6th Cir. 2000) (finding ineffectiveness where counsel failed to investigate adequately his own expert witness, who testified that, despite the defendant's intoxication at the time of the crime, the defendant nevertheless was capable of forming the requisite intent to commit the crimes); *Groseclose v. Bell*, 130 F.3d 1161, 1170 (6th Cir. 1997) (finding ineffectiveness where counsel had no strategy and conducted no investigation at all).

Nevertheless, the Supreme Court has stated that "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). It further has instructed, “In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Strickland*, 466 U.S. at 691. Accordingly, the Sixth Circuit repeatedly has concluded that an attorney’s pretrial investigation and decisions in presenting evidence and testimony was reasonable given the circumstances. *See, e.g., Landrum v. Mitchell*, 625 F.3d 905, 921-22 (6th Cir. 2010) (finding no ineffective assistance where petitioner failed to show prejudice resulting from trial counsel’s failure to conduct proper investigation or interview potential witnesses, and present important lay and expert testimony); *Austin v. Bell*, 126 F.3d

843, 848 (6th Cir. 1997) (finding no ineffective assistance where counsel did not call witnesses with credibility and reliability problems).

Here, the Court finds neither deficient representation nor prejudice. First, it is clear from the hearing transcript that Hill's counsel's strategy was to rely on the expert testimony of Dr. Hammer and to have Dr. Hammer interpret the facts in the record for the court in light of the clinical guidelines. He explained to the court, in objecting to the prison guards' testimony as inadmissible lay opinion, that it is more appropriate for "a psychologist to filter factual data relative to Prong II . . . than from factual anecdotal being delivered directly to this Court." (Supp. App., Disc 1, Tr., 1245; *see also id*. at 560-72.)

This strategy accords with the Ohio Supreme Court's emphasis in *Lott* and *White* on expert testimony in *Atkins* proceedings. In *Lott*, the court instructed trial courts to "rely on professional evaluations of [a defendant's] mental status, and consider expert testimony, appointing experts if necessary, in deciding this matter." *Lott,* 97 Ohio St. 3d at 306, 779 N.E.2d at 1015. The court added in *White*,

> While the trial court is the trier of fact, it may not disregard credible and uncontradicted expert testimony in favor of either the perceptions of lay witnesses or of the court's own expectations of how a mentally retarded person would behave. Doing so shows an arbitrary, unreasonable attitude toward the evidence before the court and constitutes an abuse of discretion.

White, 118 Ohio St. 3d at 24, 885 N.E.2d 915-16.

Second, the testimony of Drs. Weiselberg-Ross, Campbell, and Vermeulen would have been cumulative, since their notes, reports, and letters were admitted into evidence and discussed at length by both parties' experts. Similarly, Hill's mother and grandmother testified at Hill's mitigation hearing, and the transcripts of their testimony also were admitted into evidence at the

Atkins hearing. (*See* Supp. App., Disc 1, 1104.)

Third, it is not reasonably probable that the result of Hill's *Atkins* hearing would have been different had Dr. Spindler, other family members, and death row inmates testified. Hill admits that Dr. Spindler "does not recall Danny Hill or why he administered the test to him." (ECF No. 94, 57.) The testimony of additional family members and other death row prisoners would have been equally weak.

These sub-claims are meritless.

(2) failure to challenge Hill's competency

Hill argues that his counsel should have objected to the entire *Atkins* hearing on competency grounds. (*Id*. at 60-63.) The trial court did, however, hold a hearing on Hill's competency on December 7, 2006, less than ten months after it issued its opinion on Hill's *Atkins* claim. The Eleventh District Court of Appeals remanded the case to the trial court for the competency hearing after Hill's counsel filed a motion to withdraw from the case because Hill no longer wished to pursue his appeal and wanted them to withdraw as his counsel. (Supp. App., Disc 1, Tr., 1926-28.) After hearing testimony from a psychologist, the court found that Hill was competent to make decisions about his appeal. (*Id*. at 1954.) There is no evidence that the outcome would have been any different if such a hearing had taken place in the proceeding two years, before or during Hill's *Atkins* hearing. This sub-claim fails as speculative.

(3) failure to object to Teeples videotaping Hill

For this sub-claim, Hill argues that his *Atkins* counsel should have objected when Detective Teeples videotaped Hill's testing related to his *Atkins* hearing. Teeples also was present during Hill's final interrogation by police at which he confessed to being present at the

crime, and Hill believed Teeples was part of a conspiracy to falsely hold him responsible for the murder. Hill claims Teeples' presence during the testing contributed to his difficulty with the testing. (ECF No. 94, 50.)

This sub-claim also lacks merit. Hill has offered no evidence to show when, if ever, his counsel was aware of this issue, and whether or not he could have objected in time. Moreover, it is pure speculation to suggest that Hill's performance on the test would have been different had Teeples not been videotaping it.

(4) being "forced to" proceed with representation

Hill argues that his *Atkins* counsel should not have allowed himself to be "forced to" continue to represent him when their relationship had deteriorated. (*Id*. at 63-80.) As Hill acknowledges, his counsel twice filed motions to withdraw from the case, both of which were denied. (*Id*. at 65.) There was nothing more counsel could do. This claim is meritless.[31]

(5) failure to object to "the fanatical prosecution"

Hill finally claims that his counsel was ineffective because he did not object to "the fanatical prosecution." (ECF No. 94, 80.) To the contrary, the Court notes that, after reviewing the entire record, it is apparent that Hill's counsel represented him skillfully and ardently. Hill offers no evidence to support this claim, and it fails.

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[31] Hill also appears to frame this sub-claim as an error of the trial court in denying the motions to withdraw. He fails to develop that argument, however, and it is waived. *See United States v. Crosgrove,* 637 F.3d 646, 663 (6th Cir. 2011) ("Because there is no developed argumentation in these claims, the panel declines to address Cosgrove's general assertions of misconduct in witness questioning and closing statements."); *United States v. Hall*, 549 F.3d 1033, 1042 (6th Cir. 2008) ("'[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'") (quoting *United States v. Johnson*, 440 F.3d 832, 846 (6th Cir. 2006)).

Accordingly, Hill's claim for ineffective assistance of *Atkins* counsel is denied.

C. *Third Ground for Relief: Actual Innocence*

Hill claims for his third ground for relief that he is actually innocent of the death penalty because he is intellectually disabled. Respondent counters that this claim is a "reiteration" of his *Atkins* claim "and fails for the same reason." (ECF No. 98, 6.)

In *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court explained that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404. The Court stated in dicta, however, that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional" regardless of whether any constitutional violation occurred during trial. *Id*. at 417.

The Supreme Court has never applied such a claim, however, and recently declined to resolve whether a "free-standing" actual innocence claim is cognizable on federal habeas review. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013). The Sixth Circuit also has held that such a claim is not a valid ground for habeas relief. *See, e.g., Cress v. Palmer*, 484 F.3d 844, 854-55 (6th Cir. 2007); *Thomas v. Perry*, No. 13-1681, 2014 WL 128153, at *2 (6th Cir. Jan. 15, 2014). Moreover, the *Herrera* Court emphasized that "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Herrera,* 506 U.S. at 417; *see also House v. Bell*, 547 U.S. 518, 520 (2006).

Because this claim has not yet been recognized by the Supreme Court or the Sixth Circuit, relief on this claim is denied.

VI. CERTIFICATE OF APPEALABILITY ANALYSIS

This Court must now determine whether to grant a Certificate of Appealability ("COA") for any of Hill's grounds for relief. The Sixth Circuit has determined that neither a blanket grant nor a blanket denial of a COA is an appropriate means by which to conclude a capital habeas case as it "undermine[s] the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability." *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001); *see also Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001) (remanding motion for certificate of appealability for district court's analysis of claims). Thus, in concluding this Opinion, this Court now must consider whether to grant a COA as to any of the claims Hill presented in his Amended Petition pursuant to 28 U.S.C. § 2253.

That statute states in relevant part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .
>
> (2) A certificate of appealability may issue under paragraph (12) only if the applicant has make a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253. This language is identical to the requirements set forth in the pre-AEDPA statutes, requiring the habeas petitioner to obtain a Certificate of Probable Cause. The sole difference between the pre- and post-AEDPA statutes is that the petitioner must now demonstrate he was denied a *constitutional* right, rather than the federal right that was required prior to AEDPA's enactment.

The United States Supreme Court interpreted the significance of the revision between the pre- and post-AEDPA versions of that statute in *Slack v. McDaniel*, 529 U.S. 473 (2000). In that case, the Court held that § 2253 was a codification of the standard it set forth in *Barefoot v. Estelle*, 463 U.S. 880 (1983), but for the substitution of the word "constitutional" for "federal" in the statute. *Id*. at 483. Thus, the Court determined,

> [t]o obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further."

Id. at 483-04 (quoting *Barefoot*, 463 U.S. at 893 n.4).

The Court went on the distinguish the analysis a habeas court must perform depending upon its finding concerning the defaulted status of the claim. If the claim is not procedurally defaulted, then a habeas court need only determine whether reasonable jurists would find the district court's decision "debatable or wrong." *Id*. at 484. A more complicated analysis is required, however, when assessing whether to grant a COA for a claim the district court has determined is procedurally defaulted. In those instances, the Court opined, a COA should only issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id*.

After taking the above standards into consideration, the Court finds that it will issue a COA for Hill's *Atkins* claim, his first ground for relief. Reasonable jurists could debate this Court's conclusion on the merits of this claim. The Court will not issue a COA for Hill's second

ground for relief (ineffective assistance of *Atkins* counsel) or third ground for relief (actual innocence), as neither is a cognizable ground for federal habeas relief. No jurist of reason would debate the Court's conclusions on these claims.

VII. CONCLUSION

Accordingly, this Court finds that Petitioner Danny Lee Hill's Amended Petition for Writ of Habeas Corpus is denied. The Court further certifies, pursuant to 29 U.S.C. § 1915(a)(3), that an appeal from this decision as to Hill's first ground for relief can be taken in good faith.

IT IS SO ORDERED.

/s/ John R. Adams
JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

June 25, 2014

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0024p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DANNY HILL,
Petitioner-Appellant,

v.

CARL ANDERSON, Warden,
Respondent-Appellee.

Nos. 99-4317/14-3718

Appeal from the United States District Court
for the Northern District of Ohio at Youngstown.
No. 4:96-cv-00795—Paul R. Matia and John R. Adams, District Judges.

Argued: November 30, 2016

Decided and Filed: February 2, 2018

Before: MERRITT, MOORE, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Vicki Ruth Adams Werneke, FEDERAL PUBLIC DEFENDER'S OFFICE, Cleveland, Ohio, for Appellant. Peter T. Reed, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Vicki Ruth Adams Werneke, Lori B. Riga, FEDERAL PUBLIC DEFENDER'S OFFICE, Cleveland, Ohio, for Appellant. Peter T. Reed, Stephen E. Maher, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

OPINION

MERRITT, Circuit Judge. In this death penalty case out of Ohio, Danny Hill asserts in his habeas petition that he may not be executed because he is "intellectually disabled," as now

defined in three Supreme Court cases decided in the past fifteen years.[1] *Atkins v. Virginia*, 536 U.S. 304 (2002), was decided and made retroactive after Hill was convicted of murder and sentenced to death, so although Hill raised his intellectual disability as a mitigating factor in the penalty phase of his trial, he was not afforded the constitutional protections set forth in *Atkins* during his original trial. Our court issued a remand order in 2002 directing the State of Ohio to assess Hill's intellectual functioning in light of *Atkins*. *Hill v. Anderson*, 300 F.3d 679 (6th Cir. 2002). The issue now before us is whether that assessment comports with *Atkins* and the Supreme Court's later opinions on the subject. We conclude that the courts in Ohio have unreasonably applied the Supreme Court's three-part standard in this case.

In its three cases on the subject of executing the intellectually disabled, the Supreme Court relies on two diagnostic manuals of the psychiatric profession to determine whether a defendant has an "intellectual disability"—*Intellectual Disability: Definition, Classification, and Systems of Supports*, the diagnostic manual published by the American Association on Intellectual and Developmental Disabilities, and the *Diagnostic and Statistical Manual of Mental Disorders* published by the American Psychiatric Association.[2] Both manuals require three separate findings before a diagnosis of intellectual disability is appropriate: (1) the individual exhibits significant deficits in intellectual functioning—indicated by an IQ score "approximately two standard deviations or more below the mean," or roughly 70; (2) the individual exhibits significant adaptive skill deficits—such as "the inability to learn basic skills and adjust behavior to changing circumstances"—in certain specified skill sets; and (3) the deficits arose while the individual was still a minor. *See Moore v. Texas*, 137 S. Ct. 1039, 1045 (2017); *Hall v. Florida*, 134 S. Ct. 1986, 1994-95 (2014); *Atkins*, 536 U.S. at 308 n.3.

The Ohio courts and the parties agree that Hill's IQ is so low (ranging from a low of 48 to a high of 71) that he easily meets the first element of the clinical definition of intellectual disability. They disagree, however, on the propriety of the state courts' holdings that Hill did not

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[1]We will use the medical community's preferred term of "intellectually disabled" in place of "mentally retarded" except where the term is in quoted material.

[2]Prior to 2007, the American Association on Intellectual and Developmental Disabilities (AAIDD) was known as the American Association on Mental Retardation (AAMR).

exhibit sufficient adaptive deficits under the second element and that Hill's deficits did not manifest themselves before Hill reached the age of 18. Therefore, we must resolve the dispute between the parties as to these two elements.

On the question of "adaptive deficits," we conclude that the Ohio courts have made the same basic mistake as the Texas courts in the recent case of *Moore v. Texas*, in which the Supreme Court reversed the death penalty because the Texas court incorrectly ruled that the prisoner's "adaptive strengths . . . constituted evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits." 137 S. Ct. at 1050. The Supreme Court rejected that view, noting that "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." *Id.* (emphasis in original) (citing AAIDD-11, at 47 (2010); DSM-5, at 33, 38 (2013)).[3] That view is consistent with the Court's previous observation that "intellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'" *Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) (quoting AAMR-10, at 8 (2002)). The case supporting a finding that Hill is intellectually disabled is even stronger than in *Moore*. Whereas Moore's intellectual functioning based on IQ was debatable, Hill's IQ is so low that the Warden concedes that Hill satisfies the first element of the definition.

We recognize that *Moore* was decided after the Ohio Court of Appeals rejected Hill's *Atkins* claim in 2008. *See State v. Hill,* 894 N.E.2d 108, 127 (Ohio Ct. App. 2008). Ordinarily, Supreme Court decisions that post-date a state court's determination cannot be "clearly established law" for the purposes of AEDPA. *Peak v. Webb*, 673 F.3d 465, 472 (6th Cir. 2012) (Under AEDPA, the "law in question must have been clearly established at the time the state-court decision became final, not after."). However, as discussed in more detail below, we find that *Moore's* holding regarding adaptive strengths is merely an application of what was clearly established by *Atkins*.

In light of the Ohio Court of Appeals' unreasonable determinations under both the adaptive-skills and age-of-onset prongs of the *Atkins* standard, we **REVERSE** the judgment of

[3]We will refer to the diagnostic manuals as "AAMR" or "AAIDD," and "DSM" followed by a number identifying the referenced edition.

the district court and **REMAND** the case with instructions to grant the petition and to issue the writ of habeas corpus with respect to Hill's death sentence.

In addition to his *Atkins* claim, Hill raises an ineffective assistance of counsel claim that attacks his trial counsel's performance during his state *Atkins* hearing, a *Miranda* claim arguing that certain statements should have been suppressed during his trial, a prosecutorial misconduct claim, and a due process claim arguing that Hill was not competent to stand trial at the time of his convictions. For the reasons set forth below, we **AFFIRM** the district court's judgment denying Hill's habeas petition with regard to the latter three claims, and pretermit the ineffective assistance of counsel claim regarding *Atkins* because we are granting relief on the merits of the *Atkins* claim.

I. Background

The facts and legal proceedings surrounding Hill's conviction and death sentence in 1986 are set out in our earlier opinion. *See Hill*, 300 F.3d at 681. Because this case centers on the issue of intellectual disability, what follows is an account of the facts and proceedings relevant to that question in this case.

Several evaluations conducted around the time of Hill's trial in 1986 reveal that Hill "has a diminished mental capacity," a fact acknowledged by the state court after Hill's *Atkins* hearing. *See Hill,* 894 N.E.2d at 112 (summarizing the testimonies of the three experts who testified during the mitigation phase of the initial trial that Hill was "mentally retarded"). Hill's IQ at the time of trial ranged from 55 to 68, and his moral development was "primitive"—essentially that of a two-year old. *Id*.

Hill has also demonstrated an "inability to learn basic skills and adjust [his] behavior to changing circumstances" since a very young age. *Hall*, 134 S. Ct. at 1994. Since his earliest days in school, Hill has struggled with academics. At the age of six, a school psychologist noted that Hill was "a slow learning child" and recommended that his teachers "make his work as concrete as possible" without "talking about abstract ideas." Warren Cty. School Psychologist's Report, dated Mar. 20, 1973. After kindergarten, Hill was placed into special education classes for the remainder of his time in the public school system. Hill struggled to keep up academically

even in his special education classes and had difficulty remembering even the simplest of instructions. At the age of 15, Hill could barely read or write. Those problems persist today. Indeed, prison records and testimony of prison guards indicate that the prison staff believed Hill to be illiterate, that he could not remember the balance on his commissary account and would often spend more money than was in his account, and that he could not perform even the most basic cleaning tasks without close supervision.[4] *See* Supp. *Atkins* App'x at 1325, 1483-86, 1510-12, 1553, 1784.[5]

Hill has also been unable to take care of his hygiene independently from a young age. Hill's school psychologist recalled that, even as a kindergartener, Hill "had a problem with body odor and did not wear clean clothes to school." Decl. of Karen Weiselberg-Ross, Warren Cty. School Psychologist ¶¶ 4, 12. During his time in a home for children with behavioral issues, Hill could not remember to comb his hair, brush his teeth, or take a shower without daily reminders. Mitigation Hr'g Tr. at 88, No. 85-cr-317 (Ohio Ct. of Common Pleas Feb. 26, 2986).[6] Even in the highly structured environment of death row, Hill would not shower without reminders.

The Supreme Court decided *Atkins* in 2002 while Hill's appeal from the district court's denial of his habeas petition was pending before this court. We remanded the case to the district court with instructions to remand Hill's unexhausted *Atkins* claim to the state court and to stay the remaining claims pending resolution of the *Atkins* claim. *Hill*, 300 F.3d at 683. After the case was returned to the state court, three experts—Drs. David Hammer, J. Gregory Olley, and

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[4]Some prison guards and officials testified in court or during interviews conducted by the experts that Hill properly accounted for the funds in his commissary account and filled out his own commissary forms, had no noticeable difficulties maintaining proper hygiene, and was of average abilities relative to his fellow death-row inmates. However, as will be discussed further below, both the Supreme Court and clinical guidelines "caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Moore*, 137 S. Ct. at 1050. Thus, while we do not ignore evidence in the record of Hill's seemingly improved adaptive functioning once he entered the highly regimented environment of death row, we find error in the state courts' overly emphasizing such evidence without also considering the contradictory evidence highlighted above and without acknowledging the diagnostic limitations associated with evaluating "improved behavior in prison." *See id.*

[5]The Supplemental *Atkins* Appendix can be found in the district court record at R. 97 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Apr. 30, 2010).

[6]The Mitigation Hearing Transcript can be found in the district court record at R. 31 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28, 1997).

Nancy Huntsman—examined Hill and testified over the course of several evidentiary hearings on Hill's *Atkins* claim.[7] Dr. Hammer was retained by Hill, Dr. Olley acted as the state's expert, and Dr. Huntsman was appointed by the trial court. Dr. Hammer concluded that Hill met all three prongs for a diagnosis of intellectual disability. However, Drs. Olley and Huntsman concluded that Hill was not intellectually disabled. After considering the evidence presented on Hill's claim of intellectual disability, the state trial court denied Hill's petition for relief under *Atkins*, finding that Hill did not exhibit significant adaptive deficits and that any deficits he did have did not manifest before the age of 18. *State v. Hill*, No. 85-CR-317 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported). The Ohio Court of Appeals affirmed the trial court over a dissent. *State v. Hill*, 894 N.E.2d 108 (Ohio Ct. App. 2008). The Ohio Supreme Court declined to review the case, with two justices dissenting. *State v. Hill*, 912 N.E.2d 107 (Ohio 2009) (table).

Hill then moved to reopen and amend his habeas petition in this case to include claims under *Atkins*. The district court denied Hill's amended petition in a thorough opinion, holding that the deferential standard of review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) mandated denial of Hill's habeas petition. *Hill v. Anderson*, No. 4:96-cv-00795, 2014 WL 2890416, at *51 (N.D. Ohio June 25, 2014). The district court denied Hill's petition despite its serious misgivings about the state court's rejection of the extensive record evidence that provided important diagnostic information regarding Hill's adaptive functioning and the age of onset of Hill's intellectual disability. *Id*. Ultimately, the district court believed AEDPA required acceptance of the state court's determinations that Hill did not exhibit sufficient adaptive deficits and that Hill's disability did not manifest before the age of 18.

The district court was right to be skeptical of the state court judgment because it amounted to an unreasonable application of the standard articulated by the Supreme Court in *Atkins* and as later explained by *Hall* and *Moore*. Specifically, the state court's determination was unreasonable in two ways: First, the state court departed from the requirements of *Atkins*

[7]As part of his *Atkins* evaluation, Hill was administered recognized standard tests measuring adaptive behavior by the three experts. The tests took place in a prison conference room. All three experts determined that the results of these tests were not reliable because Hill was "faking" the answers and in some instances did not complete the tests, instead breaking down in tears and claiming the tests were "too hard." As these tests were deemed unreliable, the experts were forced to base their assessments on their interactions with Hill and on interviews with prison guards. *See Hill*, 894 N.E.2d at 113.

when it disregarded well-established clinical standards for assessing adaptive deficits by focusing on Hill's adaptive strengths instead of his adaptive deficits. Second, the trial court ignored clear and convincing evidence that Hill exhibited substantial deficits in both his intellectual and adaptive abilities since long before he turned 18.

II. Standard of Review

The parties dispute the proper standard of review for Hill's *Atkins* claims. Hill argues that we should review the state courts' determinations on adaptive deficits and age of onset as legal conclusions under 28 U.S.C. § 2554(d)(1), which would have us ask whether those decisions amount to an unreasonable application of the Supreme Court's precedents in *Atkins* and its progeny. The Warden argues that we should instead review those determinations as findings of fact under 28 U.S.C. § 2254(d)(2), which would require us to accept the state court's findings absent "clear and convincing evidence" to the contrary. 28 U.S.C. § 2254(e)(1).

We agree with Hill that the state courts' determination on adaptive deficits should be analyzed as a legal conclusion under 28 U.S.C. § 2254(d)(1) because it is merely the result of an application of the standard articulated by the Supreme Court in *Atkins* and its progeny to the facts as found by the trial court. *See Van Tran v. Colson*, 764 F.3d 594, 626-27 (6th Cir. 2014) (holding that the "state court's application of Tennessee law with regard to whether [the defendant] is intellectually disabled under *Atkins* was contrary to clearly established federal law"); *Black v. Bell*, 664 F.3d 81, 100 (6th Cir. 2011) ("The rules governing what factors may be considered in determining whether a defendant qualifies as mentally retarded under *Atkins* deal with questions of law."); *Murphy v. Ohio*, 551 F.3d 485, 510 (6th Cir. 2009) (reviewing state courts' resolution of *Atkins* claim under 28 U.S.C. § 2554(d)(1)). As a result, our review under AEDPA consists of determining whether the state courts' conclusion that Hill did not exhibit deficits in two or more adaptive skill sets was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court judgment is the result of an unreasonable application of clearly established law for AEDPA purposes when the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 408-09 (2000).

However, we agree with the Warden that the state court's conclusion on the age of onset is better analyzed as a finding of fact under 28 U.S.C. § 2254(d)(2) as it is based entirely on an assessment of the evidence presented during Hill's evidentiary hearing. Accordingly, our review is limited to the question of whether the state court's finding that Hill's intellectual and adaptive deficits did not manifest before the age of 18 amounts to "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). In making that assessment, we are mindful that AEDPA directs us to presume that facts decided by the state court are correct absent "clear and convincing evidence" to the contrary. 28 U.S.C. § 2254(e)(1).

III. Adaptive Deficits

Hill first disputes the Ohio court's finding that he did not exhibit "subaverage adaptive skills," reasoning that the state court's finding amounted to an unreasonable application of *Atkins* because the court's analysis on that point disregarded established medical practice. We agree and find that Hill has deficits in at least two adaptive skillsets under *Atkins*.

A. Standard for Assessing Adaptive Deficits

In *Atkins v. Virginia*, the Supreme Court held that the Eighth Amendment prohibits the execution of intellectually disabled individuals after identifying a "national consensus" against the practice from a survey of state legislation exempting the intellectually disabled from the death penalty. 536 U.S. at 314-17. The Court defined "mental retardation" by reference to two clinical definitions of the phrase: one from the American Association on Mental Retardation's *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992), and a second from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000). *Id.* at 308 n.3. Both definitions consisted of three independent elements: (1) significantly subaverage intellectual functioning, (2) significant limitations in adaptive functions, and (3) the first two elements manifested themselves before the age of 18. *Id.*

Since *Atkins*, the Supreme Court has twice reaffirmed the centrality of clinical standards to the judicial inquiry regarding a defendant's eligibility for the death penalty. *Moore*, 137 S. Ct.

at 1048-49; *Hall*, 135 S. Ct. at 2000. While it is true that the states retain some discretion to "develop[] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," *Atkins*, 536 U.S. at 317 (internal quotation and citation omitted), the Court has been clear that the states' discretion on that count is not "unfettered." *Moore*, 137 S. Ct. at 1048, 1052-53 (quoting *Hall*, 134 S. Ct. at 1998). Specifically, states' determinations on the question of whether an individual is intellectually disabled "must be 'informed by the medical community's diagnostic framework.'" *Id.* at 1048 (quoting *Hall*, 134 S. Ct. at 2000). When a court "disregards established medical practice" in assessing a criminal defendant's claim of intellectual disability, the error amounts to an unreasonable application of clearly established federal law. *Hall*, 134 S. Ct. at 1995, 2001; *see also Moore*, 137 S. Ct. at 1053.

Moore v. Texas clarified the "prevailing clinical standards" for assessing whether a criminal defendant possesses sufficient adaptive deficits to be constitutionally ineligible for execution. *Moore*, 137 S. Ct. at 1050-52. In *Moore*, the Texas Criminal Court of Appeals concluded that the prisoner did not exhibit sufficient adaptive deficits because he had previously "lived on the streets, mowed lawns, and played pool for money." *Id.* at 1050. The Court rejected that approach and admonished courts not to "overemphasize[] [the defendant's] perceived adaptive strengths." *Id.* Instead, courts should follow "prevailing clinical standards," which "focus[] the adaptive-functioning inquiry on adaptive *deficits*." *Id.* (emphasis in original) (citing AAIDD-11, at 47 (2010) and DSM-5, at 33, 38 (2013)). The Supreme Court further noted "even if clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain, neither Texas nor the dissent identifies any clinical authority permitting the arbitrary offsetting of deficits against unconnected strengths in which the [Texas Court of Criminal Appeals] engaged." *Id.* at 1050 n.8. The Supreme Court also cautioned against "reliance on adaptive strengths developed 'in a controlled setting,' [like] prison" and pointed to clinical guidelines advising that strengths observed in prison should be compared to similar skills in general society whenever possible. *Id.* (citing DSM-5, at 38 (2013)).

Although they were decided after the state court decisions in this case, the primary holdings in *Hall* and *Moore* were compelled by *Atkins*. Both are illustrations of what was

previously established by *Atkins*. *Harris v. Stovall*, 212 F.3d 940, 944 (6th Cir. 2000) ("'[C]learly established federal law as determined by the Supreme Court of the United States' means that the rule sought by petitioner must have been dictated or compelled by [existing precedent].").

Atkins itself looked to the consensus of the medical community as reflected in medical texts and treatises to define "intellectual disability." 536 U.S. at 308 n.3. In coming to its conclusion that the focus of the adaptive-functioning inquiry should be on adaptive deficits and not strengths, the Supreme Court in *Moore* looked to the medical texts available to it, including the American Association on Intellectual and Developmental Disabilities (11th ed. 2010), and a second from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013). *Moore*, 137 S. Ct. at 1045. Neither of these editions cited by the Court would have been available at the time of Hill's *Atkins* hearing. However, the medical literature available in 2008 also required that the focus be on adaptive deficits rather than adaptive strengths. For example, the American Association on Mental Retardation defined "mental retardation" and then provided four assumptions "essential to the application of the definition," including that "[s]pecific adaptive limitations often coexist with strengths in other adaptive skills or other personal capabilities." AAMR-9 (1992). As mentioned above, this source was cited by the Supreme Court in *Atkins* in order to define intellectual disability. 536 U.S. at 308 n.3. Additionally, a later edition of the American Association on Mental Retardation's manual says that intellectually disabled persons may have "strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation." AAMR-10, at 8 (2002).

Consequently, the Ohio Court of Appeals was required by *Atkins* and the medical literature available to it in 2008 to assess whether Hill had adaptive skill deficits in two or more categories, and not to focus on Hill's adaptive strengths. Our use of *Moore* and *Hall* is limited to comply with AEDPA, but our conclusion regarding what *Atkins* clearly established is buttressed by the Court's reasoning in *Hall* and *Moore*. In *Hall*, for instance, the Court stated that it "reads *Atkins* to provide substantial guidance on the definition of intellectual disability," 134 S. Ct. at 1999, and the Court determined that Florida had "misconstrue[d] the Court's statements in

Atkins" in refusing to allow defendants to present evidence of intellectual disability if their IQ scores exceeded 70. *Id.* at 2001. And in *Moore*, the Court described the Texas Court of Criminal Appeals' "conclusion" that the defendant was not intellectually disabled as "irreconcilable with *Hall*." 137 S. Ct. at 1049. Such statements indicate that *Atkins* dictated the holding in *Hall*, and *Hall*, in turn, dictated the holding in *Moore*.

In addition, the *Moore* Court described a 2015 case—*Brumfield v. Cain*, 135 S. Ct. 2269 (2015)—as "relying on *Hall* to find unreasonable a state court's conclusion that a score of 75 precluded an intellectual-disability finding." 137 S. Ct. at 1049. Because *Brumfield* reached the Supreme Court on collateral review and the state post-conviction rulings on the defendant's *Atkins* claims preceded *Hall*, the Supreme Court's reliance on *Hall* in *Brumfield* makes clear that *Hall*'s principal holdings were compelled by *Atkins*. Finally, a recent decision by our court discussed *Hall* and *Moore* in reviewing a district court's denial of an *Atkins* claim, even though the district court's decision predated *Hall* and *Moore*. *Black v. Carpenter*, 866 F.3d 734, 744 (6th Cir. 2017). *Black* therefore corroborates this panel's conclusion that the holdings of *Moore* and *Hall* were required by *Atkins*.

B. Ohio Courts' Application of Atkins

Contrary to *Atkins*, the Ohio courts overemphasized Hill's adaptive strengths and relied too heavily on adaptive strengths that Hill exhibited in the controlled environment of his death-row prison cell. In so doing, they unreasonably applied clearly established law.

Ohio has adopted the three-prong standard set forth in *Atkins* for evaluating a claim of intellectual disability. *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002). In *Lott*, the Supreme Court of Ohio specifically approved the definition of intellectual disability set forth in the then-current editions of the diagnostic manuals. *Id.* at 1014. Applying the standards in those manuals, individuals had significant limitations in adaptive skills if they exhibited deficits in at least two of the following ten areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.[8]

[8]The later editions of the AAIDD Manual have moved away from this scheme of categorization, instead forming three "clusters" of related skills and requiring a significant limitation in one of those broader domains.

In this case, the Ohio appellate court correctly set forth the three-prong *Atkins* standard as adopted by the Ohio Supreme Court in *Lott*. It also correctly noted that the second criterion under *Lott* requires the defendant to demonstrate "significant *limitations* in two or more adaptive skills, such as communication, self-care, and self-direction." *Hill*, 894 N.E.2d at 113 (emphasis added). The Ohio court then veered off track when it disregarded the prevailing clinical practice documented in the medical literature by placing undue emphasis on Hill's adaptive strengths, as opposed to his adaptive weaknesses, and by relying too heavily on the observations of prison guards concerning Hill's behavior in the highly regimented environment of his prison block. *Id.* at 124-25.

1. The Ohio Courts Inappropriately Focused on Hill's Adaptive Strengths

The Ohio courts' conclusion that Hill did not demonstrate significant limitations in two or more adaptive skill areas was the result of an inappropriate focus on Hill's adaptive strengths instead of the constitutionally required analysis of Hill's adaptive weaknesses. In 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 with law enforcement and the legal system, and the circumstances surrounding the Fife murder. *State v. Hill*, slip op. at 73-77. Those supposed adaptive strengths convinced the state trial court that Hill could not be intellectually disabled because he had "remarkable" communication and vocabulary skills and was self-directed. *Id.* at 74. Even assuming the truth of those findings—though there is substantial evidence in the record to contradict them—they demonstrate only that communication and self-direction may be some of Hill's strengths, and "prevailing clinical standards" hold that such strengths cannot be used to discount demonstrated weakness in other areas of adaptive functioning. *Moore*, 137 S. Ct. at 1050. Even cursory analysis of the evidence from the *Atkins* hearing reveals that Hill has had consistent and significant limitations in at least two identified areas of adaptive functioning—functional academics and hygiene/self-care—since

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"Conceptual" skills include language skills, reading and writing abilities, self-direction, and grasping concepts of money. These conceptual skills may be collectively labeled as functional academics. "Social" skills focus on interpersonal relationships, responsibility, self-esteem, gullibility/naïveté, following rules/obeying laws, and avoidance of victimization. "Practical" skills focus on self-care and daily living. Such skills include preparing and eating meals, dressing, toileting, personal mobility and use of transportation, occupational skills, health care, and maintenance of safe environments.

childhood. The record also supports finding limitations in two additional areas—social skills and self-direction.

With respect to functional academics, Hill was considered "mentally retarded" by the Warren City Schools. He was diagnosed as mildly mentally retarded, "trainable mentally retarded," or "educable mentally retarded" several times before he turned 18, beginning with the recognition that he was a "slow learning child" when he began formal schooling at age 6. He scored below 70 on every IQ test administered during his school years. He attended special education classes for the entirety of his school career, which meant that all of his academic classes were taught at a very basic level. He was "mainstreamed" only in physical education and music, and struggled even there to keep up with and socialize normally with his peer group. There is no record of him taking "mainstream" classes in any academic subject area, i.e., math, reading, or history. At age thirteen, he was sent to a school for intellectually disabled children, and was transferred to another, similar school at fifteen because of poor academic achievement and behavior. At seventeen years old, after being arrested for, and pleading guilty to, two felony rape charges, the juvenile court placed Hill in a facility that housed youth offenders with mental disabilities or emotional problems. There, Hill completed ninth grade in special education classes at age 18. After being released, he returned to high school, but Fife's murder occurred six months later.

At age six, Hill did not know his age, but thought he was nine. His reading and verbal skills were at the five-year-old level and he had a mental age of four years and six months. At age 8 and 8 months, Hill was considered functioning at a "high kindergarten level." At age 13, he was functioning at the "mid-2nd grade level" in reading and the "mid-1st grade level" in arithmetic. Also when Hill was 13-years-old, a school psychologist set out "special instructional recommendations" that included teaching Hill his address and phone number, as well as how to tell time. He exhibited weaknesses in reasoning ability, originality, verbal interaction, and a lack of intellectual independence. By 14, he was reading at a first-grade level and his math skills were at a third-grade level, and he still had not mastered writing his own signature. His teacher was working on self-control skills that would generally be mastered by a kindergarten student, including "working without being disruptive" and not touching other students inappropriately.

Teachers set academic objectives like learning to: tell time in five-minute intervals; write his own signature; shower regularly; put soiled clothing in the appropriate place; and eat and drink in a manner appropriate in a school setting. Hill was described as hyperactive and needing to complete tasks "one step at a time."

The record also demonstrates that Hill was deficient in hygiene and self-care. At the age of 14, he still needed to be told to shower regularly, brush his teeth, and apply deodorant every day. He would not independently follow through and take care of his hygiene unless he was told to do so. At approximately age 16, a group home officer noted that although Hill was "improving in his personal hygiene," he still "need[ed] constant reminder[s] to shower, brush his teeth, etc.[.]" Hill continued to have problems with his hygiene in prison and had to be reminded frequently to groom himself.

The record also demonstrates Hill had limitations in the area of social skills. For example, the district court pointed to the testimony of psychologists who spoke to Hill's "poor self-esteem, inability to interpret social situations and create positive relationships, and [the fact] that he was easily influenced by people, gravitated toward an antisocial peer group, and did not respond appropriately to authority figures." *Hill*, 2014 WL 2890416, at *38. Hill's school and court records demonstrate that he had trouble making friends. At 17, Hill was described as "socially constricted" and possessing "very few interpersonal coping skills."

Hill also showed limitations in at least one more area—self-direction. Hill was described as "easily led" in both his school and court records, and from periods both before and after he committed serious crimes while apparently acting alone. In school, Hill was described as immature and "easily led by others into trouble around school," like fighting. He was vulnerable to exploitation by older individuals, displayed inappropriate and immature behaviors in class, rarely considered the consequences before acting, and had trouble conforming his behavior to the rules or the law. When Hill was 13, he was described as exhibiting a "great deal of impulsivity." When Hill was 17, he was evaluated by a psychologist who concluded that he had poor judgment, "d[id] not think of consequences," was "highly suggestable," and "was 'likely to be exploited'" if placed in halfway home for adults "because of his 'passivity and limited

intellectual ability.'" Another report from that same time expressed concern about his tendency to follow others.

In addition to his significant limitations in functional academics, self-care, social skills, and self-direction, the record also demonstrates that Hill has never lived independently, never had a driver's license or a bank account, never been able to perform a job without substantial guidance from supervisors, was labeled "functionally illiterate" at school and in prison, could never read or write above a third-grade level, and could never adequately sign his own name.

In sum, the record is clear that Hill was universally considered to be intellectually disabled by school teachers, administrators, and the juvenile court system, and that those same authorities documented deficits in several adaptive skills areas. Hill consistently performed very poorly in school (functional academics); there was consistent documentation that he had trouble maintaining proper hygiene despite reminders (self-care); he had trouble making friends and responding appropriately to authority figures (social and communication); and he was described as a follower, easily led, and vulnerable to exploitation by adults (self-direction). The record shows that these deficits largely continued into adulthood, particularly with respect to self-care and functional academics. When these facts are applied 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. Any apparent strengths are not relevant to the inquiry.

The Ohio court's finding to the contrary does not comport with the clinical guidelines ratified by the Supreme Court for assessing adaptive deficits. Hill's ability to communicate effectively and to direct his actions to a specified goal does not mean that he did not have significant limitations in other adaptive skill areas. Instead of marshalling facts in opposition to the clear conclusion from the record evidence that Hill had significant limitations in at least functional academics and self-care, the Ohio court rested its conclusion on Hill's relative strengths in communication and self-direction. And even within those two areas, the Ohio courts failed to grapple with the evidence in the record indicating that Hill's perceived strengths were actually weaknesses.

To the extent the Ohio courts addressed evidence in the record pointing to adaptive deficits, they turned to inapposite or irrelevant facts to "arbitrar[ily] offset[]" such evidence of deficits—a practice *Moore* expressly rejects. *See* 137 S. Ct. at 1050 n.8 ("[E]ven if clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain, neither Texas nor the dissent identifies any clinical authority permitting the arbitrary offsetting of deficits against unconnected strengths in which the [Texas Court of Criminal Appeals] engaged."). For instance, the state trial court discounted evidence of Hill's "consistently poor" academic performance by pointing to evidence in the record that Hill was "a healthy boy described frequently by his teachers as lazy, who admits to experimenting with drugs and alcohol, who assaults the defenseless, steals frequently and lies a lot," and who, by age 18, could "write in cursive, but prefer[red] to print." *Hill*, slip op. at 70. The trial court then pointed to a teacher's note, written in October 1981, describing Hill as "a bright, perceptive boy with high reasoning ability." *Id.* The Ohio appellate court summarized the evidence regarding Hill's childhood academic performance in similar terms, stating that "Hill's public school records amply demonstrate a history of academic underachievement and behavioral problems," and noting that he "was described by at least one of his special education teachers as 'a bright perceptive boy with high reasoning ability.'" *Hill*, 894 N.E.2d at 124. The court also noted that while there "are references to Hill's being easily led or influenced by others, the trial court noted that much of Hill's serious misconduct, including two rapes committed prior to Fife's murder, occurred while he was acting alone." *Id.*

The problems with the courts' analyses of Hill's academic performance are manifold. As the district court noted, "the court's finding that Hill 'underachieved' academically or in any other adaptive skill as a child is squarely contradicted by the record. This Court could not find one reference in Hill's school records by a teacher, school administrator, psychologist, psychiatrist, or anyone else suggesting that Hill was capable of performing at a substantially higher level but chose not to.'" *Hill*, 2014 WL 2890416, at *26. And as clinical guidelines have long recognized—and as the experts in this case testified—evidence of behavioral problems or a conduct disorder simply does not undermine a simultaneous finding of intellectual disability. *See Atkins* Hr'g Tr. at 475 (Hammer test.); *id.*at 959-60 (Huntsman test.); *id.* at 573 (Olley test.) ("[I]f he's having conduct problems in school, that's neither here nor there to a diagnosis of

mental retardation."). The courts incorrectly discounted the fact that Hill was easily led because he committed crimes on his own. Under prevailing medical standards, however, Hill's prior criminal behavior should not be given weight in this analysis. Finally, the Ohio courts' focus on a note drafted by a teacher *in a school for intellectually disabled children* describing Hill as "'bright' and 'perceptive,' with 'high reasoning ability'" was, as the district court put it, "almost cynical in its selective misrepresentation of the facts." *Hill*, 2014 WL 2890416, at *27. Throughout its opinion, the district court referred to certain findings and inferences by the Ohio courts as "troubling," "irrelevant," "problematic," and "squarely contradicted by the record." *Id.* at **24-27.

The Ohio courts' handling of evidence regarding self-care is equally troubling. The Ohio Court of Appeals' sole reference to Hill's deficits with regard to self-care was its summary of testimony provided by a prison official "that Hill's self-care was 'poor but not terrible' and that Hill had to be reminded sometimes about his hygiene." *Hill*, 894 N.E.2d at 125. Such a statement downplays the record's extensive chronicling of Hill's struggles with hygiene, including the fact that an individual education plan established for Hill when he was nearly fourteen years old included an "[a]nnual [g]oal and [o]bjective" of helping Hill "learn to shower when necessary" and to "put soiled clothing in the appropriate place." *Atkins* Hr'g Tr. at 147, 193 (Hammer test.).

The state trial court also unduly relied on Hill's "initiative in coming to the police" after Fife's death, as well as his alleged efforts to misdirect the investigation and fabricate an alibi while under interrogation, as "evidence of Hill's ability concerning self-direction and self-preservation." *See Hill*, 2014 WL 2890416, at *33. As the district court noted, "'[s]elf-preservation' is not among the adaptive skills measured under the clinical definitions of intellectual disability," and "self-direction" covers a host of behaviors—including "initiating activities appropriate to the setting" and "demonstrating appropriate assertiveness and self-advocacy skills"—either unrelated or directly contrary to Hill's decision to make contact with the police. *Id.* Contrary to the Ohio courts, the district court found Hill's "performance" during the police interrogation revealed him to be "childlike, confused, often irrational, and primarily self-defeating," and characterized Hill's attempts to change his story under pressure as failing to

"skillfully hid[e] his part" in Fife's death. *Id.* at *34. These actions were "quite the opposite of adaptive." *Id.* This is especially true where Hill's decision to approach the police did not "resolve his problems," but "succeeded only in immediately drawing the police's attention to himself." *Id*.

Hill's behavior during questioning also undermines the conclusion that he had strengths in self-direction. For example, Hill often changed his story or embellished his statements "at the slightest suggestion by the police, even when the information at issue was irrelevant or incriminating." *Id*. at *35. While the Ohio court focused on what it saw as Hill's abilities in the area of "self-direction" from around the time of the crime, it also ignored other evidence from around the same time illustrating that Hill had adaptive deficits. For example, at Hill's mitigation hearing, three psychologists testified that Hill was intellectually disabled at that time and had extremely poor adaptive functioning. On appeal, the Ohio Supreme Court and Court of Appeals found these psychologists' testimony credible and concluded that Hill was disabled. *See State v. Hill,* 595 N.E.2d 884, 901 (Ohio 1992); *State v. Hill,* Nos. 3720, 2745, 1989 WL 142761, at ** 6, 32 (Ohio Ct. App. Nov. 27, 1989).

It is true, of course, that the state trial court expressly "relie[d] upon the expert opinion of Drs. Huntsman, Hancock and Olley to conclude" that Hill had failed to demonstrate adaptive deficits. *Hill*, slip op. at 81. We have previously denied *Atkins* relief in an AEDPA case arising out of Ohio where, as here, two of the three mental health experts testified that the petitioner was not intellectually disabled. *O'Neal v. Bagley*, 743 F.3d 1010, 1023 (6th Cir. 2013) ("With expert testimony split, as it often is, the state court chose to credit Dr. Chiappone and Dr. Nelson over Dr. Tureen, and we cannot say from this vantage that it was unreasonable to do so."). However, *O'Neal* is distinguishable on its facts and Hill's claim for *Atkins* relief is much stronger than the petitioner's claim in *O'Neal*. For example, in *O'Neal* there was insufficient evidence to prove that the petitioner met the first prong in demonstrating "significantly subaverage intellectual functioning." *Id*. at 1022. Here, by contrast, Hill's IQ is so low that the Warden concedes that Hill satisfies the first prong. Additionally, O'Neal's claim for *Atkins* relief also failed because his adaptive deficits may well have been better explained by his drug abuse and personality disorder rather than organic mental illness. *Id*. at 1022-23.

Even though *Atkins* requires that determinations regarding intellectual disability be informed by the medical community, as discussed above, the Ohio courts should have rejected the expert testimony in this case. Requiring courts to be "informed by the medical community's diagnostic framework," *Moore*, 137 S. Ct. at 1048 (quoting *Hall*, 134 S. Ct. at 2000), does not authorize courts to tether their decisions to expert opinions that depart from that "diagnostic framework." As Dr. Olley recognized, and as the clinical guidelines make clear, "the AAMR manual specifically says you would expect that individual[s] would have some relative strengths and some relative weaknesses." *Atkins* Hr'g Tr. at 557 (Olley test.). And yet neither Dr. Olley nor Dr. Huntsman appeared to apply this crucial aspect of the clinical guidelines in assessing Hill's adaptive deficits.[9] Consequently, many of the same criticisms we have of the trial court's analysis of Hill's *Atkins* claim apply equally to Dr. Olley's and Dr. Huntsman's testimony.

Dr. Huntsman's report focuses almost exclusively on Hill's perceived adaptive strengths—his "remarkable memory for the history of his case," his detailed and "very complex explanation for how Raymond Fife came to be killed," and the "competencies" observed by staff members in prison. Supp. *Atkins* App'x at 1141. (Huntsman Report at 16.) Her testimony at the *Atkins* hearing was no different. *Atkins* Hr'g Tr. at 907 ("[I]t's my opinion that he clearly demonstrates behavioral *capacities* that are beyond retarded level.") (emphasis added). Dr. Olley's report and testimony suffer the same defects. *See* Supp. *Atkins* App'x at 1125 (Olley Report at 8) ("The available information on Mr. Hill's current functioning does not allow a diagnosis of mental retardation . . . . Mr. Hill's memory was very good in court on April 15, 2004, when he provided details of events. In [an] interview during this evaluation, Mr. Hill showed good memory of 20-year old events and the ability to express a complex explanation of the crime in order to support his claim of innocence."); *Atkins* Hr'g Tr. at 586 (defending his opinion, in part, because of the way in which Hill exhibited "a kind of thinking and planning and integrating complex information that is a higher level than I have seen people with mental retardation be able to do").

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[9] Dr. Hancock, the third expert on whom the state trial court expressly relied, did not assess Hill's adaptive deficits. Instead, he was called upon "to review the test equating method used [by yet another expert, Dr. Sara Sparrow, whose opinion Hill wished the court to consider] to interpret scores in adaptive behavior testing of Danny Lee Hill and to examine other psychometric issues that may affect appropriate diagnostic process in the case." Supp. *Atkins* App'x at 3093. (Hancock Supp. Report at 1.)

In short, Drs. Olley and Huntsman adopted precisely the sort of analysis the Supreme Court has foreclosed. Courts cannot bypass the Supreme Court's clear instruction not to "disregard[] established medical practice," *Hall*, 134 S. Ct. at 1995, by relying on experts who have done just that. Consequently, it was unreasonable under the circumstances of this case for the Ohio courts to rely on Dr. Olley's and Dr. Huntsman's expert opinions in finding that Hill was not intellectually disabled. The state courts' failure to consider adequately Hill's adaptive deficits amounts to a sufficiently unreasonable application of the Supreme Court's decisions in *Atkins*, *Hall*, and *Moore* to warrant issuance of the writ.

2. The Ohio Courts Gave Undue Weight to Hill's Behavior in Prison

Although the Ohio courts' reliance on Hill's adaptive strengths without addressing the overwhelming evidence of his weaknesses in the areas of functional academics and self-care would be enough to justify issuance of the writ, we also hold that the Ohio courts unreasonably applied clearly established law by placing undue weight on a criminal defendant's behavior in prison when assessing his or her adaptive skills.

As mentioned above, *Atkins* drew from the consensus of the medical community as reflected in medical texts and treatises to define intellectual disability. 536 U.S. at 308 n.3. The medical literature available in 2008 prohibited the assessment of adaptive skills in atypical environments like prison. For example, the 2002 American Association on Mental Retardation says "[l]imitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture." AAMR-10, at 8. It continues: "This means that the standards against which the individual's functioning must be measured are typical community-based environments, not environments that are isolated or segregated by ability." *Id*. As the district court correctly noted, "death row is a segregated, highly structured and regulated environment" and reliance on Hill's prison records is problematic because they evaluate Hill's adaptive skills against those of other inmates on death row. *Hill*, 2014 WL 2890416, at *42.

Further, the district court noted that the weight of the testimony from various death row prison officials was limited by their potential bias against the inmates they were charged with

guarding, as well as the shortcomings affecting lay opinions about intellectual disability generally. *Id.* at **42-43. And in any event, as the district court noted, many of the prison officials' statements were "rife with contradictions, with themselves and each other." *Id.* at *43.

Assessing Hill's adaptive deficits as an adult is particularly challenging given the absence of any reliable testing to measure Hill's adaptive functioning and the lack of reliable evidence of how Hill would have functioned as an adult in general society as he has been incarcerated for all but six months of his adult life. Evidence of adaptive functioning in this kind of controlled setting is of limited value because inmates do not have the same opportunities to acquire new skills or show weaknesses in existing skills. Given the lack of evidence regarding Hill's likely adaptive performance as an adult in the general community, the Supreme Court and established clinical guidelines require consideration of all available evidence. Specifically, the testimony of prison guards who have known Hill only in a correctional setting should lead the court to treat their observations with a degree of skepticism. *United States v. Hardy*, 762 F. Supp. 2d 849, 899-900 (E.D. La. 2010) ("An institutional environment of any kind necessarily provides 'hidden supports . . . .'") (citing AAIDD-11, at 45 (2010)).

Here, the state court assessed Hill's adaptive skills almost exclusively by reference to the testimony of prison guards about Hill's behavior in a "controlled" prison environment, without mention of documentary evidence of Hill's deficits in a number of adaptive skill areas both before and after his incarceration. It did not mention any review of prison records, which reflect that prison officials always recognized Hill to be mentally incapacitated or "slow." As when he was in school, Hill was considered to be illiterate in prison. He was understood to have a "very limited writing ability," and he had other inmates write for him. Notes written from Hill to prison officials make clear that he had trouble keeping track of his prison account balance. According to fellow inmates, when Hill was given a task, he had to be carefully supervised because he could not remember how to complete the assigned task. At least one prison official reported that Hill was able to perform his job as a porter because the cleaning supplies were sorted by color, so Hill was not required to read the supplies' instructions.

The state courts' emphasis of and reliance upon prison guard testimony about Hill's behavior in prison without consideration of record evidence suggesting Hill had significant

limitations even in the "controlled setting" of his cell block goes against both the Supreme Court's precedent and long-established clinical practice. That error compounds the trouble with the state court's emphasis of Hill's strengths without independent consideration of his adaptive weaknesses because much of the evidence supporting the court's finding of Hill's adaptive strengths was based on observations of and testimony about Hill's behavior in a "controlled setting" as opposed to in the general community. Because that analysis disregards prevailing clinical standards, it amounts to an unreasonable application of the Supreme Court's decisions in *Atkins*, *Hall*, and *Moore*.

Because "[t]he medical community's current standards supply one constraint on States' leeway" in defining who is "intellectually disabled," the Ohio courts were not free to disregard the medical consensus on the appropriate standard for assessing whether Hill exhibited adaptive deficits. *Moore*, 137 S. Ct. at 1053. Application of the correct standard to the record evidence overwhelmingly supports the conclusion that Hill exhibited substantial deficits in at least two adaptive skillsets; consequently we disregard the state court's determination because it was the result of an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States" under 28 U.S.C. § 2254(d)(1).

IV. Age of Onset

We also reject the state court's finding that Hill's intellectual and adaptive deficits did not manifest themselves prior to the age of 18 because clear and convincing evidence suggests otherwise. *See* 28 U.S.C. § 2254(e)(1). In fact, as noted above, Hill's disability was extensively documented before he turned 18 because he spent all of his school years in programs for the intellectually disabled and the juvenile justice system. The record is replete with comments from teachers concerning Hill's lagging academic performance, his poor memory, his lack of personal hygiene, his immature and inappropriate behavior in relation to his peers, and his tendencies as a follower. *Hill*, 894 N.E.2d at 128-29 (O'Toole, J., dissenting). In addition to school records, the state court record contains testimony to similar effect from several staff members at a halfway house in which Hill resided as a teenager, as well as a counselor at the juvenile correction facility where he was placed.

All the of these significant adaptive skill deficits manifested themselves before Fife was killed in 1985 and, as noted by the experts, there was no reason to suspect that Hill was malingering as a child despite his apparent malingering on the assessments administered in April 2004. 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. Accordingly, we reverse the state courts' conclusion on the age-of-onset prong as it is contradicted by clear and convincing evidence.

We recognize, of course, that state court determinations of fact are entitled to a great deal of deference. But "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). 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." *Hill*, slip op. at 82. In so doing, the trial court inappropriately focused on perceived adaptive strengths, ignored clinicians' warnings not to conflate criminal behavior with adaptive functioning, *see, e.g.*, *Atkins* Hr'g Tr. at 208-09 (Hammer test.), and failed to acknowledge that Hill's performance during the police interrogations was, in the words of the district court, "childlike, confused, often irrational, and primarily self-defeating." *Hill*, 2014 WL 2890416, at *34. In a three-sentence summary, the state appellate court affirmed the trial court's findings. *Hill*, 894 N.E.2d at 126. Such selective reliance on mostly irrelevant pieces of evidence to find that Hill lacked adaptive deficits before the age of 18 constitutes "an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2).

Consequently, we conclude that the state court's finding that Hill's intellectual and adaptive deficits did not manifest before the age of 18 amounts to "an unreasonable

determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).[10]

V. Suppression of Pretrial Statements to the Police

In addition to challenging his eligibility for the death penalty after *Atkins*, Hill raised several challenges to his conviction in his habeas petition. Because we remanded his case to the state court after *Atkins* was decided in 2002, we did not reach the merits of those claims. *Hill v. Anderson*, 300 F.3d 679 (6th Cir. 2002). We do so now and **AFFIRM** his conviction.

Hill contends that the Ohio courts unreasonably applied clearly established federal law in determining that Hill's statements to police were admissible. Hill maintains that his statements were "involuntary and false" because: his intellectual disability made him especially vulnerable to police coercion; his intellectual deficiencies were known by the police, including interrogators Sergeant Thomas Stewart, Sergeant Dennis Steinbeck, and his physically abusive uncle, Detective Morris Hill; the police made statements to Hill that led him to believe that denying guilt was "hopeless"; and Hill lacked the intellectual capacity to understand the legal consequences of the statements he made (and the police recorded) while he was at the Warren police station.

Because the Ohio courts rejected this claim on the merits as part of Hill's direct appeal, *see Hill*, 595 N.E.2d at 890-91; *Hill*, 1989 WL 142761, at **5-8, Hill must show that the state courts' decisions involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. S*ee* 28 U.S.C. § 2254(d)(1). "[A]n unreasonable application of th[e Supreme Court's] holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (citation and quotation marks omitted).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that "[a] suspect in custody must be advised . . .[,] 'prior to any questioning[,] that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the

[10] As we have decided the merits of Hill's *Atkins* claim in his favor, we pretermit discussion of Hill's claim of ineffective assistance of counsel during his *Atkins* proceedings in state court.

presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010) (quoting *Miranda*, 384 U.S. at 479). This holding was necessitated by the Supreme Court's acknowledgement that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be accorded his privilege under the Fifth Amendment not to be compelled to incriminate himself." *Dickerson v. United States*, 530 U.S. 428, 434-35 (2000) (citation, quotation marks, and ellipses omitted). Thus, "[w]hen police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief." *Oregon v. Elstad*, 470 U.S. 298, 317 (1985); *see also Lego v. Twomey*, 404 U.S. 477, 487-88 (1972) ("[*Miranda*] excludes confessions flowing from custodial interrogations unless adequate warnings were administered and a waiver was obtained.").

In this case, it is undisputed that Hill was given *Miranda* warnings and signed a waiver prior to making the recorded statements that he sought to suppress at trial. Hill's challenge, then, is to the validity of that waiver. He argues that because his waiver was not knowing, intelligent, and voluntary, it was invalid.

A suspect may waive his *Miranda* rights only if "the waiver is made voluntarily, knowingly and intelligently." *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (citation and quotation marks omitted).

> The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation [reveals] both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. (citations and quotation marks omitted). For a waiver to be knowing and intelligent, the suspect must be "fully advised of [his] constitutional privilege[s]." *Colorado v. Spring*, 479 U.S. 564, 574 (1987). To be voluntary, a confession may not be "the product of coercion, either

physical or psychological." *Rogers v. Richmond*, 365 U.S. 534, 540 (1961). However, "[p]loys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns." *Illinois v. Perkins*, 496 U.S. 292, 297 (1990); *see, e.g.*, *Oregon v. Elstad*, 470 U.S. 298, 317 (1985) ("[T]he [Supreme] Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily.") (citation omitted).

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary . . . .'" *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Although a suspect's mental condition may be a "significant factor in the 'voluntariness' calculus," that "mental condition, by itself and apart from its relation to official coercion, should [n]ever dispose of the inquiry into constitutional 'voluntariness.'"[11] *Id.* at 164.

On December 16, 1985, the Ohio state trial court held a hearing on Hill's motion to suppress his audio- and video-taped statements to the police.[12] At the suppression hearing, witnesses testified to the following facts.

On September 12, 1985, two days after Fife was attacked, Hill went to the Warren Police Department and approached Sergeant Stewart to talk about that "boy being beat up in the field." R. 28, PageID# 2748-49. Stewart, who was a friend of Detective Hill and had known (Danny) Hill since he was approximately six years old, agreed to talk to Hill in the "Narcotics Room." *Id.* at 2750-51, 2782. Stewart testified that Hill had come to the police station voluntarily, i.e., that no one had "brought him in," and Hill's testimony corroborated this assertion. *Id.* at 2751; R. 29, PageID# 3130.

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[11]Under Supreme Court precedent, a person who meets the standard for intellectual disability may not be executed. As discussed extensively above, we find that Hill is intellectually disabled and is entitled to have the writ issue with respect to his sentence. However, the requirements for determining whether someone is intellectually disabled under *Atkins* and *Lott* are different from the requirements for determining whether a waiver is knowing and voluntary under *Miranda*. And a person who is intellectually disabled may still be able to knowingly and voluntarily waive his *Miranda* rights.

[12]The transcript of the suppression hearing can be found in the district court record at R. 28 and R. 29 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28, 1997). Because the pagination in the original transcript is unclear, we will cite to the pagination used by the district court.

Once in the Narcotics Room, Hill told Stewart that he had seen another boy, Reecie Lowery, riding the bike of the boy "who was beat up." R. 28, PageID# 2751-52. When Stewart asked Hill, "How do you know it's the boy's bike?", Hill responded, "I know it is." *Id*. at 2752. Hill then told Stewart about the bike's location and encouraged Stewart to "go out and get the bike" before Lowery put it back in the wooded field where Fife was attacked. *Id.* After Hill told Stewart that he was willing to show him where the bike was located, Stewart and Hill began talking about various persons, including Tim Collins and Tim Combs (Hill's co-defendant). Hill insinuated that both Collins and Combs liked boys and might have been the ones who attacked Fife. At some point during their talk, Hill mentioned that Fife was choked with his underwear. *Id*. at 2756-57.

Eventually, Stewart drove Hill to look for the bike, but because it was raining and visibility was poor, Stewart and Hill did not go to the wooded field. Instead, Hill showed Stewart where Combs lived. *Id*. at 2753-54. After dropping Hill off at his house, Stewart compiled a report that he shared with his fellow officers, including Sergeant Steinbeck. *Id*. at 2755, 2757-58.

The next day, September 13, 1985, Steinbeck went to Hill's home around 9:30 or 10:00 in the morning to follow-up on the information that Hill had given to Stewart. Steinbeck asked Hill to come talk to him at the police station and Hill agreed. *Id*. at 2762-63, 2881. Hill was driven to the police station in the front seat of Steinbeck's police cruiser and was not booked, fingerprinted, or placed under arrest. Steinbeck read Hill his *Miranda* rights aloud, asked Hill if he understood those rights, and had Hill sign a waiver of his *Miranda* rights before questioning Hill off and on for approximately three hours. *Id*. at 2863-64, 2882-84. During those three hours, Hill never asked for the questioning to stop, tried to leave, or asked to see an attorney. *Id*. at 2865-66, 2885-89. After talking to Hill, Steinbeck transcribed a copy of Hill's statement, which also included a recital of his *Miranda* rights. However, Hill did not sign the statement that day because Steinbeck had forgotten to ask him to do so after telling Hill he could go home with his mother. *Id*. at 2866-69, 2889-90.

On September 16, 1985, both Steinbeck and Detective Hill went to Hill's home, ostensibly to ask Hill to sign his statement from September 13 and to ask Hill's mother for a

written statement regarding Hill's alleged alibi. After putting up some initial resistance to speaking to the police again, Hill, at the behest of his mother, agreed to come down to the police station, this time accompanied by his mother. Hill was not placed under arrest, booked, fingerprinted, or handcuffed. *Id*. at 2869-70, 2890-92, 2899-2901, 2930-32.

In the interrogation room, and apparently separated from his mother, Hill was verbally advised of his *Miranda* rights by Detective Hill. *Id*. at 2871, 2901-02, 2933. Hill indicated that he understood his rights. *Id*. at 2902. Although not initially present, Sergeant Stewart eventually encountered Sergeant Steinbeck and Detective Hill in the interrogation room with (Danny) Hill. *Id*. at 2758, 2872, 2908. At some point, officers told Hill they did not believe he was telling the truth, and Stewart told Hill that he needed to be honest if he had "anything to do with [Fife's murder]." *Id*. at 2872, 2909-10. Officers also told Hill that it would "benefit him" to tell them the truth, believing that Combs would likely blame the attack on Hill alone. *Id*. at 2909.

Apparently at Hill's request, Detective Hill was left alone with his nephew. According to (Danny) Hill, while he and Detective Hill were alone, Detective Hill "threw [him] against the wall," slapped him across the face, and told him that he "better tell" the police what happened. *Id*. at 2759, 2810-11, 2859, 2910, 2936-37, 2953. Hill also testified that his uncle kicked him under the table in order to prompt Hill to (1) consent to his statement being taped and (2) begin talking to police at the beginning of the taping.

Detective Hill, unsurprisingly, described the time he spent alone with his nephew very differently, testifying:

> At that point in time, you know, I set [sic] there, and I tried to let Danny know that wasn't anyone [sic] going to hurt him. No one was going to do anything to him, but [I also told him] the fact that I kn[e]w that he was involved in the homicide, and I wanted to get the truth out of him. At that point in time, he looked at me and tears started to come from his eyes. When tears started coming from his eyes, he told me . . . , "I was there. I was in the field when he got murdered." When the young Fife kid got murdered.[13]

R. 28, PageID# 2937. When Detective Hill emerged from the interrogation room a few minutes later, he told the other officers that Hill was going to cooperate and tell them what happened. At

[13] Detective Hill also denied kicking his nephew.

the time Detective Hill made this announcement, Hill was either crying or had tears in his eyes. *Id*. at 2759, 2811, 2839, 2873, 2937-38.

At Stewart's suggestion, Hill gave the police permission to tape his statement. *Id*. at 2759-60, 2873-76, 2912. Sergeant Steinbeck, Sergeant Stewart, and Detective Hill were all present when Hill gave this initial audiotaped statement, as well as when Hill gave a second statement that was videotaped by Detective James Teeple. *Id*. at 2874-75. According to Stewart, Hill was not crying during the taped statement itself. About halfway through the audio-taping, the police asked Hill to sign the statement he had given to Steinbeck on September 13. *Id*. at 2903. Hill was also read his *Miranda* rights once more at some point prior to giving the second, videotaped statement. *Id*. at 2876, 2923, 2963-64. While giving his statements, Hill never asked to stop the interrogation, requested an attorney, or asked to leave. Sometime after the interrogation, Hill was placed under arrest based on the details included in his statements. *Id*. at 2776.

When asked questions about the nature of the interrogation generally, both Detective Hill and Sergeant Stewart denied that the police threatened or made promises to Hill during the interrogation, and asserted that Hill never asked for a lawyer. *Id*. at 2760, 2772, 2935, 2938. When prompted by the prosecutor about Hill's previous encounters with the police, Detective Hill estimated that by the date of the September 16, 1985 interrogation, Hill had been arrested by the Warren Police Department "[a]pproximately 15 to 20 times." *Id*. at 2929. Both Detective Hill and Sergeant Steinbeck testified that they had arrested Hill on prior occasions and had read him his *Miranda* rights "[m]any times." *Id*. at 2876, 2928-29. And two of the prosecution's exhibits at the suppression hearing included a waiver form and voluntary statement—both of which included a recitation of *Miranda* rights—signed by Hill on March 6, 1984, which was approximately a year-and-a-half before the September 16, 1985 interrogation.

In adjudicating this claim, the state appellate court rejected Hill's argument that his waiver of his *Miranda* rights was invalid. *Hill*, 1989 WL 142761, at *5. Acknowledging that it needed to make "discrete inquiries" as to both the "knowing and intelligent" and "voluntary" aspects of Hill's waiver, the appellate court considered these criteria in turn.

With regard to the knowing and intelligent factor, the appellate court noted that although the "lack of mental acuity . . . can interfere with an accused's ability to give a knowing and intelligent waiver," there is no bright line rule for distinguishing between "those capable of an intelligent waiver from those who lack the ability to do so." *Id.* The appellate court also acknowledged the Supreme Court's admonition in *Connelly* that a suspect's mental condition, by itself, does not necessarily prevent him from effectively waiving his *Miranda* rights. *Id.* In analyzing the facts of Hill's case specifically, the appellate court opined:

> [Hill] admittedly suffers from some mental retardation (although the evidence presented is divergent as to the severity of the handicap) and has had concomitant difficulties in language comprehension throughout his formal education. [Hill] is categorized as being mildly to moderately retarded. Evidence was presented which indicates that appellant is illiterate and this court acknowledges that literal recognition of each word contained in the "*Miranda* Rights" and/or "waiver form" may be beyond [Hill's] mental comprehensive capacity.
>
> However, from the record here, particularly during the suppression hearing, this court is also aware (as was the trial court below) of the long and multi-faceted exposure [Hill] has had with the state's criminal justice system. The evidential table in this case also demonstrates that [Hill] exhibited a functional capacity to understand these rights, including the right to appointed counsel. This was evident from the exchange that occurred during the audio and video tape sessions. The officers who interrogated [Hill] had either significant contact with him and/or had questioned him on prior occasions and had developed informed estimates as to [Hill's] ability to understand, albeit in a vernacular sense, all aspects of the *Miranda* warning. The audio and video tapes of [Hill's] interrogations disclose that [Hill] was capable of understanding the questions put to him and of responding intelligently.
>
> Moreover, the behavior of [Hill] during the police investigation belies the notion that he was no more than a malleable victim of police suggestion. [Hill] possessed the requisite intelligence to implicate other persons in the murder and was capable of modifying his story when inconsistencies were demonstrated to him. Additionally, [Hill] qualified and corrected the police officers' misstatements of the factual scenario which he had related to them. He also was able to follow "verbal concepting," displaying an understanding of the officers' direction of questioning and the dialogue utilized during the interrogation.

Hill, 1989 WL 142761, at *6. Based on the aforementioned concerns, and citing the Supreme Court's decisions in *Miranda* and *Lego* in support, the state appellate concluded that Hill's waiver was knowing and intelligent. *Id.*

In addressing voluntariness, the appellate court rejected Hill's argument that his waiver was involuntary "as a result of his mental [infirmities] and the coercive action of the police." *Id.* First, the court noted that Hill's IQ was not necessarily dispositive as to whether he was incapable of voluntarily waiving his *Miranda* rights, particularly since he had been read those rights in his many prior encounters with police. *Id.* at **6-7. In addressing Hill's argument that his intellectual deficiencies made him vulnerable to the police officers' "psychological ploys," the appellate court noted that Hill was read his *Miranda* rights multiple times on September 13 and 16, 1985, and "appeared articulate and coherent as he answered questions." *Id.* at *8. Finally, in concluding that the record was "devoid of evidence indicating that the custodial interrogation of [Hill] violated his constitutional rights," the appellate court reasoned that because (among other things): (1) Hill originally approached the police on September 12 of his own accord; (2) Hill was read his *Miranda* rights numerous times without ever being placed under arrest; and (3) "[t]he recorded conversations [between Hill and the police] d[id] not suggest the use of any improprieties by the police," Hill's *Miranda* claim was without merit. *Id.* at **9-10.

The Ohio Supreme Court ruled similarly, stating: "Upon a careful review of the record, we can discern no coercive or overreaching tactics employed by the police during questioning." *Hill*, 595 N.E.2d at 890. In making this finding, the court explicitly acknowledged that before Hill turned 18, Detective Hill "would at times physically discipline [his nephew] at the request of [Hill's] mother."[14] *Id.* In fact, the court appeared to credit Detective Hill's version of events—i.e., that "[Hill] stated to [Detective] Hill that he was 'in the field behind Valu King when the young Fife boy got murdered.'" *Id.* The court also found, based on the Supreme Court's ruling in *Connelly* and Hill's "his prior dealings with the criminal process as a juvenile," that Hill's "mental aptitude did not undercut the voluntariness of his statements or his waiver of *Miranda* rights." *Id.* Finally, the Ohio Supreme Court rejected Hill's contention that his waiver was rendered involuntary by virtue of the police's tactics during the interrogation. *Id.* at 891 ("Upon a careful review of the testimony and the audiotape and videotape statements, we do not find that

[14] Hill was 18 at the time of the September 16, 1985 interrogation, and Detective Hill testified at the suppression hearing that he had not physically disciplined his nephew since at least six to eight months prior. R. 28, PageID# 2976.

the interrogation tactics used by the police officers, even in light of [Hill's] mental capacity, rendered the statements involuntary, or that the officers improperly induced [Hill] to make incriminating statements.").

Reviewing the state courts' decisions under § 2254(d)(1), the district court found that Hill's arguments that he should be granted habeas relief on this claim were without merit. *Hill v. Anderson*, No. 4:96-cv-00795, 1999 U.S. Dist. LEXIS 23332, at **78-92 (N. D. Ohio Sept. 29, 1999).

Applying AEDPA's deferential review standard, we ask whether the state courts unreasonably applied Supreme Court precedent in finding that Hill's waiver of his *Miranda* rights was voluntary, knowing, and intelligent. *See* 28 U.S.C. § 2254(d)(1). *Connelly* tells us that a compromised mental state does not, "by itself and apart from its relation to official coercion," vitiate a defendant's ability to waive his *Miranda* protections. *See* 479 U.S. at 164. And *Miller v. Fenton*, 474 U.S. 104 (1985), directs us to treat state-court findings on "subsidiary questions, such as the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with the *Miranda* warnings" as "conclusive" on habeas review if they are "fairly supported in the record." *Id.* at 117.

In light of these admonitions, the state courts' conclusion that Hill effectively waived his *Miranda* rights was not "unreasonable" as that term has been defined by the Supreme Court. The state courts could plausibly credit Detective Hill's account of his interrogation techniques over Hill's allegations of physical abuse to find a lack of undue coercion and could point to Hill's prior experiences with the criminal justice system and the *Miranda* process as evidence that Hill understood the nature of his waiver.

Although the required deference to the state courts' finding compels our holding on this issue, we wish to express our consternation with this result. The record contains ample evidence demonstrating that Hill's waiver was neither voluntary nor knowing. Hill was interrogated, in private, by a police-officer uncle who admitted to disciplining Hill physically in the past, and who allegedly "'threw [Hill] against the wall,' slapped him across the face, and told him that he 'better tell' the police what happened" during the course of the interrogation. *Supra* p. 28. Hill's

uncle then purportedly kicked Hill under the table to induce his consent to a videotaped confession and kicked Hill again when he was reluctant to begin the confession. When considered alongside Hill's intellectual disabilities, Detective Hill's behavior raises grave questions about the voluntariness of Hill's waiver.

And while Hill was certainly exposed several times to *Miranda* warnings, we are not convinced that he ever registered the warnings' meaning. During the suppression hearing the state trial court held in 1985, Hill's attorney asked Hill a number of basic questions about his understanding of *Miranda*:

> Q: [W]hat are your Constitutional Rights?
> A: I don't know.
> Q: What's the word constitution mean?
> A: I don't know.
> Q: What's the word appointed—
> A: When you point at somebody.
> Q: You point at somebody?
> A: Yeah.
> . . . .
> Q: When the police talked to you, did you go ahead and talk to them?
> A: Yes.
> Q: Why?
> A: They police. [sic] You're supposed to talk to them.
> Q: You have to talk to them?
> A: Yep!
> Q: Do you know what's an attorney? [sic]
> A: I don't know.

R.29, PageID# 3114-16.

It is difficult, in light of this testimony, to accept the state courts' determination that Hill "exhibited a functional capacity to understand [his] rights." *Hill*, 1989 WL 142761, at *6. Nevertheless, because of the procedural posture of this case, we are compelled to affirm the district court.

Accordingly, we **AFFIRM** the district court's denial of habeas relief as to his suppression claim.

VI. Inflammatory Statements by the Prosecutor During Hill's Bench Trial

Hill also makes a prosecutorial misconduct claim based on the prosecutor's allegedly inflammatory statements to the three-judge panel that convicted Hill and sentenced him to death.

This claim is governed by § 2254(d)(1). As indicated above, Hill must show that the state court's decision "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

The full-text of the "inflammatory statements" challenged by Hill may be found in his opening brief. Some of those comments included:

- A reference to Raymond Fife being a 12-year-old boy from the community who had a "right to live," a right to "be in school," and a right "to be here today";
- Statements that Hill was an "animal," who "destroyed and devoured" Fife, and "would make the Marquis de Sade proud";
- A statement that "you don't necessarily have fingerprints on everything" with reference to the apparent lack of Fife's fingerprints on his bike;
- The prosecutor's opinion about which expert witness on a particular issue was "more qualified";
- A statement that Detective Hill did not want to testify against his nephew;
- A reference to Hill being a "poor, dumb boy" who nonetheless violently raped two women and therefore "relishe[d] . . . inflicting pain and torture [on] other human beings";
- A statement that Hill put Fife through a "living hell," that Fife "had no justice while he was living," and that justice demanded a guilty verdict;
- The prosecutor's opinion that defense counsel had not shown "any mitigating factors" and that the aggravated factors "clearly outweigh[ed] the absence of any mitigation";
- Two more references to Hill's history of sexual assault, which the prosecution argued belied the idea that Hill had "difficulty with his motors skills";
- A rambling soliloquy about how the prosecution would have liked to called Fife as a witness so he could describe the beating, strangulation, and sexual assault he endured, but Fife was "not here to testify about that thanks to [Hill]." The prosecutor also stated that Fife, if alive, would have testified about how he missed his family and his friends;
- A reference to Hill as "this manifestation of evil, this anomaly to mankind, this disgrace to mankind."

In adjudicating this claim as part of Hill's direct appeal, the Ohio Supreme Court (1) noted that trial counsel never objected to any of the "complained-of comments," (2) opined that those comments were therefore subject to plain error review only, and (3) concluded that the prosecutor's statements amount to "neither prejudicial error nor plain error[.]" *Hill*, 595 N.E.2d at 898. The Ohio Supreme Court also noted that in Ohio, "[courts] indulge in the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *Hill*, 595 N.E.2d at 898 (quoting *State v. White*, 239 N.E.2d 65, 70 (1968)).

The district court rejected Hill's prosecutorial misconduct claim as well, reasoning that:

> [Hill's] case was tried before a three judge panel [that] presumably was able to remember the evidence presented at trial and not be misled by any of the prosecutor's statements. Most of the statements were harmless . . . . Three judges should have been able to disregard any intended undue influence.[15]

1999 U.S. Dist. LEXIS 23332, at *110. Accordingly, the district court concluded that the Ohio Supreme Court's determination that "no prejudicial or plain error occurred . . . was not an unreasonable application of clearly established law." *Id.* at **110-11.

In assessing whether the Ohio Supreme Court's decision involved an unreasonable application of federal law, the relevant Supreme Court holding is the Court's decision in *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), which held that "a prosecutor's improper comments will be held to violate the Constitution only if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parker v. Matthews*, 576 U.S. 37, 45 (2012) (quoting *Darden*, 477 U.S. at 181). The Supreme Court has also held that "the *Darden* standard is a very general one, leaving courts 'more leeway in reaching outcomes in case-by-case determinations.'" *Id.* at 48 (citation, quotation marks, and ellipses omitted).

In *Darden*, the Supreme Court found that comments similar to some of those made by the prosecutor in this case—particularly allusions to the death penalty and the defendant being an

[15]The state appellate court, in adjudicating this claim, similarly noted that although some of the prosecutor's comments would have "perhaps [been] prejudicially erroneous in a jury trial, [that] was not so [in Hill's case]." *Hill*, 1989 WL 142761, at *15.

"animal"—were improper. 477 U.S. at 179-80. Those comments, unlike the comments in this case, were made before a jury, not a three-judge panel. *Id.* at 170-71. Nonetheless, the Supreme Court noted that these improper statements did not "manipulate or misstate the evidence, [or] implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id.* at 182.

In this case, it is clear that the prosecutor's comments were emotionally charged and designed to paint Hill in a bad light. However, it does not appear that they misstated the evidence in the case or implicated Hill's constitutional rights. Further, any efforts to play on the emotions of the three-judge panel would likely have been futile. Although they may not adopt a presumption as strong as the one "indulged" by the Ohio courts, federal courts similarly presume that a judge, as the trier of fact, can readily identify credible evidence, *United States v. Thomas*, 669 F.3d 421, 425 (4th Cir. 2012), give proper weight to the evidence, *Caban v. United States*, 728 F.2d 68, 75 (2d Cir. 1984), and understand what law is relevant to his or her deliberations, *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986). And Hill has put forth no evidence indicating that the three-judge panel that tried his case was incapable of discerning what constitutes admissible evidence and parsing such evidence out from any inflammatory or irrelevant[16] comments by the prosecutor.[17] For these reasons, we conclude that the decision by the Ohio Supreme Court was not an unreasonable application of clearly established law.

We **AFFIRM** the district court's denial of habeas relief as to Hill's prosecutorial misconduct claim.

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[16]For example, the three-judge panel disclaimed any reliance on Hill's "prior crimes . . . in reaching its verdict." *See Hill*, 595 N.E.2d at 893.

[17]Hill's reference to a single line in the panel's opinion that referred to Hill and Combs' "blood lust characterized by a series of acts of torture, rape, and murder," does not change this conclusion. The rest of the opinion describes Fife's injuries, and the means by which they were inflicted (based on the evidence at trial), in great detail. The opinion also indicates that the judges were struck by the "total lack of remorse" shown by Hill appearing at the police station to seek a reward after Fife's death. Looking at the document as a whole, there is no indication that the comment with which Hill takes issue was derived from the prosecutor's statements rather than the judges' own assessments of the offenses.

VII. The Trial Court's Failure to Hold a Pretrial Competency Hearing

Lastly, Hill argues that the trial court's failure to inquire about Hill's competency denied him a fair trial under the due process clause of the Fourteenth Amendment. Here, the term "trial court" refers to the court that tried Hill's underlying offenses in 1985 and 1986.

This claim is governed by § 2254(d)(1). As indicated above, the Supreme Court has held that to obtain relief under § 2254(d)(1), the petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). In assessing competence, the relevant question is whether the defendant's "mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Indiana v. Edwards*, 554 U.S. 164, 170 (2008). If the defendant's mental condition meets this description, the courts may not try him.[18] *Id*.

Hill maintains that because the trial court knew that he had "limitations in vocabulary, ability to calculate, and ability to draw" and "could not recognize or understand a majority of the words on the *Miranda* waiver form," the trial court should have "conduct[ed] further inquiry into [Hill's] competency to stand trial." Hill's Br. at 124-25. With regard to this final issue, Hill requests that this Court determine "not whether the state court was unreasonable in finding Danny competent to stand trial, but whether it was unreasonable under *Pate*[19] and *Drope*[20] not to make such an inquiry in the first instance." *Id*. at 124. Hill also argues, with no elaboration and

[18]Again, our conclusion that Hill is intellectually disabled and thus ineligible for execution under *Atkins* does not mean that Hill was incompetent to stand trial or that the trial court should have presumed his incompetence and ordered a competency hearing *sua sponte*. The two inquiries are different, and even *Atkins* recognizes that "[m]entally retarded persons frequently . . . are competent to stand trial." 536 U.S. at 318.

[19]*Pate v. Robinson*, 383 U.S. 375 (1966).

[20]*Drope v. Missouri*, 420 U.S. 162 (1975).

minimal citation to the record,[21] that the Ohio Supreme Court "unreasonably applied *Pate* and *Drope*" in determining that Hill was competent to stand trial. *Id.* at 125.

The Warden, for his part, asserts that "[a]lthough Hill is intellectually limited, his demeanor at trial was such that the trial court had no reason to *sua sponte* assess Hill for competence to stand [trial]." The Warden also argues that:

> The trial record gives every indication that Hill was compliant, cooperative and appropriately attentive to the proceedings. Moreover, the trial judge had ample opportunity to assess Hill's ability to navigate through the trial proceedings, where Hill testified extensively during a pre-trial suppression hearing, and also had a direct colloquy with the trial court for acceptance of the jury waiver. In addition, none of the three mental health experts who testified for the defense at trial expressed a concern about Hill's competence to stand trial.

Warden's Br. at 97. Hill's reply brief does not address these contentions.

Neither the state appellate court nor the Ohio Supreme Court opinions from Hill's direct appeal noted Hill's competency argument as one of his nineteen assignments of error and twenty-five propositions of law, respectively. *See generally State v. Hill*, 595 N.E.2d 884 (Ohio 1992); *State v. Hill*, Nos. 3720, 3745, 1989 WL 142761 (Ohio Ct. App. Nov. 27, 1989). Instead, the only similar claims addressed by these courts pertained to Hill's arguments that he could not knowingly and voluntarily waive his right to counsel or his right to a jury trial due to his alleged intellectual disability. *See, e.g.*, *Hill*, 595 N.E.2d at 890-91, 895; *Hill*, 1989 WL 142761, at **3, 5-7, 13-14. The district court found that Hill raised the issue of competency only under state law, not federal law, and that Hill did not raise the competency claim under federal law until filing for state post-conviction relief. *Hill*, 1999 U.S. Dist. LEXIS 23332, at **92-93. On this basis, the district court concluded that Hill's competency claim was procedurally defaulted. *Id.* at **93-94 (citing *State v. Hill*, No. 94-T-5116, 1995 WL 418683 (Ohio Ct. App. June 16, 1995)). The Warden argues that even if Hill's claim was not procedurally defaulted, it fails on the merits. We agree.

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[21] This issue occupies three pages in Hill's opening brief and just over a page in his reply brief. The only record citation in the opening brief seeks to demonstrate that Hill "could not recognize or understand a majority of the words on the *Miranda* waiver form."

On December 16, 1985, the trial court held a hearing on Hill's motion to suppress his statements to the police. Defense counsel called Hill as a witness to testify with respect to "the circumstances under which [he] gave statements to the police department." R. 29, PageID# 3101. In response to the trial court's questions, Hill indicated that he understood the purpose and nature of the hearing. *Id.* at 3103-04. He went on to testify about the means by which he arrived at the police station, as well as his inability to leave police custody prior to the arrival of his mother on Friday, September 13, 1985. On Monday, September 16, 1984, Hill returned to the police station at his mother's behest with his uncle, Detective Hill, and another police officer, Sergeant Steinbeck. As discussed earlier, Hill testified that while he and Detective Hill were alone, Detective Hill threw Hill against the wall, slapped him, and told him to tell the police what had happened. Hill also claimed that after being physically abused by his uncle, he told the police what they wanted to hear because he was afraid of both Detective Hill and the other officers. *Id.* at 3114, 3118-19.

Defense counsel, for his part, attempted to demonstrate that Hill could neither read nor write and that Hill signed the *Miranda* waiver without understanding its contents or knowing what it meant; meanwhile, the prosecutor attempted to demonstrate that Hill had been to the Warren police department many times before based on theft-related crimes and was therefore familiar with the department's *Miranda* form. *Id.* at 3107-09, 3115, 3121-23, 3152-53, 3155. On cross-examination, Hill testified that he signed the *Miranda* waiver because the police told him to do so. *Id.* at 3135-37. Hill's testimony ended following questions from the trial court about Hill's alleged physical abuse at the hands of Detective Hill.

Hill appeared before the trial court once more on January 7, 1986, this time to waive his right to a jury trial. *See Hill*, 595 N.E.2d at 889. The trial court's colloquy with Hill, which was designed to determine whether Hill's waiver was knowing and voluntary, included an explanation of the jury selection system, the role of the jury, the jury waiver's effect on some of Hill's pending motions, defense counsel's possible motives for seeking to waive Hill's right to a jury trial, and the differences between a jury and three-judge panel in terms of number of persons, familiarity with the law and the facts of the case, and demographic composition. The trial court read the waiver aloud to Hill and suggested the Hill go over the waiver with his

attorney. Waiver of Jury Trial Hr'g Tr. at 10-11.[22] Hill indicated that he had discussed the issue of waiver with both his attorney and his mother, and there was a 25-minute recess in which the attorney and Hill's mother apparently discussed the waiver with him further. *Id.* at 5-6. After the recess, Hill affirmatively stated that he wanted to be tried by the three-judge panel. *Id.* at 12.

A review of Hill's testimony during the December 16, 1985, suppression hearing reveals that Hill claimed to understand the nature of the hearing and was able to answer questions posed by the prosecutor, defense counsel, and the trial court. Hill stated more than once when he did not understand or did not know the answer to a question, either on his own or with attorney prompting. He also appeared to understand the role of the trial judge. Hill's interactions with the trial court at the January 7, 1986 hearing on his waiver of jury trial also failed to raise any red flags regarding competence. Although the trial court did most of the talking, Hill did not express any confusion about the nature of the waiver, and was given an opportunity to go over the considerations discussed by the trial court with his attorney and mother before and during the hearing. After Hill conferred with his attorney, the following exchange took place:

> COURT: All right. Danny, you've been talking with your lawyer now, have you not, for the last 25 minutes or so?
> DEFENDANT HILL: Yeah.
> COURT: And did he go over this matter of a jury trial with you?
> DEFENDANT HILL: Yeah.
> COURT: And you want to tell me now what decision you've made after talking this over.
> DEFENDANT HILL: I want to have—
> COURT: What do you want to do? Who do you want to try it? Three judges—
> DEFENDANT HILL: Three judges.
> COURT: —or do you want the jury?
> DEFENDANT HILL: You.
> COURT: I hope you understand—you mean myself and two other judges?
> DEFENDANT HILL: (Nods head affirmatively.)

Id. At no point during the hearing did Hill behave in a manner, or make a statement indicating, that he did not understand the nature of the waiver.

[22] The transcript of the jury waiver hearing can be found in the district court record at R. 30 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28. 1997).

On this record, there is no indication that Hill did not understand the nature of the proceedings against him or that he could not consult with defense counsel to assist in his case. *See Edwards*, 554 U.S. at 170. Although Hill is correct that the record suggests that he was functionally illiterate at the time of the suppression hearing, Hill cites no authority for the proposition that trial courts should equate illiteracy to incompetence. He also cites no authority for the proposition that because there were other signs that he was intellectually limited, i.e., his limited vocabulary or "ability to draw similarities," the trial court should have doubted his competence to stand trial and ordered a competency hearing *sua sponte*. As indicated above, the trial court had at least two opportunities to observe Hill and interact with him directly, and these incidents did not suggest that Hill was incompetent to stand trial under *Pate*, *Drope*, or the more recent Supreme Court case, *Edwards*.

For the aforementioned reasons, we **AFFIRM** the district court's denial of habeas relief as to Hill's due process claim.

VIII. Conclusion

For the reasons articulated above, we **REVERSE** the district court's denial of habeas relief with regard to Hill's *Atkins* claim and we **REMAND** with instructions to grant the petition and to issue the writ of habeas corpus with respect to Hill's death sentence. We pretermit Hill's ineffective assistance of counsel claim based on *Atkins*, and **AFFIRM** the district court's denial of habeas relief with regard to his other three claims.

CASE NO. ______

CAPITAL CASE

IN THE UNITED STATES SUPREME COURT

DANNY LEE HILL,

Petitioner,

v.

TIM SHOOP, WARDEN,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME 3 of 3

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0159p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DANNY HILL, *Petitioner-Appellant*, *v.* CARL ANDERSON, Warden, *Respondent-Appellee.*	Nos. 99-4317/14-3718

On Remand from the Supreme Court of the United States.

United States District Court for the Northern District of Ohio at Youngstown;
No. 4:96-cv-00795—Paul R. Matia, District Judge.

Reargued: December 5, 2019

Decided and Filed: May 20, 2020

Before: MERRITT, MOORE, and CLAY, Circuit Judges.

COUNSEL

REARGUED: Vicki Ruth Adams Werneke, FEDERAL PUBLIC DEFENDER'S OFFICE, Cleveland, Ohio, for Appellant. Michael J. Hendershot, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON SUPPLEMENTAL BRIEFS:** Vicki Ruth Adams Werneke, Lori B. Riga, FEDERAL PUBLIC DEFENDER'S OFFICE, Cleveland, Ohio, for Appellant. Michael J. Hendershot, Peter T. Reed, Stephen E. Maher, Benjamin M. Flowers, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

OPINION

PER CURIAM. Danny Hill asserts in his habeas petition that the State of Ohio may not execute him because he is intellectually disabled.[1] *See Atkins v. Virginia*, 536 U.S. 304 (2002). *Atkins*, the case that bars the execution of intellectually disabled defendants, was decided and made retroactive after Hill was convicted of murder and sentenced to death. Prior to *Atkins*, Hill had raised his intellectual disability as a mitigating factor in the penalty phase of his trial. *See State v. Hill*, Nos. 3720, 3745, 1989 WL 142761 (Ohio Ct. App. Nov. 27, 1989). Three psychological experts testified in that proceeding that Hill was intellectually disabled. The Ohio courts agreed, stating that Hill "suffers from some mental retardation" and is "mildly to moderately retarded." *See id.* at *6; *State v. Hill*, 595 N.E.2d 884, 901 (Ohio 1992) (discussing the experts' testimony). But ultimately, Hill was sentenced to death because all that his intellectual disability counted for at the time was a point in his favor in the sentencing calculation—not a bar to his execution. *See Hill*, 1989 WL 142761, at *4. When *Atkins* came down, our court issued a remand order directing the Ohio courts to formally assess Hill's intellectual functioning under *Atkins*. *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002). Even though "Ohio courts reviewing his case have concluded that Danny Hill is retarded, and voluminous expert testimony supported this conclusion," we issued a remand because Hill's *Atkins* claim "ha[d] not been exhausted or conceded." *Id.* (citations omitted). This time around, the Ohio courts decided that Hill was *not* intellectually disabled. *See State v. Hill*, 894 N.E.2d 108, 127 (Ohio Ct. App. 2008).

We hold that Hill is intellectually disabled and that he cannot be sentenced to death. No person looking at this record could reasonably deny that Hill is intellectually disabled under *Atkins*. In holding otherwise, the Ohio courts avoided giving serious consideration to past evidence of Hill's intellectual disability. Doing so amounted to an unreasonable determination of the facts and an unreasonable application of even the general *Atkins* standard. Accordingly,

[1]We will use the medical community's preferred term of "intellectually disabled" in place of "mentally retarded" except where the term is in quoted material.

we **REVERSE** the judgment of the district court and **REMAND** the case with instructions to grant the petition and to issue the writ of habeas corpus with respect to Hill's death sentence.

In addition to his *Atkins* claim, Hill raises a claim of ineffective assistance of counsel that attacks his trial counsel's performance during his state *Atkins* hearing, a *Miranda* claim arguing that certain statements should have been suppressed during his trial, a prosecutorial-misconduct claim, and a due-process claim arguing that Hill was not competent to stand trial at the time of his convictions. For the reasons set forth below, and as explained in our prior opinion, we **AFFIRM** the district court's judgment denying Hill's habeas petition with regard to the latter three claims, and pretermit the ineffective assistance of counsel claim regarding *Atkins* because we are granting relief on the merits of the *Atkins* claim.

I. FACTS AND PROCEDURE

The facts and legal proceedings surrounding Hill's conviction and death sentence in 1986 are set out in an earlier opinion. *See Hill*, 300 F.3d at 680–81. Because this case centers on the issue of intellectual disability, what follows is an account of the facts and proceedings relevant to that question in this case.

Several evaluations conducted around the time of Hill's trial in 1986 reveal that Hill "has a diminished mental capacity," a fact acknowledged by the state court after Hill's *Atkins* hearing. *See Hill*, 894 N.E.2d at 112 (summarizing the testimony of the three experts who testified during the mitigation phase of the initial trial that Hill was mentally "retarded"). Hill's IQ at the time of trial ranged from 55 to 68, and his moral development was "primitive"—essentially that of a two-year old. *Id*. There is no dispute that Hill's IQ is so low that he easily meets the first element of the clinical definition of intellectual disability.

Since his earliest days in school, Hill has struggled with academics. At the age of six, a school psychologist noted that Hill was "a slower learning child" and recommended that his teachers "make his work as concrete as possible" without "talking about abstract ideas." R. 97 [disc 1] (Suppl. App.) (Pages 489–91). After kindergarten, Hill was placed into special education classes for the remainder of his time in the public school system. R. 29 (Suppression

Hr'g Tr.) (Page ID #3081–92).[2] Hill struggled to keep up academically even in his special education classes and had difficulty remembering even the simplest of instructions. R. 31 (Mitigation Hr'g Tr. at 174) (Page ID #3486). At the age of thirteen, his academic and social skills were at a first-grade level. R. 97 [disc 1] (Suppl. App.) (Page 568). At the age of fifteen, Hill could barely read or write, and he was noted to have weaknesses in self-direction and socialization, in addition to communication. R. 31 (Mitigation Hr'g Tr. at 79) (Page ID #3391). Those problems persist today.

Hill has also been unable to take care of his hygiene independently from a young age. During his time in a home for children with behavioral issues, Hill could not remember to comb his hair, brush his teeth, or take a shower without daily reminders. R. 31 (Mitigation Hr'g Tr. at 88) (Page ID #3400).[3] Even in the highly structured environment of death row, Hill would not shower without reminders.

After receiving two convictions for rape at age seventeen, Hill was assessed for intellectual disability by the juvenile court. R. 97 [disc 1] (Suppl. App.) (Page 527). He was diagnosed as "mildly retarded." *Id.* Before *Atkins* was decided, Hill had been diagnosed as intellectually disabled approximately ten times over the course of his life. *Id.* at 61–76, 513–530, 592–621. During the mitigation phase of his trial for the Fife murder, the psychological experts and the Ohio courts decided that Hill was intellectually disabled and had significant adaptive deficits. *Hill*, 1989 WL 142761, at *6; *Hill*, 595 N.E.2d at 901. Nevertheless, the Ohio Supreme Court upheld his death sentence because it was then constitutional to execute intellectually disabled defendants. *See Hill*, 1989 WL 142761, at *4.

The Supreme Court decided *Atkins* in 2002 while Hill's appeal from the district court's denial of his habeas petition was pending before this court. We remanded the case to the district court with instructions to remand Hill's unexhausted *Atkins* claim to the state court and to stay the remaining claims pending resolution of the *Atkins* claim. *Hill*, 300 F.3d at 683. After the

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[2]Because the pagination in the original transcript of the suppression hearing is unclear, we will cite to the pagination used by the district court.

[3]The Mitigation Hearing Transcript can be found in the district court record at R. 31 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28, 1997).

case was returned to the state court, three experts—Drs. David Hammer, J. Gregory Olley, and Nancy Huntsman—examined Hill and testified over the course of several evidentiary hearings on Hill's *Atkins* claim. Dr. Hammer was retained by Hill, Dr. Olley acted as the state's expert, and Dr. Huntsman was appointed by the trial court. Dr. Hammer concluded that Hill met all three prongs for a diagnosis of intellectual disability. However, Drs. Olley and Huntsman concluded that Hill was not intellectually disabled.

The state trial court denied Hill's petition for relief under *Atkins*, finding that Hill did not exhibit significant adaptive deficits and that any deficits that he did have did not manifest before the age of 18. *State v. Hill*, No. 85-CR-317 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported) [R. 97 [disc 1] (Suppl. App.) (Pages 3399–3482)]. The Ohio Court of Appeals affirmed that decision, over a dissent, holding in the first instance that issue preclusion did not require a different result "because the finding that he was mentally retarded was not essential to the imposition of the death penalty in the same way that it is essential in the *Atkins/Lott* context." *Hill*, 894 N.E.2d at 116, 127. The Ohio Supreme Court declined to review the case, with two justices dissenting. *State v. Hill*, 912 N.E.2d 107 (Ohio 2009) (table).

With the conclusion of his state-court proceedings, Hill moved to reopen and amend his habeas petition in this case to include claims under *Atkins*. There is no dispute that Hill's IQ is so low (ranging from a low of 48 to a high of 71) that he easily meets the first element of the clinical definition of intellectual disability. The parties disagree, however, on the propriety of the state courts' holdings that Hill did not exhibit sufficient adaptive deficits (the second element) and that Hill's deficits did not manifest themselves before he reached the age of 18 (the third element).

The district court denied Hill's amended petition in a thorough opinion, holding that the deferential standard of review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) mandated denial of Hill's habeas petition. *Hill v. Anderson*, No. 4:96-cv-00795, 2014 WL 2890416, at *51 (N.D. Ohio June 25, 2014). It did so despite its serious misgivings about the state court's rejection of the extensive record evidence that provided important diagnostic information regarding Hill's adaptive functioning and the age of onset of Hill's intellectual disability. *Id.* Ultimately, the district court believed that AEDPA required acceptance of the

state court's determinations that Hill did not exhibit sufficient adaptive deficits and that Hill's disability did not manifest before the age of 18.

We disagreed and held that "[t]he district court was right to be skeptical of the state court judgment because it amounted to an unreasonable application of the standard articulated by the Supreme Court in *Atkins* and as later explained by *Hall* and *Moore*." *Hill v. Anderson*, 881 F.3d 483, 489 (6th Cir. 2018) (citing *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 572 U.S. 701 (2014)). "Specifically," we held, "the state court's determination was unreasonable in two ways: First, the state court departed from the requirements of *Atkins* when it disregarded well-established clinical standards for assessing adaptive deficits by focusing on Hill's adaptive strengths instead of his adaptive deficits. Second, the trial court ignored clear and convincing evidence that Hill exhibited substantial deficits in both his intellectual and adaptive abilities since long before he turned 18." *Id.* However, the Supreme Court decided that we relied too heavily on its more recent precedent in reaching that decision and remanded the case back to us to analyze Hill's *Atkins* claim based solely on Supreme Court precedent that was clearly established at the time, as required under 28 U.S.C. § 2254(d). *See Shoop v. Hill*, 139 S. Ct. 504 (2019); *see also Peak v. Webb*, 673 F.3d 465, 472 (6th Cir. 2012) (Under AEDPA, "[t]he law in question must have been clearly established at the time the state-court decision became final, not after.").

Thus, the issue before us on remand from the Supreme Court is whether it was unreasonable for the Ohio courts to decide that Hill did not exhibit significant adaptive deficits. The Court has instructed us on remand to "determine whether [our] conclusions can be sustained based strictly on legal rules that were clearly established in the decisions of [the Supreme Court] at the relevant time." *Hill*, 139 S. Ct. at 509.[4] The relevant date here is that of the Ohio Court of Appeals's decision in 2008.

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[4]We also previously held that the Ohio courts made an unreasonable determination of fact as to age of onset. *See Hill*, 881 F.3d at 501. The Supreme Court took no issue with this holding, so we will rest on our prior reasoning with respect to this element, which is repeated here for the sake of completeness. For the same reason, we stand by our decision to affirm the district court's judgment denying Hill's habeas petition with regard to his ineffective-assistance-of-counsel, suppression, and prosecutorial-misconduct claims, and pretermitting the ineffective-assistance-of-counsel claim regarding *Atkins*. *See Hill*, 881 F.3d at 487. We will repeat our analysis here as well merely for the sake of completeness.

II. STANDARD OF REVIEW

The parties dispute the proper standard of review for Hill's *Atkins* claim. Hill argues that we should review the state courts' determinations on adaptive deficits and age of onset as both legal and factual conclusions under 28 U.S.C. § 2254(d)(1) and (2). That would mean that we ask whether, under § 2254(d)(1), those decisions amount to an unreasonable application of *Atkins* and whether, under §§ 2254(d)(2) and 2254(e)(1), there is clear and convincing evidence that the state courts' findings amounted to an unreasonable determination of the facts. The Warden argues that we should review the state courts' determinations only as findings of fact under § 2254(d)(2). In its view, Hill's argument is substantively a factual argument, and if Hill intended to present § 2254(d)(1) arguments, he should have made them in his supplemental briefing filed after the remand.

We agree with Hill that the state courts' determination on adaptive deficits should be analyzed as both legal and factual conclusions under § 2254(d)(1) and (2). Hill's arguments attack the reliability of the state courts' determination of the facts and their interpretation of *Atkins*. But, at the same time, his case partly turns on what a court must consider under *Atkins* in testing for intellectual disability, which we have recognized is a question of law. Moreover, Hill presented a § 2254(d)(1) argument in his opening brief, and we issued our prior decision, with respect to adaptive deficits, based on § 2254(d)(1). (*See* Hill Opening Br. at 34 ("The state courts' application of the law and the determination of the facts were unreasonable, and therefore habeas relief is warranted under 28 U.S.C. § 2254(d)(1) and (2).")). Hill's strategic decision to focus on § 2254(d)(2) in his supplemental brief upon remand does not waive the prior arguments raised in his opening brief. Lastly, the Supreme Court instructed us on remand to "determine whether [our] conclusions can be sustained based strictly on legal rules that were clearly established in the decisions of [the Supreme Court] at the relevant time." *Hill*, 139 S. Ct. at 509. We accordingly will analyze Hill's adaptive-deficits argument under both § 2254(d)(1) and (2), keeping in mind that Hill's arguments draw heavily on the facts. As we did in our prior opinion, we will analyze the state court's conclusion on the age-of-onset prong solely as a finding of fact under § 2254(d)(2).

Under § 2254(d)(1), we must decide whether the state courts' conclusion that Hill did not exhibit significant adaptive limitations was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Section 2254(d)(1) applies when the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407–08 (2000). Under § 2254(d)(2), our review is limited to the question of whether the state court's findings amount to "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." In making that assessment, we are mindful that AEDPA directs us to presume that facts decided by the state court are correct absent "clear and convincing evidence" to the contrary. § 2254(e)(1).

"As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)).

III. *ATKINS* CLAIM

The Supreme Court held in *Atkins* that the Eighth Amendment prohibits the execution of intellectually disabled individuals. 536 U.S. at 314–17. Although it ultimately left the development of the test for intellectual disability up to the states, *id.* at 317, the Supreme Court noted that two diagnostic manuals of the psychiatric profession require three separate findings before a diagnosis of intellectual disability is appropriate.[5] *Atkins*, 536 U.S. at 308 & n.3. Those findings are: (1) "significantly subaverage intellectual functioning;"—typically indicated by an IQ level at or below 70; (2) "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety;" and (3) manifestation or onset before the age of 18. *Id.* at 308 n.3.

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[5]Prior to 2007, the American Association on Intellectual and Developmental Disabilities (AAIDD) was known as the American Association on Mental Retardation (AAMR).

Ohio adopted the three-prong standard set forth in *Atkins* for evaluating a claim of intellectual disability in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002). The Supreme Court of Ohio specifically approved the definition of intellectual disability set forth in the then-current editions of the diagnostic manuals. *Id.* at 1014. Applying the standards in those manuals, individuals had significant limitations in adaptive skills if they exhibited deficits in at least two of the skill areas set out in *Atkins*. *Id.*

A. Adaptive Deficits

Hill disputes the Ohio court's finding that he did not exhibit significant adaptive limitations, emphasizing that he has been diagnosed as intellectually disabled and lacking in adaptive skills from a young age. We agree and find that Hill has exhibited significant adaptive limitations since childhood and cannot justifiably be executed even under the general *Atkins* standard. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("[E]ven a general standard may be applied in an unreasonable manner.").

A state court decision is not entitled to AEDPA deference when "the factfinding procedures upon which the [state] court relied were 'not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth.'" *Id.* at 954 (quoting *Ford v. Wainwright*, 477 U.S. 399, 423–24 (1986) (Powell, J., concurring in part and concurring in the judgment)). Here, the state trial court ruled that the focus of the evaluation would be Hill's present functioning, and therefore that contemporary evidence was what was primarily relevant—not historical accounts. The Ohio courts failed seriously to contend with the extensive past evidence of Hill's intellectual disability. *Atkins* cannot reasonably be interpreted to permit state courts to exclude or discount past evidence of intellectual disability. And the Ohio courts' cafeteria-style selection of some evidence from Hill's behavior in the law-enforcement context, over evidence from his special education classes, resulted in an unreasonable determination of the facts.

The Supreme Court stated in *Atkins* that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also *significant limitations in adaptive skills* such as communication, self-care, and self-direction *that became manifest before age 18*."

536 U.S. at 318 (emphasis added). Accordingly, in *Williams v. Mitchell*, we held that the "refusal to consider past evidence of intellectual disability in determining whether [the petitioner] has significantly subaverage mental functioning and adaptive skills limitations is directly contrary to the clearly established governing law set forth in *Atkins*/*Lott*." 792 F.3d 606, 617 (6th Cir. 2015). "[T]he clinical definitions cited with approval by *Atkins* and adopted by *Lott* do not treat present functioning and early onset as unrelated parts of a disconnected three-part test." *Id.* at 619. Intellectual disability must manifest before age eighteen. *Id.* Based on a "plain reading" of the *Atkins* standard as explained by *Lott*, "past evidence of intellectual disability—including evidence of intellectual disability from an individual's childhood—is relevant to an analysis of an individual's present intellectual functioning." *Id.* And, "because intellectual disability manifests itself during childhood and remains static throughout life, evidence of intellectual disability from one point in life is relevant to an examination of intellectual disability in another." *Id.* (citing *State v. White*, 885 N.E.2d 905 (Ohio 2008)).

We also noted in *Williams* that, prior to *Atkins*, the Supreme Court had recognized that past evidence of intellectual disability is relevant to present or future functioning. *See Williams*, 792 F.3d at 620 (citing *Heller v. Doe*, 509 U.S. 312, 321–23 (1993)). In *Heller*, the Supreme Court held that committing people with intellectual disabilities based on clear and convincing evidence of future dangerousness was constitutional because intellectual disability manifests during childhood and "is a permanent, relatively static condition, so a determination of dangerousness may be made with some accuracy based on previous behavior." 509 U.S. at 321–23 (citation omitted). "Thus, 'almost by definition in the case of the retarded [adult] there is an 18-year record upon which to rely' when assessing the individual's *future intellectual functioning*." *Williams*, 792 F.3d at 620 (alteration in original) (quoting *Heller*, 509 U.S. at 323).

All of this was clear to the Ohio courts in 2008.[6] *See id.* at 619 (citing *White*, 885 N.E.2d 905). In *White*, the Ohio Supreme Court held that it was an abuse of discretion to dismiss the

[6] To the extent that the Ohio Supreme Court applied *Atkins* in decisions that were available at the time, we will also apply that precedent. *See Williams*, 792 F.3d at 612 ("[I]n the *Atkins* context, 'clearly established governing law' refers to the Supreme Court decisions *and* controlling state law decisions applying *Atkins*." (emphasis added)). We do so because *Atkins* left it to the states to refine the test for intellectual disability. *Id.* (citing *Black v. Bell*, 664 F.3d 81, 92 (6th Cir. 2011); *Van Tran v. Colson,* 764 F.3d 594, 617–19 (6th Cir. 2014)).

psychological experts' opinions based on White's school records as "conjectural." 885 N.E.2d at 916. "Although White had taken neither an IQ test nor an adaptive-skills test before age 18," his school "records strongly support[ed] the experts' conclusion that White's intellectual and adaptive deficits had their onset before age 18." *Id.* School records are relevant because, as both experts in *White* explained, "a person's mental-retardation status does not change over his lifetime. Hence, if an adult is found to have intellectual and adaptive deficits not caused by a brain injury or illness, it can be inferred that those deficits have existed since childhood." *Id.* at 917. "[T]he trial court, by rejecting well-supported expert opinion regarding *pre-18 onset* without any evidence to the contrary, abused its discretion." *Id.* (emphasis added).

In Hill's case, the Ohio Court of Appeals correctly set forth the three-prong *Atkins* standard as adopted by the Ohio Supreme Court in *Lott*. It also correctly noted that the second criterion under *Lott* requires the defendant to demonstrate "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction." *Hill*, 894 N.E.2d at 113. Then it veered off track. Focusing mostly on Hill's interactions with law enforcement, prison officials, and the courts, the Ohio courts discounted extensive past evidence of intellectual disability—including multiple diagnoses of intellectual disability, and numerous comments on Hill's adaptive deficiencies made while Hill was in school. The two experts who concluded that Hill did not exhibit significant adaptive deficits did the same. In the few instances where the Ohio courts did confront Hill's school records, they misrepresented the contents. These errors amount to an unreasonable application of *Atkins/Lott* and an unreasonable finding of fact.

1. Significant Limitations

The history of Hill's diagnoses and adaptive limitations was given short shrift in the Ohio courts. According to the Ohio courts, the anecdotal evidence in the record "constituted a 'thin reed' on which to make conclusions about Hill's diagnosis." *Hill*, 894 N.E.2d at 124. Yet, as the district court noted, "the state-court record was hardly a 'thin reed.' At well over 6,000 pages, it was voluminous." *Hill*, No. 4:96-cv-00795, 2014 WL 2890416, at *24. "[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," which for whatever reason, was "the focus of the evaluation." *Id.*

Of the criteria for adaptive deficits set out in *Lott*, it is clear from the record that Hill displayed significant limitations, at the very least, in functional academics, hygiene/self-care, social skills, and self-direction. With respect to functional academics, Hill was considered "mentally retarded" by the Warren City Schools. He was diagnosed as mildly mentally retarded, "trainable mentally retarded," or "educable mentally retarded" several times before he turned eighteen, beginning with the recognition that he was a "slower learning child" when he began formal schooling at age six. *See* R. 97 [disc 1] (Suppl. App.) (Pages 489–91). He scored 70 or below on every IQ test administered during his school years. *Id.* at 489–94, 511–19. He attended special education classes for the entirety of his school career. R. 29 (Suppression Hr'g Tr.) (Page ID #3081–92).[7]

At age six, Hill did not know his age, but thought he was nine. R. 97 [disc 1] (Suppl. App.) (Pages 489). His visual-motor coordination was at the three-year-old level, his reading and verbal skills were at the five-year-old level, and he had a mental age of four years and six months. *Id.* at 490. At age 8 years and 8 months, Hill was considered functioning at a "mid-kindergarten to beginning first grade level." *Id.* at 493. At age thirteen, he was functioning at the "mid-2nd grade level" in reading and the "mid-1st grade level" in arithmetic. *Id.* at 515. His psychologist noted that his learning abilities "ha[d] falled 22 points" in the last five years, and that his relative weaknesses lie "in not being able to recall everyday information, do abstract thinking, perform mental arithmetic, perceive a total social situation, [and] perceive patterns." *Id.* At the same age, he was sent to a school for intellectually disabled children to continue his special education. *See* R. 97 [disc 1] (Suppl. App.) (Pages 513–19). A school psychologist set out instructional goals that included teaching Hill his address and phone number, as well as how to tell time. *Id.* at 578. He exhibited weaknesses in reasoning ability, originality, verbal interaction, and a lack of intellectual independence.

By age fourteen, Hill was reading at a first-grade level and his math skills were at a third-grade level. He still had not mastered writing his own signature. *Id.* His teacher was working

[7]Hill was "mainstreamed" only in physical education and music, and struggled even there to keep up with and socialize normally with his peer group. R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Pages 246–48). There is no record of him taking "mainstream" classes in any academic subject area, i.e., math, reading, or history. *See id.*

on self-control skills that should generally be mastered by a kindergarten student, including "working without being disruptive" and not touching other students inappropriately. Teachers set academic objectives like learning to: tell time in five-minute intervals; write his own signature; shower regularly; put soiled clothing in the appropriate place; and eat and drink in a manner appropriate in a school setting. Hill was described as hyperactive and needing to complete tasks "one step at a time."

Hill was transferred to another, similar school at fifteen because of poor academic achievement and behavior. R. 31 (Mitigation Hr'g Tr. at 77) (Page ID #3389). At seventeen years old, after being arrested for, and pleading guilty to, two felony rape charges, the juvenile court placed Hill in a facility that housed youth offenders with mental disabilities or emotional problems. *Id.* at 120–23 (Page ID #3432–35). There, Hill completed ninth grade in special education classes at age eighteen. *Id.* at 81–82 (Page ID #3393–94). He was at the second- or third-grade reading level. *Id.* After being released, he returned to high school, but Fife's murder occurred six months later.

The record also demonstrates that Hill was deficient in hygiene and self-care. At the age of fourteen, he still needed to be told to shower regularly, brush his teeth, and apply deodorant every day. He would not independently follow through and take care of his hygiene unless he was told to do so. At approximately age sixteen, a group home officer noted that although Hill was "improving in his personal hygiene," he still "need[ed] constant reminder[s] to shower, brush his teeth, etc.[.]" Hill continued to have problems with his hygiene in prison and had to be reminded frequently to groom himself.

The record also demonstrates that Hill had limitations in the area of social skills. For example, the district court pointed to the testimony of psychologists who spoke to Hill's "poor self-esteem, inability to interpret social situations and create positive relationships, and [the fact] that he was easily influenced by people, gravitated toward an antisocial peer group, and did not respond appropriately to authority figures." *Hill*, 2014 WL 2890416, at *38. Hill's school and court records demonstrate that he had trouble making friends. At seventeen, Hill was described as "socially constricted" and possessing "very few interpersonal coping skills."

Hill also showed limitations in at least one more area—self-direction. Hill was described as "easily led" in both his school and court records, and from periods both before and after he committed serious crimes while apparently acting alone. In school, Hill was described as immature and "easily led by others into trouble around school," like fighting. He was vulnerable to exploitation by older individuals, displayed inappropriate and immature behaviors in class, rarely considered the consequences before acting, and had trouble conforming his behavior to the rules or the law. When Hill was thirteen, he was described as exhibiting a "great deal of impulsivity." When Hill was seventeen, he was evaluated by a psychologist who concluded that he had poor judgment, "d[id] not think of consequences," was "highly suggestable," and "was 'likely to be exploited'" if placed in halfway home for adults "because of his 'passivity and limited intellectual ability.'" Another report from that same time expressed concern about his tendency to follow others. Even when he was in prison at age twenty-one, a correctional officer reported that Hill was easily led by other inmates and had to be told how to do his job at every step of the way. *See* R. 97 [disc 1] (*Atkins* Hr'g Tr.) (Page 437–39).

In addition to his significant limitations in functional academics, self-care, social skills, and self-direction, the record also demonstrates that Hill never has lived independently, never had a driver's license or a bank account, never has been able to perform a job without substantial guidance from supervisors, was labeled "functionally illiterate" at school and in prison, could never read or write above a third-grade level, and could never adequately sign his own name.

Even if Hill appeared to be functioning at an average skill level to a lay person's eyes, it is common for someone with mild intellectual disability to present as functioning. *See* R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Page 189). That is why the impressions of schoolteachers are critical—because children often are not diagnosed "until they get to school and teachers who are familiar with kids at various cognitive abilities discover that this child is, No. 1, not where they should be for their age in terms of their current [intellectual] functioning . . . . And, two, that as they try to teach them they learn at a much slower rate." *Id.* Comments from Hill's schoolteachers were largely left unaddressed—or were distorted—in the Ohio courts' analysis.

2. Unreliable Experts

Nevertheless, it might seem that the Ohio courts rendered a reasonable decision because they relied on the opinions of two psychological experts who found that Hill did not exhibit significant adaptive deficits. According to the Ohio Court of Appeals, the experts and the record provided "competent and credible evidence to support the trial court's conclusion that Hill does not meet the second criterion for mental retardation." *Hill*, 894 N.E.2d at 126. But both experts, at the trial court's direction, ignored evidence of adaptive deficiencies from Hill's school years, or set it aside as irrelevant to the task at hand. Anecdotal evidence, such as comments and records from schoolteachers and others who have interacted with or evaluated the subject, is key to the adaptive-deficits analysis. *See Hill*, 894 N.E.2d at 124–25 (discussing anecdotal evidence); R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Pages 383–84) (stating that the psychological profession values "collateral information"); R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 696) (stating the importance of "drawing information from many different sources of functioning in every day life under every day circumstances").

Two experts testified in Hill's *Atkins* proceedings that Hill did not display significant adaptive limitations. *State v. Hill*, No. 85-CR-317, at 79–80 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported) [R. 97 [disc 1] (Suppl. App.) (Pages 3477–78)]. The state trial court relied upon their opinions to conclude that Hill had failed to demonstrate significant adaptive deficits. *Id*. at 81.[8] All three experts, including Dr. Hammer (Hill's expert), found that Hill malingered or tried to "fake bad" on the adaptive skills tests given to him in 2004. *State v. Hill*, No. 85-CR-317, at 53 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported) [R. 97 [disc 1] (Suppl. App.) (Pages 3451, 3479)]. Drs. Olley (the state's expert) and Huntsman (the trial court's expert) heavily weighed the fact that Hill malingered in coming to their decision that Hill

[8]We have previously denied *Atkins* relief in an AEDPA case arising out of Ohio where, as here, two of the three mental-health experts testified that the petitioner was not intellectually disabled. *O'Neal v. Bagley*, 743 F.3d 1010, 1023 (6th Cir. 2013) ("With expert testimony split, as it often is, the state court chose to credit Dr. Chiappone and Dr. Nelson over Dr. Tureen, and we cannot say from this vantage that it was unreasonable to do so."). However, *O'Neal* is distinguishable on its facts, and Hill's claim for *Atkins* relief is much stronger than the petitioner's claim in *O'Neal*. For example, in *O'Neal* there was insufficient evidence to prove that the petitioner met the first prong in demonstrating "significantly subaverage intellectual functioning." *Id*. at 1022. Here, by contrast, Hill's IQ is so low that the Warden concedes that Hill satisfies the first prong. Additionally, O'Neal's claim for *Atkins* relief also failed because his adaptive deficits may well have been better explained by his drug abuse and personality disorder rather than organic mental illness. *Id*. at 1022–23.

was not, at present, intellectually disabled. *See See* R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 781); R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Pages 1050–51). *But see* R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Page 211) (stating that a person with intellectual disability can still lie, manipulate, and cheat). Drs. Olley and Huntsman also emphasized the sophistication of Hill's crimes and his interactions with prison, law-enforcement, and court officials. *See* R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Pages 726–731, 737–50, 770–75, 779–82.); R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Pages 1024–35, 1040–55). Dr. Hammer, on the other hand, based his diagnosis on all types of anecdotal evidence, including Hill's records from school, and concluded that Hill satisfied all three prongs for a diagnosis of intellectual disability. *See* R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Pages 383–84) ("My opinion is that [Hill] falls within the high end of the mild retardation range."); *id.* at 156; *see also id.* at 190 (describing mild intellectual disability as "significant" or "severe" impairment in the ability to function).

Dr. Olley (the state's expert) stated that Hill's memory was very good in court on April 15, 2004, when he provided details of events. R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 744). Dr. Olley also stated, based on an interview with Hill, that Hill was able "to express a complex explanation of the crime in order to support his claim of innocence." R. 97 [disc 1] (Suppl. App.) (Page 1125). Although Dr. Olley admitted that Hill's case was a "close call," R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 861), he nevertheless concluded that Hill's "way of presenting himself," both in his police interrogation and before the court, was inconsistent with an intellectual-disability diagnosis, *id.* at 718–19, 726–27. Dr. Olley said that he had never heard of an intellectually disabled inmate calling the media to arrange an interview, as Hill did in this case by reaching out to the *Tribune Chronicle*. *Id.* at 763. Dr. Olley noted that Hill was able to tell an elaborate "conspiracy" theory about the events leading to his capital trial for Fife's murder, which echoed a "very similar" soliloquy he made before the trial court on April 15, 2004. *Id.* at 770–72. Dr. Olley characterized this soliloquy as "long," "rambling," and ultimately implausible—but he testified that he was nonetheless "struck" by Hill's "sophisticated memory and reasoning." *Id.* at 771–72.

Dr. Huntsman (the trial court's expert)'s report similarly focused on Hill's "remarkable memory for the history of his case," his detailed and "very complex explanation for how Raymond Fife came to be killed," as well as the "competencies" observed by staff members in prison. R. 97 [disc 1] (Suppl. App.) (Page 1141). Dr. Huntsman described Hill's story as "bouncing around in time," and she initially "couldn't keep track of what [they] were talking about." R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Pages 1021, 1025). She characterized the conspiracy story as "remarkable and not likely, not very plausible." *Id.* Still, despite the story's apparent lack of "logic," Dr. Huntsman noted "the degree of organization, the degree of complexity[,] and the degree of memory that he displayed as [they] talked." *Id.* at 1025–26. She testified that it was not the story Hill told, but his "process of telling the story"—which demonstrated complexity, "sophistication," a noteworthy vocabulary, and a "general ability to communicate"—that led to her conclusion that he was not intellectually disabled. *Id.* at 1190.

In the end, Drs. Olley and Huntsman each opined that Hill was "borderline intellectual functioning" as defined in the DSM-IV. *See* R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 936); R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Page 1044); *id.* at 1049 (stating that "what makes me say that I believe that in my opinion he falls within the borderline range of intellectual functioning has to do with his adaptive behavior"). Dr. Olley described borderline intellectual functioning as "no mental retardation but it is the . . . functioning that is . . . between one standard deviation below the mean and two standard deviations below the mean," *i.e.*, an IQ range between "71 to 85." R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 936). Drs. Olley and Huntsman came to this conclusion even though people at the lower end of borderline intellectual functioning and the higher end of intellectual disability are "going to be quite similar . . . in some regards," R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Page 465), including in their ability to create a "script" involving various people and events, *id.* at 537–38.

In Dr. Hammer (Hill's expert)'s opinion, Hill's behavior was not inconsistent with that of a person with mild intellectual disability because those persons often attempt to don a "cloak of competence." *Id.* at 191–92. "[M]any people with mild [intellectual disability]," he explained, "are quite aware of their deficits in learning and functioning and are somewhat worried that other people will find that also. So they oftentimes will develop certain skill areas that they can hold

out as indicating that they have a competence in a certain area and, therefore, are trying to mask . . . what their deficits actually are." *Id.* This frequently involves "learning sort of . . . scripts or scenarios that they can kind of pull out." *Id.* at 192–93. The trial court, which adopted the opinions of Drs. Olley and Huntsman, but made no reference to Dr. Hammer's cloak of competence discussion in its opinion, apparently did not afford this concept much weight.

Drs. Olley and Huntsman also placed significant weight on the testimony of prison officials about Hill's recent behavior in the prison environment. These officials considered Hill "average" in intelligence compared to other death row inmates. "They testified that Hill interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules." *Hill*, 2014 WL 2890416, at *39. One official said that Hill was feigning intellectual disability for his *Atkins* claim, and another said that Hill's hygiene was "poor but not terrible." *Id.* (quoting *Hill*, 894 N.E.2d at 125).

As the district court noted, all of the experts conceded that relying on Hill's behavior in prison to assess adaptive skills is problematic because "death row is a segregated, highly structured and regulated environment." *Hill*, 2014 WL 2890416, at *42.[9] Evidence of adaptive functioning in this kind of controlled setting is of limited value because inmates do not have the same opportunities to acquire new skills or show weaknesses in existing skills. Assessing Hill's adaptive deficits as an adult is particularly challenging given the absence of any reliable testing to measure Hill's adaptive functioning and the lack of reliable evidence of how Hill would have functioned as an adult in general society as he has been incarcerated for all but six months of his adult life. Given the lack of evidence regarding Hill's likely adaptive performance as an adult in the general community, the experts should have considered all available evidence.

[9]The medical literature available in 2008 prohibited the assessment of adaptive skills in atypical environments like prison. For example, the 2002 American Association on Mental Retardation says "[l]imitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture." AAMR-10, at 8. It continues: "This means that the standards against which the individual's functioning must be measured are typical community-based environments, not environments that are isolated or segregated by ability." *Id.*

Drs. Olley and Huntsman leaned heavily on these prison officials' testimony rather than treating them with the degree of skepticism that they deserved. As the district court noted, the weight of the testimony from various death-row prison officials was limited by their potential bias against the inmates they were charged with guarding, as well as the shortcomings affecting lay opinions about intellectual disability generally. *Id.* at *42–43. And many of the prison officials' statements were "rife with contradictions, with themselves and each other." *Id*. at *43.

These flaws might be forgivable under AEDPA deference, but there is one problem with Drs. Olley's and Huntsman's testimony that we cannot overlook: neither of them grappled with the extensive past evidence of Hill's intellectual disability. Both experts, instead, assessed Hill's adaptive skills "as they existed at the time of the hearing"—even though intellectual disability is a static condition. *Hill*, No. 4:96-cv-00795, 2014 WL 2890416, at *23; *see Hill*, 881 F.3d at 489, n.7 (citing *Hill*, 894 N.E.2d at 113); *Williams*, 792 F.3d at 617–19; R. 97 [disc 1] (Suppl. App.) (Page 1125) (Dr. Olley reporting that "[t]he available information on Mr. Hill's *current functioning* does not allow a diagnosis of mental retardation . . . .") (emphasis added). At the State's urging, the trial court ruled that it would focus the *Atkins* inquiry on Hill's current functioning, but noted that it would not preclude historical evidence from coming in. R. 97 [disc 1] (Suppl. App.) (Pages 175–81, 217–23, 247–50). As a result, the opinions of Drs. Olley and Huntsman, like the Ohio courts' own assessments, lack a credible foundation.

Dr. Olley recognized the importance of anecdotal evidence when he relied on testimony from prison guards to assess Hill's adaptive skills. But when it came to past anecdotal evidence of Hill's adaptive deficits, Dr. Olley dismissed it as evidence of low *academic* skills only. R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 783). Acknowledging that Hill's school teachers thought he was intellectually disabled, Dr. Olley said that he could not say the same because "[t]he information is simply not available." *Id.* That is simply not true.

As for Dr. Huntsman, she, too, did not give much thought to the past anecdotal evidence of Hill's adaptive deficits. She stated that she was retained to decide "whether [Hill] is *now* a mentally retarded individual." R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Page 1052). When prompted for her opinion of Hill's school records, she stated that these records were not as reliable as the court-conducted tests because teachers' assessments "were being done for a very

different purpose." *Id.* at 1046. Never mind that the Ohio Supreme Court had already decided in *White* that school records *are* relevant for an adaptive-deficits analysis. *White*, 885 N.E.2d at 916. Dr. Huntsman also threw out a guess that Hill had not tried his hardest in school. R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Page 1048). Having disregarded much of the past anecdotal evidence, she stated that Hill "probably" was not intellectually disabled at the time of the offense. *Id.* at 1052 ("I think that the only thing that I've said today that I didn't say previously in my report, because I wasn't asked to address it in my report, is that my opinion is that he was probably not retarded at the time of the offense.").

Even though Drs. Olley and Huntsman conceded that this was a close case, they made no real attempt to reconcile their outcome with Hill's past diagnoses of intellectual disability—and in fact, they were effectively told not to do so.

Rather than grapple with the extensive record of Hill's intellectual disability, the state trial court made its findings based on Hill's scattered and scripted conspiracy story of the Fife murder, his demeanor in interacting with law enforcement and the legal system, and the supposed sophistication of his crimes. *State v. Hill*, No. 85-CR-317, at 73–77 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported) [R. 97 [disc 1] (Suppl. App.) (Pages 3477–78)]. Those "adaptive strengths" convinced the state trial court that Hill could not be intellectually disabled because he had "remarkable" communication and vocabulary skills and was self-directed. *Id*. at 74. As we previously stated, "there is substantial evidence in the record to contradict" these findings. *See Hill*, 881 F.3d at 493. But having set their gaze on Hill's interactions with prison, court, and police officials, Drs. Olley and Huntsman said next to nothing about the substantial evidence in the record both from his time in school and in prison that Hill was easily led, struggled to communicate, and struggled to read. As we held in *Williams*, *Atkins* and *Lott* recognized that intellectual disability presents itself in childhood and is a permanent condition. *See Williams*, 792 F.3d at 617–19. Under *Atkins/Lott*, courts cannot limit their focus to contemporary accounts while discounting past evidence of intellectual disability.

3. Myths and Misrepresentations

To the extent that the Ohio courts addressed past evidence of Hill's adaptive deficits, they misconstrued it or tried to offset it with irrelevant facts. Rather than take this evidence seriously, the Ohio Court of Appeals adopted the trial court's analysis as consistent with its own perception of the record:

> *Public School Records*. Hill's public school records amply demonstrate a history of academic underachievement and behavioral problems. Hill is often described as a lazy, manipulative, and sometimes violent youth. Although there are references to Hill's being easily led or influenced by others, the trial court noted that much of Hill's serious misconduct, including two rapes committed prior to Fife's murder, occurred when he was acting alone. Hill knew how to write and was described by at least one of his special education teachers as "a bright, perceptive boy with high reasoning ability."
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> *Hill's Trial for the Murder of Raymond Fife*. The trial court observed that the record of Hill's murder trial provided evidence of Hill's ability concerning self-direction and self-preservation. In particular, the court noted Hill's initiative in coming to the police in order to misdirect the focus of the investigation by implicating others and Hill's ability to adapt his alibi to changing circumstances in the course of police interrogation. This last point was also noted by Dr. Olley in his hearing testimony: Hill "stood his ground during that interrogation very, very strongly. * * * He not only modified his story a little bit when he was faced with evidence that couldn't possibly have avoided. * * * That to me is a kind of thinking and planning and integrating complex information that is a higher level than I have seen people with mental retardation able to do."
>
> *Death Row Records*. At the time of the evidentiary hearing, Hill had been incarcerated on death row for 20 years. From this period of time, the trial court considered audiotaped interviews of Hill by Warren's Tribune Chronicle reporter Andrew Gray in the year 2000. These interviews were arranged on Hill's initiative in order to generate publicity for his case. The trial court found Hill's performance on these tapes demonstrated a high level of functional ability with respect to Hill's use of language and vocabulary, understanding of legal processes, ability to read and write, and ability to reason independently.
>
> The trial court considered the evidence of the various prison officials who testified at the evidentiary hearing. These witnesses consistently testified that Hill was an "average" prisoner with respect to his abilities in comparison with other death row inmates. They testified that Hill interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules. Prison officials offered further testimony in their interviews with the expert psychologists. One official opined that Hill began to behave differently after *Atkins* was decided, and he believed

> that Hill was "playing a game" to make others think he is retarded. Another official reported that Hill's self-care was "poor but not terrible" and that Hill had to be reminded sometimes about his hygiene.
>
> *Hill's Appearances in Court*. The trial court stated that it had "many opportunities" to observe Hill over an extended period of time and, as a lay observer, did not perceive anything about Hill's conduct or demeanor suggesting that he suffers from mental retardation.

Hill, 894 N.E.2d at 124–25.

We are troubled by these findings. To start with, the Ohio courts' finding "that Hill 'underachieved' academically or in any other adaptive skill as a child is," as the district court remarked, "squarely contradicted by the record." *Hill*, 2014 WL 2890416, at *26. The district court could not find, and neither can we, "one reference in Hill's school records by a teacher, school administrator, psychologist, psychiatrist, or anyone else suggesting that Hill was capable of performing at a substantially higher level but chose not to." *Id*. (footnote omitted). And as the experts in this case testified, evidence of behavioral problems or a conduct disorder simply does not undermine a simultaneous finding of intellectual disability. *See* R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Page 612); R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 713) ("[I]f he's having conduct problems in school, that's neither here nor there to a diagnosis of mental retardation."); (Page R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Pages 1102–03). The state courts incorrectly discounted the fact that Hill was easily led because he committed crimes on his own. Under then prevailing medical standards, however, Hill's prior criminal behavior should not be given weight in this analysis.

The Ohio courts' focus on a note drafted by a teacher *in a school for intellectually disabled children* describing Hill as "'bright' and 'perceptive,' with 'high reasoning ability'" was, as the district court put it, "almost cynical in its selective misrepresentation of the facts." *Hill*, 2014 WL 2890416, at *27. In the same report, Hill's special education teacher noted that Hill, who was thirteen at the time, had the reading skills of a first-grader and the math skills of a third-grader. R. 97 [disc 1] (Suppl. App.) (Page 578). Her proposed goals for Hill were for him to shower regularly, eat and drink in a manner appropriate to school, blend letter sounds to say words altogether out loud, tell time in five-minute intervals, and count change up to $1.00. *Id.*

The Ohio courts' handling of evidence regarding self-care is equally troubling. The Ohio Court of Appeals's sole reference to Hill's deficits with regard to self-care was its summary of testimony provided by a prison official "that Hill's self-care was 'poor but not terrible' and that Hill had to be reminded sometimes about his hygiene." *Hill*, 894 N.E.2d at 125. Such a statement downplays the record's extensive chronicling of Hill's struggles with hygiene, including the fact that an individual education plan established for Hill when he was nearly fourteen years old included an "[a]nnual [g]oal and [o]bjective" of helping Hill "learn to shower when necessary" and to "put soiled clothing in the appropriate place." R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Pages 281, 327).

The state trial court also unduly relied on Hill's "initiative in coming to the police" after Fife's death, as well as his alleged efforts to misdirect the investigation and fabricate an alibi while under interrogation, as "evidence of Hill's ability concerning self-direction and self-preservation." *See Hill*, 894 N.E.2d at 124. While conceding that there "are references to Hill's being easily led or influenced by others, the trial court noted that much of Hill's serious misconduct, including two rapes committed prior to Fife's murder, occurred when he was acting alone." *Id*. But Hill was not even a suspect before he went to the police, and his statements are what aroused their suspicion. Incriminating oneself is hardly self-preservation. And as the district court noted, "'[s]elf-preservation' is not [even] among the adaptive skills measured under the clinical definitions of intellectual disability." *Hill*, 2014 WL 2890416, at *33. And "self-direction" covers a host of behaviors—including "initiating activities appropriate to the setting" and "demonstrating appropriate assertiveness and self-advocacy skills"—that are either unrelated or directly contrary to Hill's decision to make contact with the police. *Id*.

Moreover, contrary to the Ohio courts' findings, Hill's "performance" during the police interrogation revealed him to be "childlike, confused, often irrational, and primarily self-defeating," and Hill's attempts to change his story under pressure failed to "skillfully hid[e] his part" in Fife's death. *Id.* at *34. The police even stated that Hill was suggestible, telling him that "Everytime [*sic*] we suggest something to you, you have a tendency to agree with us." R. 26 (Trial Tr. at 30) (Page ID #2105). Hill often changed his story or "embellished his statement[s] at the slightest suggestion by the police, even when the information at issue was irrelevant or

incriminating." *Hill*, 2014 WL 2890416, at *35. These actions were "quite the opposite of adaptive." *Id.* at *34. This is especially true where Hill's decision to approach the police did not "resolve his problems," but "succeeded only in immediately drawing the police's attention to himself." *Id.*

While purportedly relying on prison accounts, the Ohio courts made no mention of Hill's prison *records*. Those records reflect that prison officials always understood Hill to be mentally incapacitated or "slow." As when he was in school, Hill was considered to be illiterate in prison. He was understood to have a "very limited writing ability," and he had other inmates write for him. R. 97 [disc 1] (*Atkins* Hr'g Tr.) (Page 438). Notes written from Hill to prison officials make clear that he had trouble keeping track of his prison account balance. According to fellow inmates, when Hill was given a task, he had to be carefully supervised because he could not remember how to complete the assigned task. At least one prison official reported that Hill was able to perform his job as a porter because the cleaning supplies were sorted by color, so Hill was not required to read the supplies' instructions. *Id.* at 363, 1381.

Rather than credit the ten intellectual-disability diagnoses that Hill received prior to *Atkins* even being decided, the court made its own lay judgment that "there is nothing about [Hill's] general appearance—facial expressions or conduct—suggesting . . . that the Petitioner is mentally retarded." *State v. Hill*, No. 85-CR-317, at 76 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported) [R. 97 [disc 1] (Suppl. App.) (Page 3474)]. The Ohio Court of Appeals defended that lay judgment on the basis that the experts also believed that Hill failed to exhibit significant adaptive deficiencies. *See Hill*, 894 N.E.2d at 125–26.

Perhaps most disturbing, three psychologists who testified at Hill's pre-*Atkins* mitigation hearing concluded that Hill was intellectually disabled and had extremely poor adaptive functioning. On appeal, the Ohio Supreme Court and Court of Appeals found these psychologists' testimony credible and concluded that Hill was intellectually disabled. *See State v. Hill,* 595 N.E.2d 884, 901 (Ohio 1992); *State v. Hill*, Nos. 3720, 2745, 1989 WL 142761, at ** 6, 32 (Ohio Ct. App. Nov. 27, 1989). It was only after *Atkins* came down, and Hill was again assessed for intellectual disability in renewed state-court proceedings, that the Ohio courts reversed course. *See Hill*, 300 F.3d at 682 (remanding this case to the Ohio courts so that Hill

could exhaust his *Atkins* claim, while recognizing that the "Ohio courts reviewing his case have [already] concluded that Danny Hill is retarded and voluminous expert testimony supported this conclusion" (citation omitted)).

4. Conclusion

The evidence that Hill is intellectually disabled is overwhelming. It is clear from the record that Hill was universally considered to be intellectually disabled and seriously lacking in adaptive skills by school teachers, administrators, and the juvenile court system, and even (previously) the Ohio Supreme Court. Hill consistently performed very poorly in school (functional academics); there was consistent documentation that he had trouble maintaining proper hygiene despite reminders (self-care); he had trouble making friends and responding appropriately to authority figures (social and communication); and he was described as a follower, easily led, and vulnerable to exploitation by adults (self-direction). The record shows that these deficits largely continued into adulthood, particularly with respect to self-care and functional academics. Nevertheless, the state courts and the experts they retained failed to grapple with this extensive social history, choosing instead to favor the accounts of prison guards and personal observations.

We hold that the Ohio courts' legal conclusions breach the most basic tenets of *Atkins*, and that their factual findings cannot be sustained on this record. *Atkins*, on its most basic level, forbids the execution of persons who are intellectually disabled. It requires courts to look at all relevant evidence of intellectual disability—and certainly evidence of manifestations before the age of 18. This is not a case where evidence of intellectual disability comes out after conviction. Hill was diagnosed as intellectually disabled from a very young age. He attended special education classes. He could not be counted on to bathe. Yet, the Ohio courts were impressed by his ability to incriminate himself to the police and to rehash a scripted story in a cloak of competency. They valued the opinions of prison guards interacting with Hill in a highly structured setting over professional reports and diagnoses recorded over a lifetime. Even if *Atkins* alone (without the assistance of *Moore*) poses no bar to offsetting adaptive deficiencies with adaptive strengths, "the Ohio courts failed to grapple with the evidence in the record indicating that Hill's perceived strengths were actually weaknesses." *Hill*, 881 F.3d at 495.

As the Ohio Court of Appeals itself stated at the penalty phase, "The record is replete with competent, credible evidence which states that [Hill] has a diminished mental capacity. He is essentially illiterate, displays poor word and concept recognition and, allegedly, has deficient motor skills." *Hill*, 1989 WL 142761, at *32. There is no getting around it—Hill is intellectually disabled. To deny the obvious is unreasonable.

B. Age of Onset

We also reject the state court's finding that Hill's intellectual and adaptive deficits did not manifest themselves prior to the age of eighteen because clear and convincing evidence suggests otherwise. *See* 28 U.S.C. § 2254(e)(1). In fact, as noted above, Hill's disability was extensively documented before he turned eighteen because he spent all of his school years in programs for the intellectually disabled and the juvenile justice system. The record is replete with comments from teachers concerning Hill's lagging academic performance, his poor memory, his lack of personal hygiene, his immature and inappropriate behavior in relation to his peers, and his tendencies as a follower. *Hill*, 894 N.E.2d at 128–29 (O'Toole, J., dissenting). In addition to school records, the state court record contains testimony to similar effect from several staff members at a halfway house in which Hill resided as a teenager, as well as a counselor at the juvenile correction facility where he was placed.

All the of these significant adaptive skill deficits manifested themselves before Fife was killed in 1985 and, as noted by the experts, there was no reason to suspect that Hill was malingering as a child despite his apparent malingering on the assessments administered in April 2004. The records cover the time frame from 1973 to 1984, six months before the murder for which Hill was sentenced to death, and twenty to thirty years before the Supreme Court decided *Atkins*. Hill could not have been faking intellectual disability to avoid the death penalty. Accordingly, we reverse the state courts' conclusion on the age-of-onset prong as it is contradicted by clear and convincing evidence.

We recognize, of course, that state court determinations of fact are entitled to a great deal of deference. But "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief."

Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). 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." *State v. Hill*, No. 85-CR-317, at 82 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported). In so doing, the trial court inappropriately focused on perceived adaptive strengths, ignored clinicians' warnings not to conflate criminal behavior with adaptive functioning, *see, e.g.*, R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Pages 342–43), and failed to acknowledge that Hill's performance during the police interrogations was, in the words of the district court, "childlike, confused, often irrational, and primarily self-defeating." *Hill*, 2014 WL 2890416, at *34. In a three-sentence summary, the state appellate court affirmed the trial court's findings. *Hill*, 894 N.E.2d at 126. Such selective reliance on mostly irrelevant pieces of evidence to find that Hill lacked adaptive deficits before the age of 18 constitutes "an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2).

Consequently, we conclude that the state court's finding that Hill's intellectual and adaptive deficits did not manifest before the age of eighteen amounts to "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).[10] For all these reasons, the State of Ohio cannot constitutionally sentence Hill to death under *Atkins*.

IV. SUPPRESSION OF PRETRIAL STATEMENTS TO THE POLICE

For the convenience of the parties, this section and those that follow incorporate *in toto* Sections V through VII of our prior opinion. *See* 881 F.3d 483 (6th Cir. 2018).

In addition to challenging his eligibility for the death penalty after *Atkins*, Hill raised several challenges to his conviction in his habeas petition. Because we remanded his case to the state court after *Atkins* was decided in 2002, we did not reach the merits of those claims. *Hill v. Anderson*, 300 F.3d 679 (6th Cir. 2002). We do so now and **AFFIRM** his conviction.

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[10] As we have decided the merits of Hill's *Atkins* claim in his favor, we pretermit discussion of Hill's claim of ineffective assistance of counsel during his *Atkins* proceedings in state court.

Hill contends that the Ohio courts unreasonably applied clearly established federal law in determining that Hill's statements to police were admissible. Hill maintains that his statements were "involuntary and false" because: his intellectual disability made him especially vulnerable to police coercion; his intellectual deficiencies were known by the police, including interrogators Sergeant Thomas Stewart, Sergeant Dennis Steinbeck, and his physically abusive uncle, Detective Morris Hill; the police made statements to Hill that led him to believe that denying guilt was "hopeless"; and Hill lacked the intellectual capacity to understand the legal consequences of the statements he made (and the police recorded) while he was at the Warren police station.

Because the Ohio courts rejected this claim on the merits as part of Hill's direct appeal, *see Hill*, 595 N.E.2d at 890–91; *Hill*, 1989 WL 142761, at **5–8, Hill must show that the state courts' decisions involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. S*ee* 28 U.S.C. § 2254(d)(1). "[A]n unreasonable application of th[e Supreme Court's] holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (citation and quotation marks omitted).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that "[a] suspect in custody must be advised . . .[,] 'prior to any questioning[,] that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010) (quoting *Miranda*, 384 U.S. at 479). This holding was necessitated by the Supreme Court's acknowledgement that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be accorded his privilege under the Fifth Amendment not to be compelled to incriminate himself." *Dickerson v. United States*, 530 U.S. 428, 434–35 (2000) (citation, quotation marks, and ellipses omitted). Thus, "[w]hen police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief." *Oregon v. Elstad*, 470 U.S.

298, 317 (1985); *see also Lego v. Twomey*, 404 U.S. 477, 487-88 (1972) ("[*Miranda*] excludes confessions flowing from custodial interrogations unless adequate warnings were administered and a waiver was obtained.").

In this case, it is undisputed that Hill was given *Miranda* warnings and signed a waiver prior to making the recorded statements that he sought to suppress at trial. Hill's challenge, then, is to the validity of that waiver. He argues that because his waiver was not knowing, intelligent, and voluntary, it was invalid.

A suspect may waive his *Miranda* rights only if "the waiver is made voluntarily, knowingly and intelligently." *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (citation and quotation marks omitted).

> The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation [reveals] both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. (citations and quotation marks omitted). For a waiver to be knowing and intelligent, the suspect must be "fully advised of [his] constitutional privilege[s]." *Colorado v. Spring*, 479 U.S. 564, 574 (1987). To be voluntary, a confession may not be "the product of coercion, either physical or psychological." *Rogers v. Richmond*, 365 U.S. 534, 540 (1961). However, "[p]loys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns." *Illinois v. Perkins*, 496 U.S. 292, 297 (1990); *see, e.g.*, *Oregon v. Elstad*, 470 U.S. 298, 317 (1985) ("[T]he [Supreme] Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily.") (citation omitted).

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary . . . .'" *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Although a suspect's mental condition may be a "significant factor in the 'voluntariness' calculus," that "mental condition, by

itself and apart from its relation to official coercion, should [n]ever dispose of the inquiry into constitutional 'voluntariness.'"[11] *Id.* at 164.

On December 16, 1985, the Ohio state trial court held a hearing on Hill's motion to suppress his audio- and video-taped statements to the police.[12] At the suppression hearing, witnesses testified to the following facts.

On September 12, 1985, two days after Fife was attacked, Hill went to the Warren Police Department and approached Sergeant Stewart to talk about that "boy being beat up in the field." R. 28 (Suppression Hr'g Tr.) (Page ID #2748–49). Stewart, who was a friend of Detective Hill and had known (Danny) Hill since he was approximately six years old, agreed to talk to Hill in the "Narcotics Room." *Id.* at 2750–51, 2782. Stewart testified that Hill had come to the police station voluntarily, i.e., that no one had "brought him in," and Hill's testimony corroborated this assertion. *Id.* at 2751; R. 29 (Suppression Hr'g Tr.) (Page ID #3130).

Once in the Narcotics Room, Hill told Stewart that he had seen another boy, Reecie Lowery, riding the bike of the boy "who was beat up." R. 28 (Suppression Hr'g Tr.) (Page ID #2751–52). When Stewart asked Hill, "How do you know it's the boy's bike?", Hill responded, "I know it is." *Id.* at 2752. Hill then told Stewart about the bike's location and encouraged Stewart to "go out and get the bike" before Lowery put it back in the wooded field where Fife was attacked. *Id.* After Hill told Stewart that he was willing to show him where the bike was located, Stewart and Hill began talking about various persons, including Tim Collins and Tim Combs (Hill's co-defendant). Hill insinuated that both Collins and Combs liked boys and might have been the ones who attacked Fife. At some point during their talk, Hill mentioned that Fife was choked with his underwear. *Id.* at 2756–57.

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[11]Under Supreme Court precedent, a person who meets the standard for intellectual disability may not be executed. As discussed extensively above, we find that Hill is intellectually disabled and is entitled to have the writ issue with respect to his sentence. However, the requirements for determining whether someone is intellectually disabled under *Atkins* and *Lott* are different from the requirements for determining whether a waiver is knowing and voluntary under *Miranda*. And a person who is intellectually disabled may still be able to knowingly and voluntarily waive his *Miranda* rights.

[12]The transcript of the suppression hearing can be found in the district court record at R. 28 and R. 29 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28, 1997). Because the pagination in the original transcript is unclear, we will cite to the pagination used by the district court.

Eventually, Stewart drove Hill to look for the bike, but because it was raining and visibility was poor, Stewart and Hill did not go to the wooded field. Instead, Hill showed Stewart where Combs lived. *Id*. at 2753–54. After dropping Hill off at his house, Stewart compiled a report that he shared with his fellow officers, including Sergeant Steinbeck. *Id*. at 2755, 2757–58.

The next day, September 13, 1985, Steinbeck went to Hill's home around 9:30 or 10:00 in the morning to follow-up on the information that Hill had given to Stewart. Steinbeck asked Hill to come talk to him at the police station and Hill agreed. *Id*. at 2762–63, 2881. Hill was driven to the police station in the front seat of Steinbeck's police cruiser and was not booked, fingerprinted, or placed under arrest. Steinbeck read Hill his *Miranda* rights aloud, asked Hill if he understood those rights, and had Hill sign a waiver of his *Miranda* rights before questioning Hill off and on for approximately three hours. *Id*. at 2863–64, 2882–84. During those three hours, Hill never asked for the questioning to stop, tried to leave, or asked to see an attorney. *Id*. at 2865–66, 2885–89. After talking to Hill, Steinbeck transcribed a copy of Hill's statement, which also included a recital of his *Miranda* rights. However, Hill did not sign the statement that day because Steinbeck had forgotten to ask him to do so after telling Hill he could go home with his mother. *Id*. at 2866–69, 2889–90.

On September 16, 1985, both Steinbeck and Detective Hill went to Hill's home, ostensibly to ask Hill to sign his statement from September 13 and to ask Hill's mother for a written statement regarding Hill's alleged alibi. After putting up some initial resistance to speaking to the police again, Hill, at the behest of his mother, agreed to come down to the police station, this time accompanied by his mother. Hill was not placed under arrest, booked, fingerprinted, or handcuffed. *Id*. at 2869–70, 2890–92, 2899–2901, 2930–32.

In the interrogation room, and apparently separated from his mother, Hill was verbally advised of his *Miranda* rights by Detective Hill. *Id*. at 2871, 2901–02, 2933. Hill indicated that he understood his rights. *Id*. at 2902. Although not initially present, Sergeant Stewart eventually encountered Sergeant Steinbeck and Detective Hill in the interrogation room with (Danny) Hill. *Id*. at 2758, 2872, 2908. At some point, officers told Hill they did not believe he was telling the truth, and Stewart told Hill that he needed to be honest if he had "anything to do with [Fife's

murder].” *Id*. at 2872, 2909–10. Officers also told Hill that it would “benefit him” to tell them the truth, believing that Combs would likely blame the attack on Hill alone. *Id*. at 2909.

Apparently at Hill’s request, Detective Hill was left alone with his nephew. According to (Danny) Hill, while he and Detective Hill were alone, Detective Hill “threw [him] against the wall,” slapped him across the face, and told him that he “better tell” the police what happened. *Id*. at 2759, 2810–11, 2859, 2910, 2936–37, 2953. Hill also testified that his uncle kicked him under the table in order to prompt Hill to (1) consent to his statement being taped and (2) begin talking to police at the beginning of the taping.

Detective Hill, unsurprisingly, described the time he spent alone with his nephew very differently, testifying:

> At that point in time, you know, I set [sic] there, and I tried to let Danny know that wasn’t anyone [sic] going to hurt him. No one was going to do anything to him, but [I also told him] the fact that I kn[e]w that he was involved in the homicide, and I wanted to get the truth out of him. At that point in time, he looked at me and tears started to come from his eyes. When tears started coming from his eyes, he told me . . . , “I was there. I was in the field when he got murdered.” When the young Fife kid got murdered.[13]

R. 28 (Suppression Hr’g Tr.) (Page ID #2937). When Detective Hill emerged from the interrogation room a few minutes later, he told the other officers that Hill was going to cooperate and tell them what happened. At the time Detective Hill made this announcement, Hill was either crying or had tears in his eyes. *Id*. at 2759, 2811, 2839, 2873, 2937–38.

At Stewart’s suggestion, Hill gave the police permission to tape his statement. *Id*. at 2759–60, 2873–76, 2912. Sergeant Steinbeck, Sergeant Stewart, and Detective Hill were all present when Hill gave this initial audiotaped statement, as well as when Hill gave a second statement that was videotaped by Detective James Teeple. *Id*. at 2874–75. According to Stewart, Hill was not crying during the taped statement itself. About halfway through the audio-taping, the police asked Hill to sign the statement he had given to Steinbeck on September 13. *Id*. at 2903. Hill was also read his *Miranda* rights once more at some point prior to giving the second, videotaped statement. *Id*. at 2876, 2923, 2963–64. While giving his statements, Hill

[13]Detective Hill also denied kicking his nephew.

never asked to stop the interrogation, requested an attorney, or asked to leave. Sometime after the interrogation, Hill was placed under arrest based on the details included in his statements. *Id.* at 2776.

When asked questions about the nature of the interrogation generally, both Detective Hill and Sergeant Stewart denied that the police threatened or made promises to Hill during the interrogation, and asserted that Hill never asked for a lawyer. *Id.* at 2760, 2772, 2935, 2938. When prompted by the prosecutor about Hill's previous encounters with the police, Detective Hill estimated that by the date of the September 16, 1985 interrogation, Hill had been arrested by the Warren Police Department "[a]pproximately 15 to 20 times." *Id.* at 2929. Both Detective Hill and Sergeant Steinbeck testified that they had arrested Hill on prior occasions and had read him his *Miranda* rights "[m]any times." *Id.* at 2876, 2928–29. And two of the prosecution's exhibits at the suppression hearing included a waiver form and voluntary statement—both of which included a recitation of *Miranda* rights—signed by Hill on March 6, 1984, which was approximately a year-and-a-half before the September 16, 1985 interrogation.

In adjudicating this claim, the state appellate court rejected Hill's argument that his waiver of his *Miranda* rights was invalid. *Hill*, 1989 WL 142761, at *5. Acknowledging that it needed to make "discrete inquiries" as to both the "knowing and intelligent" and "voluntary" aspects of Hill's waiver, the appellate court considered these criteria in turn.

With regard to the knowing and intelligent factor, the appellate court noted that although the "lack of mental acuity . . . can interfere with an accused's ability to give a knowing and intelligent waiver," there is no bright line rule for distinguishing between "those capable of an intelligent waiver from those who lack the ability to do so." *Id.* The appellate court also acknowledged the Supreme Court's admonition in *Connelly* that a suspect's mental condition, by itself, does not necessarily prevent him from effectively waiving his *Miranda* rights. *Id.* In analyzing the facts of Hill's case specifically, the appellate court opined:

> [Hill] admittedly suffers from some mental retardation (although the evidence presented is divergent as to the severity of the handicap) and has had concomitant difficulties in language comprehension throughout his formal education. [Hill] is categorized as being mildly to moderately retarded. Evidence was presented which indicates that appellant is illiterate and this court

> acknowledges that literal recognition of each word contained in the "*Miranda* Rights" and/or "waiver form" may be beyond [Hill's] mental comprehensive capacity.
>
> However, from the record here, particularly during the suppression hearing, this court is also aware (as was the trial court below) of the long and multi-faceted exposure [Hill] has had with the state's criminal justice system. The evidential table in this case also demonstrates that [Hill] exhibited a functional capacity to understand these rights, including the right to appointed counsel. This was evident from the exchange that occurred during the audio and video tape sessions. The officers who interrogated [Hill] had either significant contact with him and/or had questioned him on prior occasions and had developed informed estimates as to [Hill's] ability to understand, albeit in a vernacular sense, all aspects of the *Miranda* warning. The audio and video tapes of [Hill's] interrogations disclose that [Hill] was capable of understanding the questions put to him and of responding intelligently.
>
> Moreover, the behavior of the [Hill] during the police investigation belies the notion that he was no more than a malleable victim of police suggestion. [Hill] possessed the requisite intelligence to implicate other persons in the murder and was capable of modifying his story when inconsistencies were demonstrated to him. Additionally, [Hill] qualified and corrected the police officers' misstatements of the factual scenario which he had related to them. He also was able to follow "verbal concepting," displaying an understanding of the officers' direction of questioning and the dialogue utilized during the interrogation.

Hill, 1989 WL 142761, at *6. Based on the aforementioned concerns, and citing the Supreme Court's decisions in *Miranda* and *Lego* in support, the state appellate concluded that Hill's waiver was knowing and intelligent. *Id.*

In addressing voluntariness, the appellate court rejected Hill's argument that his waiver was involuntary "as a result of his mental [infirmities] and the coercive action of the police." *Id.* First, the court noted that Hill's IQ was not necessarily dispositive as to whether he was incapable of voluntarily waiving his *Miranda* rights, particularly since he had been read those rights in his many prior encounters with police. *Id.* at **6–7. In addressing Hill's argument that his intellectual deficiencies made him vulnerable to the police officers' "psychological ploys," the appellate court noted that Hill was read his *Miranda* rights multiple times on September 13 and 16, 1985, and "appeared articulate and coherent as he answered questions." *Id.* at *8. Finally, in concluding that the record was "devoid of evidence indicating that the custodial interrogation of [Hill] violated his constitutional rights," the appellate court reasoned that

because (among other things): (1) Hill originally approached the police on September 12 of his own accord; (2) Hill was read his *Miranda* rights numerous times without ever being placed under arrest; and (3) "[t]he recorded conversations [between Hill and the police] d[id] not suggest the use of any improprieties by the police," Hill's *Miranda* claim was without merit. *Id.* at **9–10.

The Ohio Supreme Court ruled similarly, stating: "Upon a careful review of the record, we can discern no coercive or overreaching tactics employed by the police during questioning." *Hill*, 595 N.E.2d at 890. In making this finding, the court explicitly acknowledged that before Hill turned 18, Detective Hill "would at times physically discipline [his nephew] at the request of [Hill's] mother."[14] *Id.* In fact, the court appeared to credit Detective Hill's version of events—i.e., that "[Hill] stated to [Detective] Hill that he was 'in the field behind Valu King when the young Fife boy got murdered.'" *Id.* The court also found, based on the Supreme Court's ruling in *Connelly* and Hill's "his prior dealings with the criminal process as a juvenile," that Hill's "mental aptitude did not undercut the voluntariness of his statements or his waiver of *Miranda* rights." *Id.* Finally, the Ohio Supreme Court rejected Hill's contention that his waiver was rendered involuntary by virtue of the police's tactics during the interrogation. *Id.* at 891 ("Upon a careful review of the testimony and the audiotape and videotape statements, we do not find that the interrogation tactics used by the police officers, even in light of [Hill's] mental capacity, rendered the statements involuntary, or that the officers improperly induced [Hill] to make incriminating statements.").

Reviewing the state courts' decisions under § 2254(d)(1), the district court found that Hill's arguments that he should be granted habeas relief on this claim were without merit. *Hill v. Anderson*, No. 4:96-cv-00795, 1999 U.S. Dist. LEXIS 23332, at **78–92 (N. D. Ohio Sept. 29, 1999).

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[14]Hill was 18 at the time of the September 16, 1985 interrogation, and Detective Hill testified at the suppression hearing that he had not physically disciplined his nephew since at least six to eight months prior. R. 28 (Suppression Hr'g Tr.) (Page ID #2976).

Applying AEDPA's deferential review standard, we ask whether the state courts unreasonably applied Supreme Court precedent in finding that Hill's waiver of his *Miranda* rights was voluntary, knowing, and intelligent. *See* 28 U.S.C. § 2254(d)(1). *Connelly* tells us that a compromised mental state does not, "by itself and apart from its relation to official coercion," vitiate a defendant's ability to waive his *Miranda* protections. *See* 479 U.S. at 164. And *Miller v. Fenton*, 474 U.S. 104 (1985), directs us to treat state-court findings on "subsidiary questions, such as the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with the *Miranda* warnings" as "conclusive" on habeas review if they are "fairly supported in the record." *Id.* at 117.

In light of these admonitions, the state courts' conclusion that Hill effectively waived his *Miranda* rights was not "unreasonable" as that term has been defined by the Supreme Court. The state courts could plausibly credit Detective Hill's account of his interrogation techniques over Hill's allegations of physical abuse to find a lack of undue coercion and could point to Hill's prior experiences with the criminal justice system and the *Miranda* process as evidence that Hill understood the nature of his waiver.

Although the required deference to the state courts' finding compels our holding on this issue, we wish to express our consternation with this result. The record contains ample evidence demonstrating that Hill's waiver was neither voluntary nor knowing. Hill was interrogated, in private, by a police-officer uncle who admitted to disciplining Hill physically in the past, and who allegedly "'threw [Hill] against the wall,' slapped him across the face, and told him that he 'better tell' the police what happened" during the course of the interrogation. *Supra* p. 34. Hill's uncle then purportedly kicked Hill under the table to induce his consent to a videotaped confession and kicked Hill again when he was reluctant to begin the confession. When considered alongside Hill's intellectual disabilities, Detective Hill's behavior raises grave questions about the voluntariness of Hill's waiver.

And while Hill was certainly exposed several times to *Miranda* warnings, we are not convinced that he ever registered the warnings' meaning. During the suppression hearing the state trial court held in 1985, Hill's attorney asked Hill a number of basic questions about his understanding of *Miranda*:

> Q: [W]hat are your Constitutional Rights?
>
> A: I don't know.
>
> Q: What's the word constitution mean?
>
> A: I don't know.
>
> Q: What's the word appointed—
>
> A: When you point at somebody.
>
> Q: You point at somebody?
>
> A: Yeah.
>
> . . . .
>
> Q: When the police talked to you, did you go ahead and talk to them?
>
> A: Yes.
>
> Q: Why?
>
> A: They police. [sic] You're supposed to talk to them.
>
> Q: You have to talk to them?
>
> A: Yep!
>
> Q: Do you know what's an attorney? [sic]
>
> A: I don't know.

R. 29 (Suppression Hr'g Tr.) (Page ID #3114–16).

It is difficult, in light of this testimony, to accept the state courts' determination that Hill "exhibited a functional capacity to understand [his] rights." *Hill*, 1989 WL 142761, at *6. Nevertheless, because of the procedural posture of this case, we are compelled to affirm the district court.

Accordingly, we **AFFIRM** the district court's denial of habeas relief as to his suppression claim.

V. INFLAMMATORY STATEMENTS BY THE PROSECUTOR DURING HILL'S BENCH TRIAL

Hill also makes a prosecutorial misconduct claim based on the prosecutor's allegedly inflammatory statements to the three-judge panel that convicted Hill and sentenced him to death.

This claim is governed by § 2254(d)(1). As indicated above, Hill must show that the state court's decision "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

The full-text of the "inflammatory statements" challenged by Hill may be found in his opening brief. Some of those comments included:

- A reference to Raymond Fife being a 12-year-old boy from the community who had a "right to live," a right to "be in school," and a right "to be here today";
- Statements that Hill was an "animal," who "destroyed and devoured" Fife, and "would make the Marquis de Sade proud";
- A statement that "you don't necessarily have fingerprints on everything" with reference to the apparent lack of Fife's fingerprints on his bike;
- The prosecutor's opinion about which expert witness on a particular issue was "more qualified";
- A statement that Detective Hill did not want to testify against his nephew;
- A reference to Hill being a "poor, dumb boy" who nonetheless violently raped two women and therefore "relishe[d] . . . inflicting pain and torture [on] other human beings";
- A statement that Hill put Fife through a "living hell," that Fife "had no justice while was living," and that justice demanded a guilty verdict;
- The prosecutor's opinion that defense counsel had not shown "any mitigating factors" and that the aggravated factors "clearly outweigh[ed] the absence of any mitigation";
- Two more references to Hill's history of sexual assault, which the prosecution argued belied the idea that Hill had "difficulty with his motors skills";
- A rambling soliloquy about how the prosecution would have liked to called Fife as a witness so he could describe the beating, strangulation, and sexual assault he endured, but Fife was "not here to testify about that thanks to [Hill]." The prosecutor also stated that Fife, if alive, would have testified about how he missed his family and his friends;

- A reference to Hill as "this manifestation of evil, this anomaly to mankind, this disgrace to mankind."

In adjudicating this claim as part of Hill's direct appeal, the Ohio Supreme Court (1) noted that trial counsel never objected to any of the "complained-of comments," (2) opined that those comments were therefore subject to plain error review only, and (3) concluded that the prosecutor's statements amount to "neither prejudicial error nor plain error[.]" *Hill*, 595 N.E.2d at 898. The Ohio Supreme Court also noted that in Ohio, "[courts] indulge in the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *Hill*, 595 N.E.2d at 898 (quoting *State v. White*, 239 N.E.2d 65, 70 (1968)).

The district court rejected Hill's prosecutorial misconduct claim as well, reasoning that:

> [Hill's] case was tried before a three judge panel [that] presumably was able to remember the evidence presented at trial and not be misled by any of the prosecutor's statements. Most of the statements were harmless . . . . Three judges should have been able to disregard any intended undue influence.[15]

1999 U.S. Dist. LEXIS 23332, at *110. Accordingly, the district court concluded that the Ohio Supreme Court's determination that "no prejudicial or plain error occurred . . . was not an unreasonable application of clearly established law." *Id.* at **110–11.

In assessing whether the Ohio Supreme Court's decision involved an unreasonable application of federal law, the relevant Supreme Court holding is the Court's decision in *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), which held that "a prosecutor's improper comments will be held to violate the Constitution only if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parker v. Matthews*, 576 U.S. 37, 45 (2012) (quoting *Darden*, 477 U.S. at 181). The Supreme Court has also held that "the *Darden* standard is a very general one, leaving courts 'more leeway in reaching outcomes in case-by-case determinations.'" *Id.* at 48 (citation, quotation marks, and ellipses omitted).

[15]The state appellate court, in adjudicating this claim, similarly noted that although some of the prosecutor's comments would have "perhaps [been] prejudicially erroneous in a jury trial, [that] was not so [in Hill's case]." *Hill*, 1989 WL 142761, at *15.

In *Darden*, the Supreme Court found that comments similar to some of those made by the prosecutor in this case—particularly allusions to the death penalty and the defendant being an "animal"—were improper. 477 U.S. at 179–80. Those comments, unlike the comments in this case, were made before a jury, not a three-judge panel. *Id.* at 170–71. Nonetheless, the Supreme Court noted that these improper statements did not "manipulate or misstate the evidence, [or] implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id.* at 182.

In this case, it is clear that the prosecutor's comments were emotionally charged and designed to paint Hill in a bad light. However, it does not appear that they misstated the evidence in the case or implicated Hill's constitutional rights. Further, any efforts to play on the emotions of the three-judge panel would likely have been futile. Although they may not adopt a presumption as strong as the one "indulged" by the Ohio courts, federal courts similarly presume that a judge, as the trier of fact, can readily identify credible evidence, *United States v. Thomas*, 669 F.3d 421, 425 (4th Cir. 2012), give proper weight to the evidence, *Caban v. United States*, 728 F.2d 68, 75 (2d Cir. 1984), and understand what law is relevant to his or her deliberations, *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986). And Hill has put forth no evidence indicating that the three-judge panel that tried his case was incapable of discerning what constitutes admissible evidence and parsing such evidence out from any inflammatory or irrelevant[16] comments by the prosecutor.[17] For these reasons, we conclude that the decision by the Ohio Supreme Court was not an unreasonable application of clearly established law.

We **AFFIRM** the district court's denial of habeas relief as to Hill's prosecutorial misconduct claim.

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[16]For example, the three-judge panel disclaimed any reliance on Hill's "prior crimes . . . in reaching its verdict." *See Hill*, 595 N.E.2d at 893.

[17]Hill's reference to a single line in the panel's opinion that referred to Hill and Combs' "blood lust characterized by a series of acts of torture, rape, and murder," does not change this conclusion. The rest of the opinion describes Fife's injuries, and the means by which they were inflicted (based on the evidence at trial), in great detail. The opinion also indicates that the judges were struck by the "total lack of remorse" shown by Hill appearing at the police station to seek a reward after Fife's death. Looking at the document as a whole, there is no indication that the comment with which Hill takes issue was derived from the prosecutor's statements rather than the judges' own assessments of the offenses.

VI. THE TRIAL COURT'S FAILURE TO HOLD A PRETRIAL COMPETENCY HEARING

Lastly, Hill argues that the trial court's failure to inquire about Hill's competency denied him a fair trial under the due process clause of the Fourteenth Amendment. Here, the term "trial court" refers to the court that tried Hill's underlying offenses in 1985 and 1986.

This claim is governed by § 2254(d)(1). As indicated above, the Supreme Court has held that to obtain relief under § 2254(d)(1), the petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). In assessing competence, the relevant question is whether the defendant's "mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Indiana v. Edwards*, 554 U.S. 164, 170 (2008). If the defendant's mental condition meets this description, the courts may not try him.[18] *Id.*

Hill maintains that because the trial court knew that he had "limitations in vocabulary, ability to calculate, and ability to draw" and "could not recognize or understand a majority of the words on the *Miranda* waiver form," the trial court should have "conduct[ed] further inquiry into [Hill's] competency to stand trial." Hill's Br. at 124–25. With regard to this final issue, Hill requests that this Court determine "not whether the state court was unreasonable in finding Danny competent to stand trial, but whether it was unreasonable under *Pate*[19] and *Drope*[20] not to make such an inquiry in the first instance." *Id.* at 124. Hill also argues, with no elaboration and

[18]Again, our conclusion that Hill is intellectually disabled and thus ineligible for execution under *Atkins* does not mean that Hill was incompetent to stand trial or that the trial court should have presumed his incompetence and ordered a competency hearing *sua sponte*. The two inquiries are different, and even *Atkins* recognizes that "[m]entally retarded persons frequently . . . are competent to stand trial." 536 U.S. at 318.

[19]*Pate v. Robinson*, 383 U.S. 375 (1966).

[20]*Drope v. Missouri*, 420 U.S. 162 (1975).

minimal citation to the record,[21] that the Ohio Supreme Court "unreasonably applied *Pate* and *Drope*" in determining that Hill was competent to stand trial. *Id.* at 125.

The Warden, for his part, asserts that "[a]lthough Hill is intellectually limited, his demeanor at trial was such that the trial court had no reason to *sua sponte* assess Hill for competence to stand [trial]." The Warden also argues that:

> The trial record gives every indication that Hill was compliant, cooperative and appropriately attentive to the proceedings. Moreover, the trial judge had ample opportunity to assess Hill's ability to navigate through the trial proceedings, where Hill testified extensively during a pre-trial suppression hearing, and also had a direct colloquy with the trial court for acceptance of the jury waiver. In addition, none of the three mental health experts who testified for the defense at trial expressed a concern about Hill's competence to stand trial.

Warden's Br. at 97. Hill's reply brief does not address these contentions.

Neither the state appellate court nor the Ohio Supreme Court opinions from Hill's direct appeal noted Hill's competency argument as one of his nineteen assignments of error and twenty-five propositions of law, respectively. *See generally State v. Hill*, 595 N.E.2d 884 (Ohio 1992); *State v. Hill*, Nos. 3720, 3745, 1989 WL 142761 (Ohio Ct. App. Nov. 27, 1989). Instead, the only similar claims addressed by these courts pertained to Hill's arguments that he could not knowingly and voluntarily waive his right to counsel or his right to a jury trial due to his alleged intellectual disability. *See, e.g.*, *Hill*, 595 N.E.2d at 890–91, 895; *Hill*, 1989 WL 142761, at **3, 5–7, 13–14. The district court found that Hill raised the issue of competency only under state law, not federal law, and that Hill did not raise the competency claim under federal law until filing for state post-conviction relief. *Hill*, 1999 U.S. Dist. LEXIS 23332, at **92–93. On this basis, the district court concluded that Hill's competency claim was procedurally defaulted. *Id.* at **93–94 (citing *State v. Hill*, No. 94-T-5116, 1995 WL 418683 (Ohio Ct. App. June 16, 1995)). The Warden argues that even if Hill's claim was not procedurally defaulted, it fails on the merits. We agree.

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[21] This issue occupies three pages in Hill's opening brief and just over a page in his reply brief. The only record citation in the opening brief seeks to demonstrate that Hill "could not recognize or understand a majority of the words on the *Miranda* waiver form."

On December 16, 1985, the trial court held a hearing on Hill's motion to suppress his statements to the police. Defense counsel called Hill as a witness to testify with respect to "the circumstances under which [he] gave statements to the police department." R. 29 (Suppression Hr'g Tr.) (Page ID #3101). In response to the trial court's questions, Hill indicated that he understood the purpose and nature of the hearing. *Id.* at 3103–04. He went on to testify about the means by which he arrived at the police station, as well as his inability to leave police custody prior to the arrival of his mother on Friday, September 13, 1985. On Monday, September 16, 1984, Hill returned to the police station at his mother's behest with his uncle, Detective Hill, and another police officer, Sergeant Steinbeck. As discussed earlier, Hill testified that while he and Detective Hill were alone, Detective Hill threw Hill against the wall, slapped him, and told him to tell the police what had happened. Hill also claimed that after being physically abused by his uncle, he told the police what they wanted to hear because he was afraid of both Detective Hill and the other officers. *Id*. at 3114, 3118–19.

Defense counsel, for his part, attempted to demonstrate that Hill could neither read nor write and that Hill signed the *Miranda* waiver without understanding its contents or knowing what it meant; meanwhile, the prosecutor attempted to demonstrate that Hill had been to the Warren police department many times before based on theft-related crimes and was therefore familiar with the department's *Miranda* form. *Id*. at 3107–09, 3115, 3121–23, 3152–53, 3155. On cross-examination, Hill testified that he signed the *Miranda* waiver because the police told him to do so. *Id*. at 3135–37. Hill's testimony ended following questions from the trial court about Hill's alleged physical abuse at the hands of Detective Hill.

Hill appeared before the trial court once more on January 7, 1986, this time to waive his right to a jury trial. *See Hill*, 595 N.E.2d at 889. The trial court's colloquy with Hill, which was designed to determine whether Hill's waiver was knowing and voluntary, included an explanation of the jury selection system, the role of the jury, the jury waiver's effect on some of Hill's pending motions, defense counsel's possible motives for seeking to waive Hill's right to a jury trial, and the differences between a jury and three-judge panel in terms of number of persons, familiarity with the law and the facts of the case, and demographic composition. The trial court read the waiver aloud to Hill and suggested the Hill go over the waiver with his

attorney. Waiver of Jury Trial Hr'g Tr. at 10–11.[22] Hill indicated that he had discussed the issue of waiver with both his attorney and his mother, and there was a 25-minute recess in which the attorney and Hill's mother apparently discussed the waiver with him further. *Id.* at 5–6. After the recess, Hill affirmatively stated that he wanted to be tried by the three-judge panel. *Id.* at 12.

A review of Hill's testimony during the December 16, 1985, suppression hearing reveals that Hill claimed to understand the nature of the hearing and was able to answer questions posed by the prosecutor, defense counsel, and the trial court. Hill stated more than once when he did not understand or did not know the answer to a question, either on his own or with attorney prompting. He also appeared to understand the role of the trial judge. Hill's interactions with the trial court at the January 7, 1986 hearing on his waiver of jury trial also failed to raise any red flags regarding competence. Although the trial court did most of the talking, Hill did not express any confusion about the nature of the waiver, and was given an opportunity to go over the considerations discussed by the trial court with his attorney and mother before and during the hearing. After Hill conferred with his attorney, the following exchange took place:

> COURT: All right. Danny, you've been talking with your lawyer now, have you not, for the last 25 minutes or so?
>
> DEFENDANT HILL: Yeah.
>
> COURT: And did he go over this matter of a jury trial with you?
>
> DEFENDANT HILL: Yeah.
>
> COURT: And you want to tell me now what decision you've made after talking this over.
>
> DEFENDANT HILL: I want to have—
>
> COURT: What do you want to do? Who do you want to try it? Three judges—
>
> DEFENDANT HILL: Three judges.
>
> COURT: —or do you want the jury?
>
> DEFENDANT HILL: You.
>
> COURT: I hope you understand—you mean myself and two other judges?
>
> DEFENDANT HILL: (Nods head affirmatively.)

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[22] The transcript of the jury waiver hearing can be found in the district court record at R. 30 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28. 1997).

Id. At no point during the hearing did Hill behave in a manner, or make a statement indicating, that he did not understand the nature of the waiver.

On this record, there is no indication that Hill did not understand the nature of the proceedings against him or that he could not consult with defense counsel to assist in his case. *See Edwards*, 554 U.S. at 170. Although Hill is correct that the record suggests that he was functionally illiterate at the time of the suppression hearing, Hill cites no authority for the proposition that trial courts should equate illiteracy to incompetence. He also cites no authority for the proposition that because there were other signs that he was intellectually limited, i.e., his limited vocabulary or "ability to draw similarities," the trial court should have doubted his competence to stand trial and ordered a competency hearing *sua sponte*. As indicated above, the trial court had at least two opportunities to observe Hill and interact with him directly, and these incidents did not suggest that Hill was incompetent to stand trial under *Pate*, *Drope*, or the more recent Supreme Court case, *Edwards*.

For the aforementioned reasons, we **AFFIRM** the district court's denial of habeas relief as to Hill's due process claim.

VII. CONCLUSION

For the reasons articulated above, we **REVERSE** the district court's denial of habeas relief with regard to Hill's *Atkins* claim and we **REMAND** with instructions to grant the petition and to issue the writ of habeas corpus with respect to Hill's death sentence. We pretermit Hill's ineffective assistance of counsel claim based on *Atkins*, and **AFFIRM** the district court's denial of habeas relief with regard to his other three claims.

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0188p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DANNY HILL,

Petitioner-Appellant,

v.

TIMOTHY SHOOP, Warden,

Respondent-Appellee.

Nos. 99-4317/14-3718

On Petition for Rehearing En Banc

United States District Court for the Northern District of Ohio at Youngstown.
No. 4:96-cv-00795—Paul R. Matia and John R. Adams, District Judges.

Argued En Banc: December 2, 2020

Decided and Filed: August 20, 2021

Before: SUTTON, Chief Circuit Judge; MERRITT, MOORE, COLE, CLAY, GIBBONS, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, BUSH, LARSEN, NALBANDIAN, and READLER, Circuit Judges.*

COUNSEL

ARGUED EN BANC: Vicki Ruth Adams Werneke, FEDERAL PUBLIC DEFENDER'S OFFICE, Cleveland, Ohio, for Appellant. Benjamin M. Flowers, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON SUPPLEMENTAL BRIEF:** Vicki Ruth Adams Werneke, Lori B. Riga, FEDERAL PUBLIC DEFENDER'S OFFICE, Cleveland, Ohio, for Appellant. Benjamin M. Flowers, Stephen E. Maher, Michael J. Hendershot, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. Sarah K. Campbell, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, Kevin J. Truitt, DISABILITY RIGHTS OHIO, Columbus, Ohio, for Amici Curiae.

*Pursuant to 6 Cir. I.O.P. 35(c), Composition of the En Banc Court, Judge Merritt, senior judge of the court who sat on the original panel in this case, participated in this decision. Judge Murphy recused himself from participation in this decision.

GIBBONS, J., delivered the opinion of the court in which SUTTON, C.J., and GRIFFIN, KETHLEDGE, THAPAR, BUSH, LARSEN, NALBANDIAN, and READLER, JJ., joined. MOORE, J. (pp. 29–63), delivered a separate dissenting opinion, in which MERRITT, COLE, CLAY, WHITE, STRANCH, and DONALD, JJ., joined. An excerpt of the panel's 2018 opinion, *see* 881 F.3d 483 (6th Cir. 2018), is appended, (app. 64–81).

OPINION

JULIA SMITH GIBBONS, Circuit Judge. In this death penalty habeas case, appellant Danny Hill seeks collateral review of his conviction for the murder of Raymond Fife, a twelve-year-old boy. The case has been to the Supreme Court once and before panels of this court twice. The core issue in the underlying state case was whether Hill was ineligible for the death penalty because he is intellectually disabled, a question that became pertinent after the Supreme Court's 2002 decision in *Atkins v. Virginia*. 536 U.S. 304 (2002). Before us, the issues are whether, under governing AEDPA review principles, the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). We conclude that the state court's resolution of the issue does not meet either of the criteria that would permit a federal court to disturb a state conviction. Thus, we affirm the district court's denial of Hill's petition for a writ of habeas corpus.

I.

In 1986, a three-judge Ohio state court panel convicted Hill of the murder of Raymond Fife, a twelve-year-old boy. *State v. Hill*, 894 N.E.2d 108, 111 (Ohio Ct. App. 2008). Hill abused and injured Fife in multiple horrible ways. *Id.* Fife was found by his father and died two days later. *Id.* The same panel sentenced Hill to death. *Id.* During the mitigation stage of Hill's sentencing, the court heard testimony from three medical professionals about whether Hill was

intellectually disabled.[1] One found that Hill's intelligence level "fluctuat[ed] between mild retarded and borderline intellectual functioning," another that Hill fell "in the mild range of mental retardation," and the last that Hill's "upper level cortical functioning indicated very poor efficiency." *Id.* at 112 (quoting *State v. Hill*, 595 N.E.2d 884, 901 (Ohio 1992)). After considering this evidence, the Ohio state court found that the record evidence suggested that Hill had a "diminished mental capacity" and that testimony suggested he would be "categorized as mildly to moderately retarded." *Id.* (quoting *State v. Hill*, Nos. 3720, 3745, 1989 WL 142761, at *32 (Ohio Ct. App. Nov. 27, 1989)). The Ohio Court of Appeals and Ohio Supreme Court both affirmed the trial court's imposition of the death penalty because they found that the aggravating circumstances outweighed any mitigating factors, including Hill's diminished intellectual capacity. *Id.*

In 2002, the Supreme Court decided *Atkins v. Virginia*, which held that it was unconstitutional to execute the intellectually disabled. 536 U.S. 304 (2002). The *Atkins* Court provided some discussion of the clinical definitions of intellectual disability, but it left it to the states to "develop[] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 317 (second alteration in original) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)). In *State v. Lott*, the Ohio Supreme Court articulated a three-part test for establishing intellectual disability based on *Atkins*: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." 779 N.E.2d 1011, 1014 (Ohio 2002), *overruled by State v. Ford*, 140 N.E.3d 616 (Ohio 2019).

In response to *Atkins*, Hill filed a petition for state post-conviction relief in 2003. *State v. Hill*, 894 N.E.2d at 113. The trial court held an evidentiary hearing, and Hill, the prosecution, and the court each chose a medical expert to evaluate Hill's intellectual capabilities. *Id.* Hill retained Dr. David Hammer, a professor and director of psychology services at the Ohio State University; the prosecution hired Dr. Gregory Olley, a professor and director of the Center for

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[1]At the time, the condition was referred to as "mental retardation." While some of the past decisions and material we cite use that outdated terminology, the preferred term in the current lexicon is "intellectual disability." *See Hall v. Florida*, 572 U.S. 701, 704 (2014).

the Study of Development and Learning at the University of North Carolina at Chapel Hill; and the court appointed Dr. Nancy Huntsman, a forensic psychologist who worked at the Court Psychiatric Clinic in Cleveland, Ohio. *Id.* The Ohio Court of Appeals, in reviewing Hill's *Atkins* claim, described the trial court proceedings as follows:

> In April 2004, Drs. Olley, Hammer, and Huntsman evaluated Hill at the Mansfield Correctional Institution for the purposes of preparing for the *Atkins* hearing. At this time, Hill was administered the Wechsler Adult Intelligence Scale ("WAIS–III") IQ test, the Test of Mental Malingering, the Street Survival Skills Questionnaire, and the Woodcock–Johnson–III. The doctors concurred that Hill was either "faking bad" and/or malingering in the performance of these tests. As a result, the full scale IQ score of 58 obtained on this occasion was deemed unreliable, and no psychometric assessment of Hill's current adaptive functioning was possible. Thus, the doctors were forced to rely on collateral sources in reaching their conclusions, such as Hill's school records containing evaluations of his intellectual functioning, evaluations performed at the time of Hill's sentencing and while Hill was on death row, institutional records from the Southern Ohio Correctional Institution and the Mansfield Correctional Institution, interviews with Hill, corrections officers, and case workers, and prior court records and testimony.
>
> The evidentiary hearing on Hill's *Atkins* petition was held on October 4 through 8 and 26 through 29, 2004, and on March 23 through 24, 2005. Doctors Olley and Huntsman testified that in their opinion, Hill is not mentally retarded. Doctor Hammer concluded that Hill qualifies for a diagnosis of mild mental retardation.

Id. at 113–14.

The trial court held that Hill was not intellectually disabled and rejected his *Atkins* claim. *Id.* at 114. The Ohio Court of Appeals affirmed, finding that Hill failed to prove he suffered from two or more significant limitations in adaptive skills that manifested before age 18. *Id.* at 126–27. The Ohio Supreme Court, with two justices dissenting, declined to hear Hill's appeal. *State v. Hill*, 912 N.E.2d 107 (Ohio 2009) (Table).

Hill then filed a petition for a writ of habeas corpus, which the district court denied. The district court concluded that Hill had not overcome the highly deferential standard of review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[2] *Hill v.*

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[2]The district court was critical of the Ohio Court of Appeals opinion. Some of us agree with some of its observations. Here, however, we do not itemize the opinion's possible flaws in order to focus attention on our

Anderson, No. 4:96 CV 00795, 2014 WL 2890416, at *51 (N.D. Ohio June 25, 2014). The district court explained that while reasonable minds may disagree with the state court's determination and weighing of the evidence, the state court's "conclusion regarding Hill's adaptive behavior *at the time he filed his* Atkins *claim* was supported by sufficient credible evidence and, most importantly, the opinions of two experts." *Id.*

Hill appealed, and a panel of judges on this court reversed the district court's decision on Hill's *Atkins* claim. The panel found that "the state court judgment . . . amounted to an unreasonable application of the standard articulated by the Supreme Court in *Atkins* and as later explained by *Hall* and *Moore*."[3] *Hill v. Anderson*, 881 F.3d 483, 489 (6th Cir. 2018). In addition to his *Atkins* claim, Hill raised four other issues on appeal: an ineffective assistance of counsel claim related to his *Atkins* hearing, a *Miranda* claim, a claim of prosecutorial misconduct, and a due process claim based on the trial court's alleged failure to hold a pretrial competency hearing. *Id.* at 487. The panel pretermitted Hill's ineffective assistance of counsel claim and affirmed the district court's denial of the other three claims, which Hill has not challenged. *Id.* The Warden filed a petition for rehearing *en banc*, which was denied. He then filed a petition for a writ of certiorari, which the Supreme Court granted.

The Supreme Court vacated and remanded, finding that the panel's "reliance on *Moore* was plainly improper under § 2254(d)(1)." *Shoop v. Hill*, 139 S. Ct. 504, 505 (2019) (per curiam). The Court explained that "habeas relief may be granted only if the state court's adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of,' Supreme Court precedent that was 'clearly established' at the time of the adjudication." *Id.* at 506 (quoting 28 U.S.C. § 2254(d)(1)). Because *Moore* was decided after Hill's state-court proceedings, the Court found that the panel erred by relying on *Moore* when determining whether habeas relief was warranted under § 2254(d)(1). *Id.* at 508–09. The Court ordered that "[o]n remand, the [panel] should determine whether its conclusions can be sustained based strictly on legal rules that were clearly established in the decisions of this Court at the relevant

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modest review role: that of determining whether the Ohio Court of Appeals unreasonably concluded that Hill was not intellectually disabled.

[3]*See Hall v. Florida*, 572 U.S. 701 (2014); *Moore v. Texas*, 137 S. Ct. 1039 (2017).

time." *Id.* at 509. The Supreme Court did not directly comment on any other part of the panel's decision, including its analysis under § 2254(d)(2) or Hill's other four claims for relief. *See generally id.*

On remand, the panel again granted Hill relief on his *Atkins* claim. *Hill v. Anderson*, 960 F.3d 260, 265 (6th Cir. 2020) (per curiam). The panel also once again pretermitted Hill's ineffective assistance of counsel claim and affirmed the district court's denial of Hill's other three claims, incorporating its prior opinion in full. *Id.* at 265, 283.

The Warden filed a petition for rehearing *en banc* on Hill's *Atkins* claim, arguing that the panel erred under both § 2254(d)(1) and § 2254(d)(2). This court granted *en banc* review, which vacated the prior panel decision. Because we conclude that Hill's *Atkins* claim does not satisfy the demanding AEDPA standard, we affirm the district court's denial of habeas relief. In addition to our discussion of his *Atkins* claim, we find that Hill's ineffective assistance of counsel claim fails on its merits. We also reinstate the panel's prior discussion affirming the district court's denial of Hill's remaining claims to the extent it is consistent with this opinion.

II.

Under 28 U.S.C. § 2254(d)(1), a federal court may grant a writ of habeas corpus if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court's decision is an "unreasonable application" of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407–08 (2000). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous"—it must be "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Objective unreasonableness is a higher standard than clear error. *See White v. Woodall*, 572 U.S. 415, 419 (2014). To demonstrate that the state court's decision was objectively unreasonable, the petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in

existing law beyond any possibility for fairminded disagreement." *Id.* at 419–20 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

A federal court may grant a writ under 28 U.S.C. § 2254(d)(2) if the state court proceedings "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Under AEDPA, the question for this court to answer "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007). Furthermore, "the petitioner must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice v. White*, 660 F.3d 242, 250 (6th Cir. 2011). Factual findings made by the state courts based on the trial record are entitled to a presumption of correctness that may be rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Warren v. Smith,* 161 F.3d 358, 360–61 (6th Cir. 1998).

This "highly deferential standard" requires that determinations made in state court "be given the benefit of the doubt." *Cullen v. Pinholster,* 563 U.S. 170, 181 (2011) (quoting *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) *(per curiam)). When applying AEDPA, this court considers* "the decision of 'the last state court to issue a reasoned opinion on the issue[s]' raised in [the] habeas petition." *Shimel v. Warren*, 838 F.3d 685, 696 (6th Cir. 2016) (first alteration in original) (quoting *Joseph v. Coyle*, 469 F.3d 441, 450 (6th Cir. 2006)). Here, that is the Ohio Court of Appeals decision. *See State v. Hill*, 894 N.E.2d at 108.

III.

A.

1.

While Hill's *en banc* supplemental brief only asserts a claim for relief under § 2254(d)(2), in his original appeal Hill also argued that he is entitled to relief under § 2254(d)(1). Specifically, Hill claimed that the state court's decision to evaluate whether Hill

was intellectually disabled at the time of his *Atkins* hearing rather than at the time the crime was committed was an unreasonable application of clearly established federal law.[4]

At the time of the Ohio Court of Appeals decision, the only clearly established Supreme Court precedent was *Atkins* itself.[5] *Atkins* held that the execution of intellectually disabled individuals violated the Eighth Amendment, but it did not provide a "comprehensive definition of 'mental retardation' for Eighth Amendment purposes." *Shoop*, 139 S. Ct. at 507. Instead, *Atkins* delegated to the states "the task of developing appropriate ways to enforce the constitutional restriction." *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 416). *Atkins* did not, as the Warden appears to claim, relinquish all standard-making authority to the states. *Atkins* set out several guideposts for the states' discretion by relying heavily on clinical definitions of intellectual disability and factors such as "subaverage intellectual functioning" and "significant limitations in adaptive skills . . . that became manifest before age 18." *Atkins*, 536 U.S. at 318.

Though *Atkins* took note of "standard definitions of mental retardation," the Court "did not definitively resolve how" those definitions "w[ere] to be evaluated but instead left [their] application in the first instance to the States." *Shoop*, 139 S. Ct. at 508; *see Bobby v. Bies*, 556 U.S. 825, 831 (2009) (explaining that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation will be so

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[4]It is unclear whether Hill has waived this argument. In the district court, Hill argued that "[t]o the extent that the state procedures themselves used to render the factual findings of the mental retardation clinical components contributed to and fostered inaccurate and unreliable factfinding by the trial court, the procedures violated clearly established federal law." DE 94, Petition, Page ID 148. Read in the light most favorable to Hill, Hill's current argument that the Ohio Court of Appeals focused its inquiry on the incorrect time period may be construed as one of the state procedures that Hill claimed before the district court contributed to inaccurate and unreliable factual findings. Given the ambiguity, and because neither party raised the potential waiver issue, we will proceed under the assumption that Hill's argument has not been waived.

[5]The Warden and twelve states as amici urge us to take this opportunity to overrule a line of Sixth Circuit precedent which permits courts to rely on clearly established law from both the United States Supreme Court and state supreme courts when considering an *Atkins* claim under § 2254(d)(1). *See* CA 6 R. 369, Response Br., at 14; CA 6 R. 371, Amicus Br., at 6; *see also Williams v. Mitchell*, 792 F.3d 606, 612 (6th Cir. 2015) ("[I]n the *Atkins* context, 'clearly established governing law' refers to the Supreme Court decisions and controlling state law decisions applying *Atkins*.") However, Hill does not attempt to rely on state court precedent to establish his § 2254(d)(1) claim. *See* CA 6 R. 375, Reply Br., at 7 n.2 ("The amicus brief filed on behalf of various states . . . focuses solely on a 2254(d)(1) argument that petitioner does not raise."). Because Hill does not present this issue to us, it is extraneous to this appeal, and we decline to resolve it here. *See United States v. Asakevich*, 810 F.3d 418, 421 (6th Cir. 2016) ("The federal courts have no license to issue advisory opinions . . . .").

impaired as to fall within *Atkins'* compass" (internal quotations omitted) (alteration adopted)). Therefore, Hill faces the difficult task of showing that the Ohio Court of Appeals applied the highly general holding of *Atkins* in an objectively unreasonable way. *Cf. Parker v. Matthews*, 567 U.S. 37, 49 (2012) (finding no unreasonable application of the "highly generalized standard for evaluating claims of prosecutorial misconduct"); *Lockyer*, 538 U.S. at 73, 76 (finding no unreasonable application of clearly established federal law when the "precise contours" of the constitutional standard at issue were "unclear" (internal quotations omitted)).

While it is possible for state courts to unreasonably apply *Atkins*, evaluating a defendant's intellectual abilities at a later date rather than at the time of the crime is not an unreasonable application of *Atkins*. *Atkins* does not define the time period when the inquiry must be made. Hill argues that because the Court in *Atkins* "list[ed] several common characteristics of those with intellectual disability . . . it contemplated their diminished culpability" which is "a reference to the time the crime was committed. Thus, any assessment of a criminal defendant's intellectual function must derive from that same moment in time." CA 6 R. 295, Petition, at 50. Hill's interpretation of *Atkins*, however, is hardly the only reasonable interpretation. As this court has previously explained, *Atkins* supports the conclusion that intellectual disability is not a transient condition. *See Williams*, 792 F.3d at 619 (concluding that "if an individual is indeed presently intellectually disabled, . . . the disability would have manifested itself before the individual turned eighteen" and "past evidence of intellectual disability . . . is relevant to an analysis of an individual's present intellectual functioning" (emphasis omitted)); *see also id.* at 626 (Gibbons, J., concurring) ("It is clear from the entire thrust of the *Atkins* decision—along with the medical literature that it cites in support—that intellectual disability is a permanent condition."); *Heller v. Doe,* 509 U.S. 312, 323 (1993) (noting, in a different context, that intellectual disability "is a permanent, relatively static condition" (citing S. Brakel et al., The Mentally Disabled and the Law 37 (3d ed. 1985))). If intellectual disability is not a transient condition, then the outcome should not change if the court evaluates a defendant's abilities at the time of the crime or at the time of a later *Atkins* hearing. Thus, we find Hill's argument that *Atkins* requires evaluating a defendant's intellectual abilities at the time of the offense to be unpersuasive.

Here, the Ohio Court of Appeals did not question the trial court's decision to evaluate Hill's intellectual abilities at the time of the *Atkins* proceedings rather than when the crime was committed. Nevertheless, the Ohio court considered evidence of Hill's past abilities including Hill's medical history, public school records, and prior standardized test results. *State v. Hill*, 894 N.E.2d at 123–24. The court also evaluated criteria mentioned in *Atkins* such as intellectual functioning, adaptive skills, and the onset age of disability. We cannot say that the Ohio court's decision was objectively unreasonable given the discretion *Atkins* left to the states.

2.

Next, Hill argues that the Ohio Court of Appeals decision was an unreasonable determination of the facts in light of the evidence presented in the state court proceedings, in violation of 28 U.S.C. § 2254(d)(2). Specifically, Hill claims that the state court mischaracterized the record, improperly discounted historical evidence, and unreasonably concluded that Hill failed to establish that his disability manifested before age 18. The Warden argues that the state court's decision was not unreasonable because the court relied on the opinions of two experts and because the court properly evaluated the evidence in the record. We conclude that the Ohio Court of Appeals decision was not based on an unreasonable determination of the facts.

Under Ohio law at the time of Hill's *Atkins* hearing, a defendant had to prove three factors to establish that he was intellectually disabled: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, . . . and (3) onset before the age of 18."[6] *Lott*, 779 N.E.2d at 1014. While courts are to conduct an independent review of the evidence presented, they "should rely on professional evaluations of [the defendant's] mental status, and consider expert testimony." *Id.* at 1015. Both parties agree that Hill satisfied the first factor, that he had significantly subaverage intellectual functioning. The Warden also admits that any adaptive deficits that Hill does have arose before he turned 18. Thus, the only remaining dispute is whether the Ohio Court of Appeals reasonably determined that Hill failed to prove the second *Lott* factor—"significant limitations in two or more adaptive skills, such as

[6] *Lott* has since been overruled, *see Ford*, 140 N.E.3d at 654–55, but it was the controlling state law at the time of the Ohio Court of Appeals decision.

communication, self-care, and self-direction." *Lott*, 779 N.E.2d at 1014; *see also Hill v. Anderson*, 2014 WL 2890416, at *22.

As an initial matter, the Warden argues that the Ohio Court of Appeals opinion is per se reasonable because two experts concluded that Hill did not have significant adaptive deficits. CA 6 R. 369, Response Br., at 11–12, 17 (citing *O'Neal v. Bagley*, 743 F.3d 1010, 1023 (6th Cir. 2013); *Carter v. Bogan*, 900 F.3d 754, 771 (6th Cir. 2018); *Apelt v. Ryan*, 878 F.3d 800, 837 (9th Cir. 2017); *Larry v. Branker*, 552 F.3d 356, 370 (4th Cir. 2009)). None of the four cases cited by the Warden, however, suggests such a per se rule. Instead, the court in each case based its conclusion on the content of the expert testimony and overall evidence before it. *See O'Neal*, 743 F.3d at 1023 ("With expert testimony split, . . . we cannot say from this vantage that [the state court decision to credit two experts over another] was unreasonable . . . ."); *Carter*, 900 F.3d at 771; *Apelt*, 878 F.3d at 837; *Larry*, 552 F.3d at 370. The Warden claims that "[w]hen a credible expert conducts an analysis—and when the defendant failed to put on evidence contradicting that analysis beyond reasonable debate—it is not *unreasonable* for the trial court to rely on that expert testimony." CA 6 R. 369, Response Br., at 17. But that statement itself is inconsistent with a per se rule. A per se rule would eliminate the need to ask whether the defendant "put on evidence contradicting [the] analysis [of the state's experts] beyond reasonable debate." CA 6 R. 369, Response Br., at 17; *cf. Rice v. Collins*, 546 U.S. 333, 341–42 (2006). Accordingly, this court must consider whether, based on the evidence presented, the Ohio Court of Appeals's determination that Hill did not suffer from significant limitations in two or more adaptive skills was unreasonable.

Our resolution of this case turns on the Ohio Court of Appeals consideration of the expert testimony presented at the *Atkins* hearing. Nevertheless, we outline the Court of Appeals's analysis in some detail before turning to the expert opinions, following the order in which the state appellate court considered various portions of the factual record.

The Ohio Court of Appeals began its review of the record by analyzing the standardized adaptive behavior tests performed on Hill at various stages of his life.[7] *State v. Hill*, 894 N.E.2d at 122. First, the court noted that the three experts assigned to evaluate Hill's ability at the time of the *Atkins* hearing—Drs. Hammer, Olley, and Huntsman—could not obtain "reliable [standardized test] results . . . on account of Hill's lack of effort." *Id.* The court considered standardized adaptive behavior tests Hill had completed in the past but concluded that they were unreliable because the methods used had later been discredited. *Id.* at 122–23. A voluminous 6,000 page record contains reports from Hill's teachers, school psychologists, medical experts, and prison officials about Hill's adaptive abilities. *See Hill v. Anderson*, 2014 WL 2890416, at *24.

The Ohio Court of Appeals next separated this factual record into four categories of largely anecdotal evidence: public school records, reports around the time of the trial for the killing of Raymond Fife, records from Hill's time in prison, and Hill's appearances before the trial court itself. *State v. Hill*, 894 N.E.2d at 124–25. After summarizing each category and considering the expert opinions, the court found that Hill had not met the second *Lott* factor. *Id.* at 126.

First, the Ohio Court of Appeals considered Hill's school records. *Id.* at 124. In one paragraph, the court stated:

> Hill's public school records amply demonstrate a history of academic underachievement and behavioral problems. Hill is often described as a lazy, manipulative, and sometimes violent youth. Although there are references to Hill's being easily led or influenced by others, the trial court noted that much of Hill's serious misconduct, including two rapes committed prior to Fife's murder, occurred when he was acting alone. Hill knew how to write and was described by at least one of his special education teachers as "a bright, perceptive boy with high reasoning ability."

Id.

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[7]The Ohio Court of Appeals reviewed the trial court's decision for abuse of discretion and stated that the trial court must be affirmed if its decision is supported by competent and credible evidence. *State v. Hill*, 894 N.E.2d at 121.

This characterization of Hill's school records represents a short summary of the records. There are multiple accounts in Hill's records of his lying, stealing, and struggling to interact appropriately with his peers. *See, e.g.*, DE 97, Supp. Appendix, Page 530 ("Lying needs to be confronted."); *id.* at Page 568 ("Danny often manipulates the truth to his own advantage."); *id.* at Page 584 (describing an incident where Hill stole money from teachers' wallets); *id.* at Page 558 (listing one of Hill's annual goals when he was twelve as "improve peer-group relations"). Hill's behavioral problems, however, do not necessarily correlate with an absence of intellectual disability. *See Atkins*, 536 U.S. at 306 ("Because of their disabilities in areas of reasoning, judgment, and control of their impulses . . . [intellectually disabled individuals] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."). Each of the three experts who testified at Hill's *Atkins* proceeding agreed that Hill's behavioral problems during childhood did not necessarily contradict a finding of significant adaptive limitations. In addition to the accounts of behavioral problems, multiple evaluators also reported that Hill attempted to follow instructions and behaved well, particularly when dealing with adults. *See, e.g.*, DE 97, Supp. Appendix, Page 513 (school psychologist reported that, when given a test, Hill "did cooperate and accepted all tasks presented to him."); *id.* at Page 524 (court liaison officer describing Hill as a "personable black child who has good rapport with staff as well as the other residents" in a group home where he was placed when he was sixteen); *id.* at Page 568 ("Danny is a very affectionate child. He often expresses the desire to be hugged and will often rest his head on the teachers shoulder.").

Hill's school records suggest that he struggled academically as a child. *See, e.g.*, DE 97, Supp. Appendix, Page 515 (reporting that at age thirteen Hill's relative weaknesses included "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"); *id.* at Page 569 (describing how at age thirteen, Hill was working on spelling words with more than four letters, learning to tell time, "ha[d] just begun working on subtraction," and "[w]hen given sentences, he [could] write them with assistance"); *id.* at Page 594 (listing one of Hill's goals for ninth grade as being able to "read a one page story and . . . answer comprehension questions with 80% accuracy").

There is also evidence that Hill needed reminders to perform basic personal hygiene and lacked self-direction. *See, e.g.*, *id.* at Page 511 (describing one of Hill's weaknesses as "self-direction"); *id.* at Page 524 ("[Hill] needs constant reminder to shower, brush his teeth, etc., [but] he does attempt to do a [more] thorough job than when he first came to the program."); *id.* at Page 578 (reporting that Hill was still learning "to shower[] regularly, use[] deodorant regularly, [and] maintain[] a neat appearance" at the age of fourteen); *id.* at Page 575 (listing one of Hill's goals for ninth grade as being able to "learn to maintain[] a clean, neat, appearance" throughout the day). All of this additional evidence, not included in the Court of Appeals summary, may be relevant to determining whether Hill had significant limitations in two or more adaptive skills.

Second, the Ohio Court of Appeals considered Hill's conduct during the time period surrounding the trial for the killing of Fife:

> *Hill's Trial for the Murder of Raymond Fife.* The trial court observed that the record of Hill's murder trial provided evidence of Hill's ability concerning self-direction and self-preservation. In particular, the court noted Hill's initiative in coming to the police in order to misdirect the focus of the investigation by implicating others and Hill's ability to adapt his alibi to changing circumstances in the course of police interrogation. This last point was also noted by Dr. Olley in his hearing testimony: Hill "stood his ground during that interrogation very, very strongly. * * * He not only modified his story a little bit when he was faced with evidence that couldn't possibly have avoided. * * * That to me is a kind of thinking and planning and integrating complex information that is a higher level than I have seen people with mental retardation able to do."

State v. Hill, 894 N.E.2d at 124 (alterations in original).

In looking at the evidence, it is unclear that Hill's conduct demonstrated self-direction or self-preservation. As the district court explained, under the prevailing medical guidelines at the time, self-direction was defined as:

> skills related to making choices; learning and following a schedule; initiating activities appropriate to the setting, conditions, schedule, and personal interests; completing necessary or required tasks; seeking assistance when needed; resolving problems confronted in familiar and novel situations; and demonstrating appropriate assertiveness and self-advocacy skills.

Hill v. Anderson, 2014 WL 2890416, at *33 (quoting AAMR 1992 Manual, 40). While the trial court's assessment of Hill's conduct is one reasonable interpretation, a reasonable person might

also interpret Hill's conduct as evidence of a lack of self-direction. For example, before Hill came forward to the police with information about the crime, the police were not pursuing Hill. Thus, coming forward does not necessarily demonstrate appropriate self-advocacy skills since it drew more attention to Hill and linked him to the crime. But faced with two reasonable interpretations of evidence, we cannot say that the state court's decision to go with one over the other was unreasonable.

The Ohio Court of Appeals does not mention the testimony of three experts—Dr. Douglas Darnall, Dr. Nancy Schmidtgoessling, and Dr. Douglas Crush—who found that Hill was intellectually disabled at the time of the 1986 trial, *see Hill*, 595 N.E.2d at 901, though the court recognized that "several of the experts pointed out . . . [that Hill] knew right from wrong," *Hill*, 894 N.E.2d at 118 (quoting *Hill*, 595 N.E.2d at 901). On direct appeal, the Ohio Supreme Court accepted these experts' conclusion that Hill was intellectually disabled. *Hill*, 595 N.E.2d at 901. Although the experts at the mitigation stage were not using the definition of intellectual disability that was later articulated in *Lott* and *Atkins*, their testimony focused on similar characteristics such as Hill's intelligence level and adaptive skills, including whether Hill was a follower or a leader and whether he acted appropriately in different situations. *See, e.g.*, *id.* (describing Hill's moral development as "'primitive,' a level at which 'one do[es] things based on whether you think you'll get caught or whether it feels good. [T]hat's essentially whereabout [*sic*] a 2-year old is.'" (alterations in original)). Failure to grapple with the expert reports from the time of the Fife trial that found Hill to be intellectually disabled is concerning, particularly given *Lott*'s direction that courts should rely on professional evaluations of the defendant's mental state. *Lott*, 779 N.E.2d at 1015.

Third, the Ohio Court of Appeals examined the records from Hill's time on death row:

> *Death Row Records.* At the time of the evidentiary hearing, Hill had been incarcerated on death row for 20 years. From this period of time, the trial court considered audiotaped interviews of Hill by Warren's Tribune Chronicle reporter Andrew Gray in the year 2000. These interviews were arranged on Hill's initiative in order to generate publicity for his case. The trial court found Hill's performance on these tapes demonstrated a high level of functional ability with respect to Hill's use of language and vocabulary, understanding of legal processes, ability to read and write, and ability to reason independently.

> The trial court considered the evidence of the various prison officials who testified at the evidentiary hearing. These witnesses consistently testified that Hill was an "average" prisoner with respect to his abilities in comparison with other death row inmates. They testified that Hill interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules. Prison officials offered further testimony in their interviews with the expert psychologists. One official opined that Hill began to behave differently after *Atkins* was decided, and he believed that Hill was "playing a game" to make others think he is retarded. Another official reported that Hill's self-care was "poor but not terrible" and that Hill had to be reminded sometimes about his hygiene.

Hill, 894 N.E.2d at 124–25.

While Hill's conduct in prison is relevant to an analysis of his adaptive skills, his time incarcerated may be an imperfect indicator of his functional abilities. Both Dr. Olley and Dr. Huntsman, who later concluded that Hill was not intellectually disabled, conceded that Hill's conduct in the highly-regulated prison environment was not a good indicator of his adaptive skills. Some courts have also discounted prison records, reasoning that they provide little insight into how the defendant would function in the general community. *See Hill v. Anderson*, 2014 WL 2890416, at *42 (collecting cases).

Additionally, Hill's prison record is not neat. Describing Hill as an average death row inmate is ambiguous without additional context about the average inmate's adaptive functioning level, particularly if some inmates, such as Hill, had been committed to death row before *Atkins* was decided. Prison officials are also not trained to diagnose intellectual disability, and, as the district court explained in detail, there were multiple inconsistencies within the prison employees' reports. *See Hill v. Anderson*, 2014 WL 2890416, at *43–44. The Ohio Court of Appeals, however, accurately described the accounts of some prison officials who reported that Hill did not appear to have significant limitations functioning on death row. *See, e.g.*, DE 97, Atkins Hr'g Tr., Page 787–89 (Hill did not need special accommodations to perform his prison job); *id.* at Page 793 (Hill would inform the prison staff when he had a medical problem); *id.* at Page 815 ("[Hill was] slow when he want[ed] to be slow.").

Fourth, the Ohio Court of Appeals considered the trial court's conclusion that "as a lay observer, [he] did not perceive anything about Hill's conduct or demeanor [during the court

proceedings] suggesting that he suffers from mental retardation." *Hill*, 894 N.E.2d at 125. While the Ohio Court of Appeals conceded that trial courts should not rely solely on their own perception of the defendant in court to determine whether the defendant is intellectually disabled, the Ohio Court of Appeals still utilized the trial court's perception here because it aligned with the conclusions of two experts. *Id.* at 125–26.

The last, and most important, type of evidence the Ohio Court of Appeals considered was the opinions of three medical experts who evaluated Hill in preparation for the *Atkins* hearing: Dr. Hammer (selected by Hill), Dr. Olley (selected by the prosecution), and Dr. Huntsman (selected by the court). *State v. Hill*, 894 N.E.2d at 113. All three experts relied on a comprehensive record of Hill's history, including his past medical reports, school records, transcripts and videos from the time of the Fife trial, accounts from prison officials, and their own evaluation of Hill. Dr. Hammer concluded that Hill was intellectually disabled, and Drs. Olley and Huntsman found that he was not. The Ohio Court of Appeals described Drs. Olley's and Huntsman's findings in detail. *Id.* at 125.

Dr. Hammer was licensed to practice psychology in the state of Ohio and was the director of psychology services at the Nisonger Center at the Ohio State University. During his career, he had specialized in behavioral pediatrics, which included working with children, adolescents, and adults with intellectual disabilities. As part of his evaluation, Dr. Hammer reviewed an extensive list of Hill's relevant history including evaluations from school officials, transcripts from Hill's past court proceedings, and prison records. Hammer concluded that "[o]verall, these records provide an extensive and consistent documentation that Mr. Hill has demonstrated, from an early age, sufficient intellectual and adaptive behavior deficits to qualify for a diagnosis of Mild Mental Retardation." DE 97, Supp. Appendix, Page 1110. Hammer noted that "the records also indicate that [Hill] was generally regarded as mentally retarded by nearly all the psychological, psychiatric, educational, and youth authority professionals he encountered over the years." *Id.*

Hammer, along with Olley and Huntsman, interviewed Hill himself. The three doctors performed a series of tests to evaluate Hill's intellectual abilities but could not complete the testing. *Id.* at Page 1111–12. Hammer reported that Hill "appeared to be quite disinterested and unmotivated" during some of the testing but was unable to determine whether Hill "was trying to

deliberately do poorly on the test or whether the significant cognitive demands of the test, especially following the extensive demands of [previous testing] may have caused him to give up and shut down." *Id.* at Page 1111. However, Hammer also testified at the *Atkins* hearing that all three experts "agreed that [Hill] was trying to fake bad." DE 97, Atkins Hr'g Tr., Page 264. Because of the difficulties with testing and the inability to measure several adaptive abilities in a prison setting, "all three psychologists agreed that an independent, valid standardized adaptive behavior instrument could not be completed for Mr. Hill." DE 97, Supp. Appendix, Page 1112.

In his report, Hammer weighed the opinions of prison officials who interacted with Hill. Hammer concluded that the officials' descriptions of Hill:

> [W]ere relatively consistent in describing Mr. Hill across some areas (e.g., average compared to other inmates, helping others, no 'falling out' episodes) and strikingly discrepant in others (e.g., energy level, getting along with other inmates, hygiene and self-care problems.) Overall, the description of Mr. Hill's adaptive and social behavior on Death Row was not inconsistent with that of a person with mild mental retardation and conduct problems and it was not generally contradictory of information in Mr. Hill's historical records.

Id. at Page 1115. In conclusion, Hammer found that "records, observations and interviews indicate adaptive behavior functioning consistent with the Mild Retardation range" and concluded that Hill had "significant deficits in functional academic, social-emotional functioning, self-care and work habits over the years." *Id.* at Page 1116–17.

Like Hammer, Dr. Olley was a licensed psychologist who specialized in working with individuals who have intellectual disabilities. He had previously testified on behalf of a defendant in nine other capital cases involving claims of intellectual disability. When making his evaluation, Olley considered Hill's historical records including evaluations performed at school, evidence from around the time of the Fife trial, and interviews with Hill and prison officials. Olley testified that "this [was] the most thorough evaluation of a death row inmate that [he] ha[d] been involved with." DE 97, Atkins Hr'g Tr., Page 773. Unlike Hammer, Olley concluded that "[r]ecords regarding Mr. Hill's adaptive behavior before age 18 [were] less extensive." DE 97, Supp. Appendix., Page 1119. But Olley acknowledged that Hill had undergone two formal adaptive behavior tests during childhood, one "yield[ing] a score in the average range, and another yield[ing] a score in the range of mild mental retardation." *Id.* at

Page 1119. Olley stated that Hill "had consistently low academic performance," and his "records indicate significant behavior problems from an early age and a history of lying." *Id.*

Olley also analyzed more recent evidence of Hill's intellectual abilities. He emphasized Hill's latest court appearance where he showed his "ability to orally express his claim of innocence" and "used vocabulary and sentence structure and complex reasoning that, in [Olley's] opinion, indicate[d] intellectual ability above the level of mental retardation." *Id.* Olley testified that "the way that Mr. Hill presents himself in his language, in his arguing on his own behalf and his assertiveness about his case is substantially more sophisticated than any of the other defendants with whom [he] ha[d] worked."[8] DE 97, Atkins Hr'g Tr., Page 1763. Like Hammer, Olley also interviewed several prison employees and compared their descriptions of Hill against Hill's own description of his abilities. In general, the prison officials reported that Hill had a higher adaptive capability than Hill reported having himself, which Olley stated "further support[ed] the conclusion that Mr. Hill tried to portray himself as having mental retardation." DE 97, Supp. Appendix., Page 1125. In sum, Olley held that there was "[t]oo little information . . . available about adaptive behavior in childhood to make a confident retrospective diagnosis of mental retardation" and that "[t]he available information on Mr. Hill's current functioning [did] not allow a diagnosis of mental retardation." *Id.* at Page 1124–25; *see also* DE 97, Atkins Hr'g Tr., Page 1785 (testifying that "this hits me between the eyeballs that this is not a man with mental retardation").

The third expert to testify at Hill's *Atkins* proceeding was Dr. Huntsman. Unlike Hammer and Olley, Huntsman's work focused on diagnosing defendants who suffered from serious mental disorders rather than intellectual disabilities. She had limited experience working with defendants who had intellectual disabilities and had only administered an adaptive-skills test a handful of times, the last time being several years before Hill's *Atkins* hearing. *Id.* at Page 980–81, 992. Like Hammer and Olley, Huntsman considered Hill's past school records,

[8]Hammer testified that sometimes individuals with intellectual disabilities will learn "sort of scripts or scenarios that they can kind of pull out and go through when they encounter a situation" to make it appear that they are more competent or well-spoken than they truly are. DE 97, Atkins Hr'g Tr., Page 192–93. Olley, however, did not address this cloak-of-competency theory, and Hammer himself did not verify that Hill was attempting to don a "cloak of competence" when speaking about his past conduct, *see* DE 97, Atkins Hr'g Tr., Page 191–93.

evidence from around the time of the Fife trial, and contemporary evidence when assessing Hill's intellectual abilities.

Huntsman concluded that Hill fell in the "[b]orderline" range of intellectual functioning and his "level of adaptive behavior certainly exceeds the level expected of a mildly mentally retarded individual." DE 97, Supp. Appendix., Page 1140–41. Huntsman stated that "in many respects [the] most persuasive[]" evidence was the prison officials' "consistent descriptions of [Hill] as 'average' within the death row population at Mansfield." *Id.* at Page 1141. Huntsman, however, testified that it was difficult to assess adaptive behaviors in the prison setting. And as we previously explained, describing Hill as the "average" inmate is ambiguous without additional context. Huntsman also appears to have relied heavily on her own conversations with Hill, where she said Hill "demonstrated a remarkable memory for the history of his case." DE 97, Supp. Appendix., Page 1141. She emphasized that she believed Hill was malingering during standardized testing, trying "to appear less competent than he is." *Id.* at Page 1140. Huntsman concluded that in her opinion, "when one takes both his probable performance on the formal assessment of I.Q. and his level of adaptive behavior into account, [Hill's] overall level of intellectual functioning falls within the borderline range" rather than intellectually disabled. *Id.* at Page 1141.

Olley and Huntsman focused on whether Hill was intellectually disabled at the time of the evaluation rather than at the time of the Fife trial or during his childhood. *See* DE 97, Supp. Appendix, Page 1125 (Dr. Olley opining that "[t]he available information on Mr. Hill's current functioning does not allow a diagnosis of mental retardation."). Both, however, grappled with the historical evidence of Hill's intellectual functioning and reviewed records from Hill's childhood when making their determinations.

Olley testified that "[b]ased upon the available information," including records from Hill's time in school, it was his opinion that "Hill did not have mental retardation *at the time of the offense*." DE 97, Atkins Hr'g Tr., Page 779 (emphasis added). Olley did not dismiss Hill's past anecdotal evidence; rather, he concluded after reviewing the record that "there was inadequate information about adaptive behavior that would allow [him] to conclude that there was a significant impairment in adaptive behavior" at the time of the offense. *Id.* at Page 780.

Olley explained that while there were numerous IQ tests from Hill's childhood that satisfied the first requirement of *Lott*, there was insufficient evidence to find that Hill had significant adaptive deficits. *Id.* at Page 783. Olley testified that Hill "certainly did function low in academic skills" but that none of the four formal evaluations Hill had taken during childhood "confirmed adaptive behavior overall at a significantly subaverage level" and the "[o]ther information was anecdotal." *Id.* Huntsman also testified that she thought Hill probably was not intellectually disabled at the time of the offense. *Id.* at Page 1051. When making her assessment, Huntsman weighed Hill's past records including formal testing done by psychologists and the evaluations done by school officials. *Id.* at Page 1046–50. She explained that she gave less weight to school assessments because they "were being done for a very different purpose," namely to create educational interventions rather than determine whether Hill was intellectually disabled under clinical guidelines. *Id.* at Page 1046. Both doctors weighed the available evidence of Hill's past and present adaptive abilities when reaching their conclusions.

In view of this expert testimony, the Ohio Court of Appeals reasonably concluded that Hill is not intellectually disabled. Three credentialed and independent physicians met with Hill, thoroughly reviewed the evidence—including records dating back to Hill's childhood—and conveyed their findings in detailed reports. Two of those experts found that Hill is not intellectually disabled.

In conclusion, the Ohio Court of Appeals did not act unreasonably in relying on the opinions of Olley and Huntsman, trained medical professionals who had full access to the extensive record in this case. The question before us is narrow, and the AEDPA standard is demanding. The law does not allow us to weigh the evidence according to a modern understanding of intellectual disability or to engage in de novo factfinding. To prevail, Hill must demonstrate that "in light of the evidence presented" before it, the Ohio Court of Appeals's determination that he did not have significant limitations in two or more adaptive skills was unreasonable. *Schriro*, 550 U.S. at 473 ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."). Hill has not cleared this high hurdle.

Admittedly, there is evidence in the record that shows Hill has limitations in some adaptive skills such as self-care, functional academics, and self-direction. But there is also evidence that Hill's adaptive abilities were not as lacking as several of the anecdotal accounts suggest. Importantly, two medical experts, including Dr. Olley who had significant experience working with individuals with intellectual disabilities, concluded after looking at Hill's entire record that he did not have significant limitations in two or more adaptive skills, and, thus, was not intellectually disabled. In light of the evidence presented, it was not unreasonable for the Ohio Court of Appeals to rely on the reasoned judgment of two experts over another. *See O'Neal*, 743 F.3d at 1023; *see also Lott*, 779 N.E.2d at 1015 ("The trial court should rely on professional evaluations of [the defendant's] mental status, and consider expert testimony . . . in deciding this matter."). While another judge could have reasonably reached the opposite conclusion, the determination of the Ohio Court of Appeals was not unreasonable. Accordingly, Hill cannot succeed on his *Atkins* claim. The district court properly denied Hill relief under § 2254(d)(2).

B.

Hill's ineffective assistance of counsel claim also remains unresolved. In his first habeas petition after his *Atkins* hearing, Hill argued that his *Atkins* counsel provided ineffective assistance. The district court held that Hill's claim was barred by 28 U.S.C. § 2254(i) and failed on its merits. *Hill*, 2014 WL 2890416, at *53–57. The panel twice pretermitted the ineffective assistance of counsel claim after granting Hill relief on his *Atkins* claim, *Hill*, 881 F.3d at 487; *Hill*, 960 F.3d at 265, and the Supreme Court did not address the issue, *see Shoop*, 139 S. Ct. at 505–09. The Warden now asks this court to affirm the district court's dismissal of Hill's ineffective assistance of counsel claim under § 2254(i). While Hill does not present a full argument in his supplemental *en banc* briefing, he notes that "whether *Atkins* counsel provided ineffective assistance has not been fully adjudicated." CA 6 R. 362, Supp. Br., at 3 n.2. Because we find that Hill's claim fails on the merits, we affirm the district court.

As a preliminary matter, the parties dispute whether Hill's ineffective assistance of counsel claim is barred by § 2254(i), which provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground

for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). Hill argues that his claim is not barred by § 2254(i) because defendants like him, who were convicted before *Atkins* was decided have a constitutional right to counsel during their postconviction *Atkins* hearings. One circuit agrees with Hill, *see Hooks v. Workman*, 689 F.3d 1148, 1183–84 (10th Cir. 2012), and the Supreme Court has left open the possibility that a right to counsel exists during initial-review collateral proceedings, *see Martinez v. Ryan*, 566 U.S. 1, 8 (2012) (stating, without deciding, that "the Constitution may require States to provide counsel in initial-review collateral proceedings because 'in [these] cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction'" (alteration and omission in original) (quoting *Coleman v. Thompson*, 501 U.S. 722, 755 (1991))). *But see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (holding that the right to counsel generally does not extend to collateral proceedings); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion) (applying *Finley* to capital cases);); *id.* at 14 (Kennedy, J., concurring in the judgment) (agreeing that the Constitution does not require the appointment of counsel for capital defendants in state collateral proceedings). We need not address Hill's constitutional argument here, however, because even if Hill had a right to the effective assistance of post-conviction counsel during his *Atkins* proceedings, his *Atkins* counsel provided effective assistance. *See Hooks*, 689 F.3d at 1208 (Gorsuch, J., concurring in part and dissenting in part) ("Caution is always warranted when venturing down the road of deciding a weighty question of first impression and recognizing a previously unrecognized constitutional right. And surely caution must be doubly warranted when nothing turns on it.").

To prevail on his ineffective assistance of counsel claim, Hill must first "show that counsel's performance was deficient" by "an objective standard of reasonableness," meaning that his *Atkins* counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). "Judicial scrutiny of counsel's performance must be highly deferential," and there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Second, the defendant must show that the deficient performance prejudiced the defense," meaning that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at

687, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Because the Ohio state courts did not address the potential ineffectiveness of Hill's *Atkins* counsel, AEDPA deference does not apply, and we review the district court's findings de novo. *Hill v. Mitchell*, 842 F.3d 910, 919–20 (6th Cir. 2016).[9]

Hill argues that his *Atkins* counsel's performance was deficient in four ways: (1) failing to object to the presence of James Teeple during Hill's psychological evaluation; (2) failing to properly investigate Hill's adaptive functioning with school officials, prison psychologists, family members, and death row inmates; (3) failing to object to the *Atkins* proceeding on competency grounds; and (4) failing to withdraw as counsel given his antagonistic relationship with Hill.

1.

First, Hill claims that his *Atkins* counsel, Gregory Meyers, was ineffective for failing to object to James Teeple's presence during Hill's psychological evaluation on April 26, 2004, with Drs. Hammer, Olley, and Huntsman. Teeple was one of the detectives who was involved in the initial 1985 investigation into Hill after the killing of Fife, and Hill wrongly believed that Teeple was part of a conspiracy to frame him for Fife's murder. Because Meyers was aware that Hill distrusted Teeple, Hill argues that Meyers should have objected to Teeple's presence during the evaluation after the trial court issued an order on April 15, 2004, stating, among other things, that Teeple would be present to record the April 26 evaluation.[10]

Assuming, without deciding, that Hill is correct that Meyers should have objected to Teeple's presence, Hill has not demonstrated prejudice. To establish prejudice Hill "must show a substantial, not just conceivable, likelihood of a different result." *Campbell v. Bradshaw*, 674 F.3d 578, 586 (6th Cir. 2012) (internal quotation marks omitted) (quoting *Pinholster*, 563 U.S. at

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[9]The Warden argues that Hill's claim is procedurally defaulted because he may have been able to raise a claim of ineffective assistance of *Atkins* counsel in state court. We decline to review this procedural question because Hill's claim fails on the merits. 28 U.S.C. § 2254(b)(2); *see also Lambrix v. Singletary*, 520 U.S. 518, 525 (1997); *Cyars v. Hofbauer*, 383 F.3d 485, 486 n.1 (6th Cir. 2004) ("We need not delve into the morass of procedural bar, however, because Petitioner's claim fails on the merits even *assuming* he properly exhausted available state court remedies." (emphasis omitted)).

[10]In a rare misreading of the record, the district court incorrectly found that Meyers did not have notice that Teeple would be present at the April 26 evaluation. *Hill*, 2014 WL 2890416, at *57.

189). Both Drs. Huntsman and Olley acknowledged during 2011 depositions that the presence of the three medical experts and Teeple may have negatively impacted Hill's performance during the psychological testing. Hill argues that this calls into doubt the experts' determination that he intentionally performed poorly during testing. However, neither Olley nor Huntsman stated that they believed there is a substantial likelihood that their ultimate conclusion that Hill was not intellectual disabled would have been different if Teeple had not been present. Furthermore, neither expert could say that Teeple's presence on the first of three days of testing was the only possible cause for Hill's performance. For example, Huntsman acknowledged that she did not set a proper tone at the beginning of the evaluation and that could have influenced Hill's performance. While Teeple's presence may have made Hill uncomfortable during the first day of the psychological evaluation, Hill has not proven that there is a reasonable probability that the outcome of his *Atkins* proceeding would have been different had Meyers objected to Teeple videotaping the evaluation.

2.

Second, Hill argues that Meyers failed to investigate and fully prepare for the *Atkins* hearing because he only presented one witness, Dr. Hammer. Hill claims Meyers should have also presented testimony during the *Atkins* hearing from: (1) school psychologists Karen Weiselberg-Ross and Annette Campbell; (2) Dr. John Vermeulen, who evaluated Hill when he was incarcerated in 1986; (3) Dr. James Spindler, who evaluated Hill in 2000; (4) other death-row inmates; and (5) Hill's family members, including his mother. Hill argues that "[t]he failure to investigate the issue of [Hill's] mental retardation more thoroughly and to present these additional witnesses . . . was deficient performance by Meyers which prejudiced [Hill] beyond measure." CA 6 R. 295, Petition, 73.

Failure to reasonably investigate a defendant's background and medical history or present mitigating evidence may establish ineffective assistance of counsel. *Wiggins v. Smith*, 539 U.S. 510, 522–23 (2003). However, a counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*,

466 U.S. at 690–91. While counsel may be deficient for failing to investigate a "known and potentially important witness," *United States v. Arny*, 831 F.3d 725, 732 (6th Cir. 2016) (quoting *Towns v. Smith*, 395 F.3d 251, 259 (6th Cir. 2005) (quotation omitted)), a "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste," *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

Meyers's decision to rely solely on Dr. Hammer's testimony and the factual record was a reasonable professional judgment. Medical expert testimony is key to determining whether a defendant is intellectually disabled under Ohio law. *See Lott*, 779 N.E.2d at 1015 ("The trial court should rely on professional evaluations of [the defendant's] mental status, and consider expert testimony, appointing experts if necessary, in deciding this matter."). A trial court "may not disregard credible and uncontradicted expert testimony in favor of either the perceptions of lay witnesses or of the court's own expectations of how a mentally retarded person would behave." *State v. White*, 885 N.E.2d 905, 915 (Ohio 2008). Given the importance of medical testimony, Meyers's choice to focus on Hammer, an expert in intellectual disabilities, was reasonable. Hammer had reviewed Hill's past school records and medical evaluations as part of his evaluation process, which included reports from many of the individuals Hill argues Meyers should have called as witnesses. Because, as Hill concedes, Hammer's evaluation and testimony "w[ere] thorough and compelling in [their] own right," CA 6 R. 295, Petition, 73, Meyers had good reason to think that further investigation would be a waste. Meyers's decision not to continue the investigation was a reasonable professional judgment. Since Meyers's performance was not deficient, we need not address the prejudice prong of *Strickland*.

3.

Third, Hill argues that Meyers was deficient for failing to formally raise concerns about Hill's competency. In a preliminary hearing on April 15, 2004, Meyers told the court that he had "deep professional concerns about Mr. Hill's competence" because Hill was considering not continuing his *Atkins* claim. DE 97, Supp. Appendix, Page 1192. Hill claims that based on this one statement, Meyers should have petitioned the court to evaluate Hill's competency before proceeding. Hill does not point to any evidence beyond Meyers's statement, however, that suggests that he was incompetent at the time of his *Atkins* proceeding. Particularly given the fact

that Hill continued to pursue his *Atkins* claim after Meyers's statement on April 15, 2004, there is insufficient evidence to prove either that Meyers's decision not to file a motion to evaluate Hill's competency was deficient or to demonstrate that there was a reasonable probability that, had Hill been evaluated at that time, he would have been found incompetent.

4.

Finally, Hill claims that Meyers should have done more to withdraw as his attorney considering Hill's distrust of Meyers and the Office of the Ohio Public Defender ("OPD"). Hill had a "deep and abiding antipathy towards lawyers affiliated with the [OPD]," which began before Meyers agreed to represent Hill during his *Atkins* proceeding. DE 97, Supp. Appendix, Page 461, 464. Hill believed that the OPD had misrepresented him during his first, pre-*Atkins*, postconviction litigation and was suspicious of the OPD because his uncle, Morris Hill, who Hill believed had tried to wrongly frame him for the Fife murder while working as a police officer, was an OPD investigator during his *Atkins* proceeding. Hill was also unhappy that OPD attorneys would not pursue an actual innocence claim in conjunction with his *Atkins* proceeding. According to Meyers, these longstanding issues made it impossible for him to maintain a productive attorney-client relationship with Hill.

Hill argues that Meyers had a "duty to use any means available to get off the case" once he realized the severity of the breakdown in the attorney-client relationship. CA 6 R. 295, Petition, 95. The record demonstrates, however, that Meyers did use any means available to attempt to withdraw after his relationship with Hill deteriorated. Meyers submitted two written motions and one oral motion to withdraw as Hill's counsel. DE 97, Supp. Appendix, Page 461. In his second written motion, Meyers clearly asked to be removed as counsel because he believed Hill's misguided ideas that Meyers was conspiring against him had "utterly destroyed anything akin to an attorney-client relationship" and, in his professional opinion, "no viable attorney-client relationship exist[ed] between" himself and Hill. *Id.* at Page 467. Despite Meyers's appeals, the trial court denied his motions to withdraw as counsel, citing Meyers's experience as "probably the foremost capital jurisprudence public defender in the State of Ohio" and the complicated nature of Hill's case. *Id.* at 1178; *see also id.* at 1219–20 (finding no

conflict of interest with respect to Meyers's representation of Hill).[11] Hill has not demonstrated that Meyers was deficient for failing to bring a fourth motion to withdraw or that further attempts by Meyers would have affected the outcome of the proceeding given the trial court's consistent refusal to allow Meyers to withdraw.

Alternatively, Hill claims that Meyers should never have accepted the appointment to represent Hill in the first place because he knew that Hill had conflicts with the OPD during his trial and initial appeals. When questioned by the trial court, however, Meyers explained that he only agreed to represent Hill after carefully considering whether he could provide effective representation given Hill's past conflict with the OPD. Hill has not demonstrated that Meyers, who was not employed by the OPD during Hill's trial and first state postconviction appeal, should have realized before he filed his initial appearance that Hill's past disagreements with OPD lawyers could have prevented Meyers from developing a working attorney-client relationship with Hill. Additionally, Hill has not established a reasonable probability that the outcome of his *Atkins* proceeding would have been different had Meyers not entered his initial appearance. In sum, Hill's arguments that Meyers provided ineffective assistance of counsel are without merit. Accordingly, we affirm the district court's denial of his claim.

C.

Hill's remaining issues were correctly resolved in the panel's 2018 opinion, *see* 881 F.3d 483 (6th Cir. 2018), and we reinstate those portions of the opinion to the extent they are consistent with this opinion. For the convenience of the reader, they are attached as an appendix to this opinion.

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[11]Hill appears to suggest that his right to counsel was violated by the district court's denial of Meyers's motions to withdraw. A trial court's "decision to deny a motion to withdraw or for substitute counsel is reviewed for abuse of discretion." *United States v. Powell*, 847 F.3d 760, 778 (6th Cir. 2017); *see also id.* ("Appellate courts reviewing the denial of such a motion generally consider four factors: 'the timeliness of the motion'; 'the adequacy of the court's inquiry into the matter'; 'the extent of the conflict between the attorney and client and whether it was so great that it resulted in a total lack of communication preventing an adequate defense'; and 'the balancing of these factors with the public's interest in the prompt and efficient administration of justice.'" (quoting *United States v. Mack*, 258 F.3d 548, 556 (6th Cir. 2001)). Hill has not put forth any developed argument supporting his argument that the trial court's decision not to remove Meyers in this case was an abuse of discretion. Accordingly, Hill has waived this argument. *See United States v. Johnson*, 440 F.3d 832, 846 (6th Cir. 2006).

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. Danny Hill asserts in his habeas petition that the State of Ohio may not execute him because he is intellectually disabled.[1] *See Atkins v. Virginia*, 536 U.S. 304 (2002). *Atkins*, the case that bars the execution of intellectually disabled defendants, was decided and made retroactive after Hill was convicted of murder and sentenced to death. Before *Atkins* was decided, Hill had been diagnosed as intellectually disabled approximately ten times over the course of his life, R. 97 [disc 1] (Suppl. App.) (Pages 61–76, 513–530, 592–621), including during the penalty phase of his trial when three psychological experts testified that Hill was intellectually disabled. *See State v. Hill*, Nos. 3720, 3745, 1989 WL 142761 (Ohio Ct. App. Nov. 27, 1989). The Ohio courts agreed, stating that Hill "suffers from some mental retardation" and is "mildly to moderately retarded." *See id.* at *6; *State v. Hill*, 595 N.E.2d 884, 901 (Ohio 1992) (discussing the experts' testimony). But ultimately, Hill was sentenced to death because all that his intellectual disability counted for at the time was a point in his favor in the sentencing calculation—not a bar to his execution. *See Hill*, 1989 WL 142761, at *4. When *Atkins* came down, our court issued a remand order directing the Ohio courts formally to assess Hill's intellectual functioning under *Atkins*. *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002). Even "[t]hough Ohio courts reviewing his case have concluded that Danny Hill is retarded, and voluminous expert testimony supported this conclusion," we issued a remand because Hill's *Atkins* claim "ha[d] not been exhausted or conceded." *Id.* (citations omitted). This time around, the Ohio courts decided that Hill was *not* intellectually disabled. *See State v. Hill*, 894 N.E.2d 108, 127 (Ohio Ct. App. 2008).

No person looking at this record could reasonably deny that Hill is intellectually disabled under *Atkins*. In holding otherwise, the Ohio courts avoided giving serious consideration to past evidence of Hill's intellectual disability. Doing so amounted to an unreasonable determination of the facts and an unreasonable application of even the general *Atkins* standard. Because *Atkins*

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[1] I will use the medical community's preferred term of "intellectually disabled" in place of "mentally retarded" except where the term is in quoted material.

and the record inescapably mandate, even under AEDPA deference, that Ohio cannot execute Hill due to his intellectual disability, I dissent.

I. BACKGROUND

The facts and legal proceedings surrounding Hill's conviction and death sentence in 1986 are set out in an earlier opinion. *See Hill*, 300 F.3d at 680–81. Because this case centers on the issue of intellectual disability, what follows is an account of the facts and proceedings relevant to that question in this case.

Several evaluations conducted around the time of Hill's trial in 1986 reveal that Hill "has a diminished mental capacity," *Hill*, 1989 WL 142761, at *32, a fact acknowledged by the state court after Hill's *Atkins* hearing. *See Hill*, 894 N.E.2d at 112 (summarizing the testimony of the three experts who testified during the mitigation phase of the initial trial that Hill was mentally "retarded"). Hill's IQ at the time of trial ranged from 55 to 68, and his moral development was "primitive"—essentially that of a two-year-old. *Id*. There is no dispute that Hill's IQ is so low that he easily meets the first element of the clinical definition of intellectual disability.

Since his earliest days in school, Hill has struggled with academics. At the age of six, a school psychologist noted that Hill was "a slower learning child" and recommended that his teachers "make his work as concrete as possible" without "talking about abstract ideas." R. 97 [disc 1] (Suppl. App.) (Pages 489–91). After kindergarten, Hill was placed into special education classes for the remainder of his time in the public school system. R. 29 (Suppression Hr'g Tr.) (Page ID #3081–92).[2] Hill struggled to keep up academically even in his special education classes and had difficulty remembering even the simplest of instructions. R. 31 (Mitigation Hr'g Tr. at 173–74) (Page ID #3485–86).[3] At the age of thirteen, his academic and social skills were at a first-grade level. R. 97 [disc 1] (Suppl. App.) (Page 568). At the age of fifteen, Hill could barely read or write, and he was noted to have deficits in adaptive behavior, specifically in the areas of self-direction, socialization, and communication. R. 31 (Mitigation

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[2]Because the pagination in the original transcript of the suppression hearing is unclear, I will cite the pagination used by the district court.

[3]The Mitigation Hearing Transcript can be found in the district court record at R. 31 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28, 1997).

Hr'g Tr. at 79–89) (Page ID #3391–401); R. 97 [disc 1] (Suppl. App.) (Pages 592–93). Those problems persist today.

Hill has also been unable to take care of his hygiene independently from a young age. During his time in a home for children with behavioral issues, Hill could not remember to comb his hair, brush his teeth, or take a shower without daily reminders. R. 31 (Mitigation Hr'g Tr. at 88) (Page ID #3400). Even in the highly structured environment of death row, Hill would not shower without reminders.

After receiving two convictions for rape at age seventeen, Hill was assessed for intellectual disability by the juvenile court. R. 97 [disc 1] (Suppl. App.) (Page 527). He was diagnosed as "mildly retarded" with very poor adaptive functioning. *Id.* at 527–28. Before *Atkins* was decided, Hill had been diagnosed as intellectually disabled approximately ten times over the course of his life. *Id.* at 61–76, 513–30, 592–621. During the mitigation phase of his trial for the Fife murder, the psychological experts and the Ohio courts decided that Hill was intellectually disabled and had significant adaptive deficits. *Hill*, 1989 WL 142761, at *6; *Hill*, 595 N.E.2d at 901. Nevertheless, the Ohio Supreme Court upheld his death sentence because it was then constitutional to execute intellectually disabled defendants. *See Hill*, 1989 WL 142761, at *4.

The Supreme Court decided *Atkins* in 2002 while Hill's appeal from the district court's denial of his habeas petition was pending before this court. We remanded the case to the district court with instructions to remand Hill's unexhausted *Atkins* claim to the state court and to stay the remaining claims pending resolution of the *Atkins* claim. *Hill*, 300 F.3d at 683. After the case was returned to the state court, three experts—Drs. David Hammer, J. Gregory Olley, and Nancy Huntsman—examined Hill and testified over the course of several evidentiary hearings on Hill's *Atkins* claim. Hill retained Dr. Hammer, Dr. Olley acted as the state's expert, and Dr. Huntsman was appointed by the trial court. Dr. Hammer concluded that Hill met all three prongs for a diagnosis of intellectual disability. However, Drs. Olley and Huntsman concluded that Hill was not intellectually disabled.

The state trial court denied Hill's petition for relief under *Atkins*, finding that Hill did not exhibit significant adaptive deficits and that any deficits that he did have did not manifest before the age of 18. *State v. Hill*, No. 85-CR-317 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported) [R. 97 [disc 1] (Suppl. App.) (Pages 3399–482)]. The Ohio Court of Appeals affirmed that decision, over a dissent, holding in the first instance that issue preclusion did not require a different result "because the finding that he was mentally retarded was not essential to the imposition of the death penalty in the same way that it is essential in the *Atkins/Lott* context." *Hill*, 894 N.E.2d at 116, 127. The Ohio Supreme Court declined to review the case, with two justices dissenting. *State v. Hill*, 912 N.E.2d 107 (Ohio 2009) (table).

With the conclusion of his state-court proceedings, Hill moved to reopen and amend his habeas petition in this case to include claims under *Atkins*. There is no dispute that Hill's IQ is so low (ranging from a low of 48 to a high of 71) that he easily meets the first element of the clinical definition of intellectual disability. The parties disagree, however, on the propriety of the state courts' holdings that Hill did not exhibit sufficient adaptive deficits (the second element).[4] Thus, the issue before us is whether it was unreasonable for the Ohio courts to decide that Hill did not exhibit significant adaptive deficits.

II. STANDARD OF REVIEW

In his opening brief, Hill argued that we should review the state courts' determinations on adaptive deficits as both legal and factual conclusions under 28 U.S.C. § 2254(d)(1) and (2). *See* Hill Opening Br. at 34 ("The state courts' application of the law and the determination of the facts were unreasonable, and therefore habeas relief is warranted under 28 U.S.C. § 2254(d)(1) and (2)."). That would mean that we ask whether, under § 2254(d)(1), those decisions amount to an unreasonable application of *Atkins* and whether, under §§ 2254(d)(2) and 2254(e)(1), there is clear and convincing evidence that the state courts' findings amounted to an unreasonable determination of the facts.

[4]The Warden concedes that Hill's "adaptive deficits (the second element) arose before age eighteen (the third element) if they arose at all." Warden Supp. En Banc Br. at 16.

I agree with Hill that the state courts' determination on adaptive deficits should be analyzed as both legal and factual conclusions under § 2254(d)(1) and (2). Hill's arguments attack the reliability of the state courts' determination of the facts and their interpretation of *Atkins*. But, at the same time, his case partly turns on what a court must consider under *Atkins* in testing for intellectual disability, which we have recognized is a question of law. Moreover, Hill presented a § 2254(d)(1) argument in his opening brief. Hill's strategic decision to focus on § 2254(d)(2) in his en banc brief does not waive the prior arguments raised in his opening brief. And the Warden does not argue that Hill has waived his § 2254(d)(1) argument. Warden Supp. En Banc Br. at 12. Accordingly, I will analyze Hill's adaptive-deficits argument under both § 2254(d)(1) and (2), keeping in mind that Hill's arguments draw heavily on the facts.

Under § 2254(d)(1), we must decide whether the state courts' conclusion that Hill did not exhibit significant adaptive limitations was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Section 2254(d)(1) applies when the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407–08 (2000). Under § 2254(d)(2), our review is limited to the question of whether the state court's findings amount to "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." In making that assessment, we are mindful that AEDPA directs us to presume that facts decided by the state court are correct absent "clear and convincing evidence" to the contrary. § 2254(e)(1).

"As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White v. Woodall*, 572 U.S. 415, 419–20 (2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). We recognize, of course, that state court determinations are entitled to a great deal of deference. But "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

III. DISCUSSION

A. *Atkins* Claim

The Supreme Court held in *Atkins* that the Eighth Amendment prohibits the execution of intellectually disabled individuals. 536 U.S. at 314–17. Although it ultimately left the development of the test for intellectual disability up to the states, *id.* at 317, the Supreme Court noted that two diagnostic manuals of the psychiatric profession require three separate findings before a diagnosis of intellectual disability is appropriate.[5] *Id.* at 308 n.3. Those findings are: (1) "significantly subaverage intellectual functioning";—typically indicated by an IQ level at or below 70; (2) "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety"; and (3) manifestation or onset before the age of 18. *Id*.

Ohio adopted the three-prong standard set forth in *Atkins* for evaluating a claim of intellectual disability in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002).[6] The Supreme Court of Ohio specifically approved the definition of intellectual disability set forth in the then current editions of the diagnostic manuals. *Id.* at 1014. Applying the standards in those manuals, individuals had significant limitations in adaptive skills if they exhibited deficits in at least two of the skill areas set out in *Atkins*. *Id.*

Hill disputes the Ohio courts' finding that he did not exhibit significant adaptive limitations, and he emphasizes that he has been diagnosed as intellectually disabled and lacking in adaptive skills from a young age. I agree: Hill has exhibited significant adaptive limitations since childhood and cannot justifiably be executed even under the general *Atkins* standard. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("[E]ven a general standard may be applied in an unreasonable manner."); *see e.g.*, *Williams*, 529 U.S. at 367 (finding that a state-court

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[5]Prior to 2007, the American Association on Intellectual and Developmental Disabilities (AAIDD) was known as the American Association on Mental Retardation (AAMR).

[6]Ohio later overruled *Lott* and substantially amended its standard for evaluating intellectual disability in *State v. Ford*, 140 N.E.3d 616 (Ohio 2019).

decision was both contrary to and an unreasonable application of the generalized standard for evaluating whether a petitioner's right to effective assistance of counsel was violated).

A state court decision is not entitled to AEDPA deference when "the factfinding procedures upon which the [state] court relied were 'not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth.'" *Panetti*, 551 U.S. at 954 (quoting *Ford v. Wainwright*, 477 U.S. 399, 423–24 (1986) (Powell, J., concurring in part and concurring in the judgment)). Here, the state trial court ruled that the focus of the evaluation would be Hill's present functioning, and therefore that contemporary evidence was what was primarily relevant—not historical accounts. The Ohio courts failed seriously to contend with the extensive past evidence of Hill's intellectual disability. *Atkins* cannot reasonably be interpreted to permit state courts to exclude or discount past evidence of intellectual disability. And the Ohio courts' cafeteria-style selection of some evidence from Hill's behavior during the proceedings in this case and while incarcerated, over evidence from his special education classes, resulted in an unreasonable determination of the facts.

The Supreme Court stated in *Atkins* that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also *significant limitations in adaptive skills* such as communication, self-care, and self-direction *that became manifest before age 18*." 536 U.S. at 318 (emphasis added). Accordingly, in *Williams v. Mitchell*, we held that the "refusal to consider past evidence of intellectual disability in determining whether [the petitioner] has significantly subaverage mental functioning and adaptive skills limitations" contravenes "clearly established Supreme Court precedent." 792 F.3d 606, 617, 619 (6th Cir. 2015). "[T]he clinical definitions cited with approval by *Atkins* and adopted by *Lott* do not treat present functioning and early onset as unrelated parts of a disconnected three-part test." *Id.* at 619. Intellectual disability must manifest before age eighteen. *Id.* Based on a "plain reading" of *Atkins*, "past evidence of intellectual disability—including evidence of intellectual disability from an individual's childhood—is relevant to an analysis of an individual's present intellectual functioning." *Id.*; *see also id.* at 626 (Gibbons, J., concurring in part and concurring in the judgment) (noting that *Atkins* "plainly require[s]" the consideration of past evidence of

intellectual disability, including evidence of a defendant's functioning pre-incarceration, "[g]iven the enduring nature of intellectual disability").

We also noted in *Williams* that, prior to *Atkins*, the Supreme Court had recognized that past evidence of intellectual disability is relevant to present or future functioning. *See id.* at 620 (majority opinion) (citing *Heller v. Doe*, 509 U.S. 312, 321–23 (1993)). In *Heller*, the Supreme Court held that civilly committing people with intellectual disabilities based on clear and convincing evidence of future dangerousness was constitutional because intellectual disability manifests during childhood and "is a permanent, relatively static condition, so a determination of dangerousness may be made with some accuracy based on previous behavior." 509 U.S. at 321–23 (citation omitted). "Thus, 'almost by definition in the case of the retarded [adult] there is an 18-year record upon which to rely' when assessing the individual's *future intellectual functioning*." *Williams*, 792 F.3d at 620 (alteration in original) (quoting *Heller*, 509 U.S. at 323). Although *Atkins* left to the states the job of delineating the precise contours of how to evaluate intellectual disability, clearly established law mandates that courts cannot, under any reasonable interpretation of *Atkins*'s general standard, discount or ignore evidence of intellectual disability from an individual's childhood.

In Hill's case, the Ohio Court of Appeals correctly set forth the three-prong *Atkins* standard as adopted by the Ohio Supreme Court in *Lott*. It also correctly noted that the second criterion under *Lott* requires the defendant to demonstrate "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction." *Hill*, 894 N.E.2d at 113 (quoting *Lott*, 779 N.E.2d at 1014). Then it veered off track. Focusing mostly on Hill's interactions with law enforcement, prison officials, and the courts, the Ohio courts discounted extensive past evidence of intellectual disability—including multiple diagnoses of intellectual disability and numerous comments on Hill's adaptive deficiencies made while Hill was in school. The two experts who concluded that Hill did not exhibit significant adaptive deficits did the same. In the few instances where the Ohio courts did confront Hill's school records, they grossly misrepresented the contents. The Ohio courts' decision to focus on and privilege contemporary evidence over historical accounts is contrary to clearly established Supreme Court precedent in *Atkins* and *Heller* and seriously undermined the courts' ability to make an accurate

assessment of Hill's intellectual disability. These errors amount to an unreasonable application of *Atkins* and an unreasonable finding of fact. *See Williams*, 792 F.3d at 626 (Gibbons, J., concurring in part and concurring in the judgment) ("By excluding the pre–1989 evidence, the state court severely limited its own ability to make a reasoned assessment of Williams's condition according to the legal and medical standard that *Atkins* . . . plainly require[s]."); *see also Panetti*, 551 U.S. at 953 (recognizing that "a general standard may be applied in an unreasonable manner," especially when a reviewing court faces "a record that cannot, under any reasonable interpretation of the controlling legal standard, support a certain legal ruling"). The majority, in concluding otherwise, refuses to acknowledge the significance, and in some cases the very existence, of these failures, misrepresentations, and omissions.

1. Significant Limitations

The history of Hill's diagnoses and adaptive limitations was given short shrift in the Ohio courts. According to the Ohio courts, the anecdotal evidence in the record "constituted a 'thin reed' on which to make conclusions about Hill's diagnosis." *Hill*, 894 N.E.2d at 124. Yet, as the district court noted, "the state-court record was hardly a 'thin reed.' At well over 6,000 pages, it was voluminous." *Hill v. Anderson*, No. 4:96-cv-00795, 2014 WL 2890416, at *24 (N.D. Ohio June 25, 2014). "[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," which, for whatever reason, was "the focus of the evaluation." *Id.*

Of the criteria for adaptive deficits set out in *Lott*, it is clear from the record that Hill displayed significant limitations, at the very least, in functional academics, hygiene/self-care, social skills, and self-direction. With respect to functional academics, Hill was considered "mentally retarded" by the Warren City Schools. He was diagnosed as "mildly retarded," "trainable mentally retarded," or "educable mentally retarded" several times before he turned 18, beginning with the recognition that he was a "slower learning child" when he began formal schooling at age 6. *See* R. 97 [disc 1] (Suppl. App.) (Pages 489–91). He scored 70 or below on every IQ test administered during his school years. *Id.* at 489–94, 511–19. He attended special

education classes for the entirety of his school career. R. 29 (Suppression Hr'g Tr.) (Page ID #3081–88).[7]

At age six, Hill did not know his age, but thought he was nine. R. 97 [disc 1] (Suppl. App.) (Page 489). His visual-motor coordination was at the three-year-old level, his reading and verbal skills were at the five-year-old level, and he had a mental age of four years and six months. *Id.* at 490. At age 8 years and 8 months, Hill was considered functioning at a "mid-kindergarten to beginning first grade level." *Id.* at 493. At age thirteen, he was functioning at the "mid-2nd grade level" in reading and the "mid-1st grade level" in arithmetic. *Id.* at 515. His psychologist noted that his learning abilities "ha[d] fallen 22 points" in the last five years, and that his relative weaknesses lie "in not being able to recall everyday information, do abstract thinking, perform mental arithmetic, perceive a total social situation, [and] perceive patterns." *Id.* At the same age, he was sent to a school for intellectually disabled children to continue his special education. *See id.* at 513–19. A school psychologist set out instructional goals that included teaching Hill his address and phone number, as well as how to tell time. *Id.* at 578. He exhibited weaknesses in reasoning ability, originality, verbal interaction, and a lack of intellectual independence.

By age fourteen, Hill was reading at a first-grade level and his math skills were at a third-grade level. He still had not mastered writing his own signature. *Id.* His teacher was working on self-control skills that should generally be mastered by a kindergarten student, including "working without being disruptive" and not touching other students inappropriately. *Id.* Teachers set academic objectives like learning to: tell time in five-minute intervals; write his own signature; shower regularly; put soiled clothing in the appropriate place; and eat and drink in a manner appropriate in a school setting.

Hill was transferred to another, similar school at fifteen because of poor academic achievement and behavior. R. 31 (Mitigation Hr'g Tr. at 77–79) (Page ID #3389–91). He received tutoring at a first-grade level for reading and a second-grade level for math. R. 97

[7]Hill was "mainstreamed" only in physical education and music, and struggled even there to keep up with and socialize normally with his peer group. R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Pages 247–49). There is no record of him taking "mainstream" classes in any academic subject area, i.e., math, reading, or history. *See id.*

[disc 1] (Suppl. App.) (Page 525). At seventeen years old, after being arrested for, and pleading guilty to, two felony rape charges, the juvenile court placed Hill in a facility that housed youth offenders with mental disabilities or emotional problems. R. 31 (Mitigation Hr'g Tr. at 120–23) (Page ID #3432–35). There, Hill completed ninth grade in special education classes at age 18. R. 97 [disc 1] (Suppl. App.) (Page 533). After being released, he returned to high school, and testing indicated Hill was at a second-grade level for reading and math. *Id.* at 1109. Fife's murder occurred six months later.

The record also demonstrates that Hill was deficient in hygiene and self-care. At the age of fourteen, he still needed to be told to shower regularly, brush his teeth, and apply deodorant every day. He would not independently follow through and take care of his hygiene unless he was told to do so. At approximately age sixteen, a group home officer noted that although Hill was "improving in his personal hygiene," he still "need[ed] constant reminder[s] to shower, brush his teeth, etc." *Id.* at 524. Hill continued to have problems with his hygiene in prison and had to be reminded frequently to groom himself.

The record also demonstrates that Hill had limitations in the area of social skills. For example, the district court pointed to the testimony of psychologists who spoke to Hill's "poor self-esteem, inability to interpret social situations and create positive relationships, and [the fact] that he was easily influenced by people, gravitated toward an antisocial peer group, and did not respond appropriately to authority figures." *Hill*, 2014 WL 2890416, at *38. Hill's school and court records demonstrate that he had trouble making friends. At seventeen, Hill was described as "socially constricted" and possessing "very few interpersonal coping skills." R. 97 [disc 1] (Suppl. App.) (Page 530).

Hill also showed limitations in at least one more area—self-direction. Hill was described as "easily led" in both his school and court records, during periods both before and after he committed serious crimes while apparently acting alone. In school, Hill was described as immature and "easily led by others into trouble around school," like fighting. *Id.* at 515. He was vulnerable to exploitation by older individuals, displayed inappropriate and immature behaviors in class, rarely considered the consequences before acting, and had trouble conforming his behavior to the rules or the law. When Hill was thirteen, he was described as exhibiting a "great

deal of impulsivity." *Id.* When Hill was seventeen, he was evaluated by a psychologist who concluded that he had poor judgment, "d[id] not think of consequences," was "highly suggestable," and "was 'likely to be exploited'" if placed in a halfway home for adults "[b]ecause of his passivity and limited intellectual ability." *Id.* at 527–28. Another report from that same time expressed concern about his tendency to follow others. Even when he was in prison at age twenty-one, a correctional officer reported that Hill was easily led by other inmates and had to be told how to do his job at every step of the way. *See* R. 97 [disc 1] (*Atkins* Hr'g Tr.) (Pages 437–39).

Time after time, psychologists examined Hill and diagnosed him as intellectually disabled. R. 97 [disc 1] (Suppl. App.) (Pages 61–76, 513–30, 592–621). These psychologists assessed Hill's IQ and his adaptive skills. During one of the earliest assessments, his school's psychologist noted that Hill was limited in functional academics and self-direction. *Id.* at 63–65 (noting that Hill is "limited in his ability to generalize, to transfer learning from one situation to another, . . . or to do much self-evaluation"). Later assessments consistently detailed the same issues and deficits in social skills, communication, and self-care as well. *See, e.g.*, *id.* at 69, 71, 516, 519, 527–28, 530, 592.

In addition to his significant limitations in functional academics, self-care, social skills, and self-direction, the record also demonstrates that Hill never has lived independently, never had a driver's license or a bank account, never has been able to perform a job without substantial guidance from supervisors, was labeled "functionally illiterate" at school and in prison, could never read or write above a third-grade level, and could never adequately sign his own name.

Even if Hill appeared to be functioning at an average skill level to a layperson's eyes, it is common for someone with mild intellectual disability to present as functioning. *See* R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Page 189). That is why the impressions of schoolteachers are critical—because children often are not diagnosed "until they get to school and teachers who are familiar with kids at various cognitive abilities discover that this child is, No. 1, not where they should be for their age in terms of their current [intellectual] functioning . . . . And, two, that as they try to teach them they learn at a much slower rate." *Id.* Comments from Hill's schoolteachers were largely left unaddressed—or were distorted—in the Ohio courts' analysis.

2. Unreliable Experts

Nevertheless, it might seem that the Ohio courts rendered a reasonable decision because they relied on the opinions of two psychological experts who found that Hill did not exhibit significant adaptive deficits. The majority here certainly takes that stance. Maj. Op. at 21–22. According to the Ohio Court of Appeals, the experts *and* the record provided "competent and credible evidence to support the trial court's conclusion that Hill does not meet the second criterion for mental retardation." *Hill*, 894 N.E.2d at 126. But both experts, at the trial court's direction, ignored evidence of adaptive deficiencies from Hill's school years, or set it aside as irrelevant to the task at hand. Anecdotal evidence, such as comments and records from schoolteachers and others who have interacted with or evaluated the subject, is key to the adaptive-deficits analysis. *See Hill*, 894 N.E.2d at 124–25 (discussing anecdotal evidence); R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Pages 383–84) (stating that the psychological profession values "collateral information"); R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 696) (stating the importance of "drawing information from many different sources of functioning in every day life under every day circumstances").

Two experts testified in Hill's *Atkins* proceedings that Hill did not display significant adaptive limitations. *State v. Hill*, No. 85-CR-317, at 79–80 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported) [R. 97 [disc 1] (Suppl. App.) (Pages 3477–78)]. The state trial court relied upon their opinions to conclude that Hill had failed to demonstrate significant adaptive deficits. *Id*. at 81 (Page 3479).[8] All three experts, including Dr. Hammer (Hill's expert), found that Hill malingered or tried to "fake bad" on the adaptive skills tests given to him in 2004. *Id.* at

[8]We have previously denied *Atkins* relief in an AEDPA case arising out of Ohio where, as here, two of the three mental-health experts testified that the petitioner was not intellectually disabled. *O'Neal v. Bagley*, 743 F.3d 1010, 1023 (6th Cir. 2013) ("With expert testimony split, as it often is, the state court chose to credit Dr. Chiappone and Dr. Nelson over Dr. Tureen, and we cannot say from this vantage that it was unreasonable to do so."). However, *O'Neal* is distinguishable on its facts, and Hill's claim for *Atkins* relief is much stronger than the petitioner's claim in *O'Neal*. For example, in *O'Neal* there was insufficient evidence to prove that the petitioner met the first prong in demonstrating "significantly subaverage intellectual functioning." *Id*. at 1022. Here, by contrast, Hill's IQ is so low that the Warden concedes that Hill satisfies the first prong. Additionally, O'Neal's claim for *Atkins* relief also failed because his adaptive deficits may well have been better explained by his drug abuse and personality disorder rather than organic mental illness. *Id*. at 1022–23. Furthermore, we have never held that a reliance on an expert witness's conclusion makes a state court's determination reasonable per se. Instead, we consider whether "the record read as a whole" allows a reviewing court to conclude that the state court's determination was unreasonable. *Id.* at 1022; *see also Carter v. Bogan*, 900 F.3d 754, 768, 771 (6th Cir. 2018).

53, 81 (Pages 3451, 3479). In coming to their decision that Hill was not, at present, intellectually disabled, Drs. Olley (the state's expert) and Huntsman (the trial court's expert) heavily weighed the fact that Hill malingered. *See* R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 781); R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Pages 1050–51). *But see* R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Page 211) (stating that a person with intellectual disability can still lie, manipulate, and cheat). Drs. Olley and Huntsman also emphasized the sophistication of Hill's crimes and his interactions with prison, law-enforcement, and court officials. *See* R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Pages 726–31, 737–50, 770–75); R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Pages 1027, 1034–35, 1040–44). Dr. Hammer, on the other hand, based his diagnosis on all types of anecdotal evidence, including Hill's records from school, and concluded that Hill satisfied all three prongs for a diagnosis of intellectual disability. *See* R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Pages 383–84); *id.* at 156 ("My opinion is that [Hill] falls within the high end of the mild retardation range."); *see also id.* at 190 (describing mild intellectual disability as "significant" or "severe" impairment in the ability to function).

Dr. Olley (the state's expert) stated that Hill's memory was very good in court on April 15, 2004, when he provided details of events. R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 744). Dr. Olley also stated, based on an interview with Hill, that Hill was able "to express a complex explanation of the crime in order to support his claim of innocence." R. 97 [disc 1] (Suppl. App.) (Page 1125). Although Dr. Olley admitted that Hill's case was a "close call," R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 861), he nevertheless concluded that Hill's "way of presenting himself," both in his police interrogation and before the court, was inconsistent with an intellectual-disability diagnosis, *id.* at 718–19, 726–27. Dr. Olley said that he had never heard of an intellectually disabled inmate calling the media to arrange an interview, as Hill did in this case by reaching out to the *Tribune Chronicle*. *Id.* at 763. Dr. Olley noted that Hill was able to tell an elaborate "conspiracy" theory about the events leading to his capital trial for Fife's murder, which echoed a "very similar" soliloquy he made before the trial court on April 15, 2004. *Id.* at 770–72. Dr. Olley characterized this soliloquy as "long," "rambling," and ultimately implausible—but he testified that he was nonetheless "struck" by Hill's "sophisticated memory and reasoning." *Id.* at 744, 771–72.

Dr. Huntsman (the trial court's expert) similarly focused in her report on Hill's "remarkable memory for the history of his case," his detailed and "very complex explanation for how Raymond Fife came to be killed," as well as the "competencies" observed by staff members in prison. R. 97 [disc 1] (Suppl. App.) (Page 1141). Dr. Huntsman described Hill's story as "bouncing around in time," and she initially "couldn't keep track of what [they] were talking about." R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Pages 1021). She characterized the conspiracy story as "remarkable and not likely, not very plausible." *Id.* at 1025. Still, despite the story's apparent lack of "logic," Dr. Huntsman noted "the degree of organization, the degree of complexity[,] and the degree of memory that he displayed as [they] talked." *Id.* at 1025–26, 1031. She testified that it was not the story Hill told, but his "process of telling the story"—which demonstrated complexity, "sophistication," a noteworthy vocabulary, and a "general ability to communicate"—that led to her conclusion that he was not intellectually disabled. *Id.* at 1190.

In the end, Drs. Olley and Huntsman each opined that Hill was "borderline intellectual functioning" as defined in the DSM-IV. *See* R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 936); R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Page 1044); *id.* at 1049 (stating that "what makes me say that I believe that in my opinion he falls within the borderline range of intellectual functioning has to do with his adaptive behavior"). Dr. Olley described borderline intellectual functioning as "no mental retardation but it is the . . . functioning that is . . . between one standard deviation below the mean and two standard deviations below the mean," *i.e.*, an IQ range between "71 to 85." R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 936). Drs. Olley and Huntsman came to this conclusion even though people at the lower end of borderline intellectual functioning and the higher end of intellectual disability are "going to be quite similar . . . in some regards," R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Page 465), including in their ability to create a "script" involving various people and events, *id.* at 537–38.

In the opinion of Dr. Hammer (Hill's expert), Hill's behavior was not inconsistent with that of a person with mild intellectual disability because those persons often attempt to don a "cloak of competence." *Id.* at 191–92. "[M]any people with mild [intellectual disability]," he explained, "are quite aware of their deficits in learning and functioning and are somewhat

worried that other people will find that also. So they oftentimes will develop certain skill areas that they can hold out as indicating that they have a competence in a certain area and, therefore, are trying to mask . . . what their deficits actually are." *Id*. This frequently involves "learning sort of . . . scripts or scenarios that they can kind of pull out." *Id.* at 192–93. The trial court, which adopted the opinions of Drs. Olley and Huntsman, but made no reference to Dr. Hammer's cloak of competence discussion in its opinion, apparently did not afford this concept much weight.

Drs. Olley and Huntsman also placed significant weight on the testimony of prison officials about Hill's recent behavior in the prison environment. These officials considered Hill "average" in intelligence compared to other death row inmates. "They testified that Hill interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules." *Hill*, 2014 WL 2890416, at *39 (quoting *Hill*, 894 N.E.2d at 124). One official said that Hill was feigning intellectual disability for his *Atkins* claim, and another said that Hill's hygiene was "poor but not terrible." *Id.* (quoting *Hill*, 894 N.E.2d at 125).

As the district court noted, all of the experts conceded that relying on Hill's behavior in prison to assess adaptive skills is problematic because "death row is a segregated, highly structured and regulated environment." *Id.* at *42.[9] Evidence of adaptive functioning in this kind of controlled setting is of limited value because inmates do not have the same opportunities to acquire new skills or show weaknesses in existing skills. Assessing Hill's adaptive deficits as an adult is particularly challenging given the absence of any reliable testing to measure Hill's adaptive functioning and the lack of reliable evidence of how Hill would have functioned as an adult in general society as he has been incarcerated for all but six months of his adult life. Given the lack of evidence regarding Hill's likely adaptive performance as an adult in the general community, the experts should have utilized all available evidence.

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[9]The medical literature available in 2008 prohibited the assessment of adaptive skills in atypical environments like prison. For example, the 2002 AAMR Manual says "[l]imitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture." AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 13 (10th ed. 2002). It explains: "[t]his means that the standards against which the individual's functioning must be measured are typical community-based environments, not environments that are isolated or segregated by ability." *Id.* at 8.

The majority acknowledges that Dr. Huntsman, in particular, considered prison officials' descriptions of Hill's adaptive behavior as "'[the] most persuasive[]' evidence" of Hill's adaptive functioning. Maj. Op. at 22 (alterations in original) (quoting R. 97 [disc 1] (Suppl. App.) (Page 1141)). Given that the existing medical guidelines prohibited measuring an individual's functioning based on their behaviors in a prison setting, Dr. Huntsman's weighty reliance on this evidence in coming to her conclusion about Hill's intellectual disability casts serious doubt on its reasonableness. The same is true for Dr. Olley, especially in light of his own admission that "[i]t is impossible to assess all of Mr. Hill's adaptive behavior while he is in prison." R. 97 [disc 1] (Suppl. App.) (Page 1124).

Drs. Olley and Huntsman leaned heavily on these prison officials' testimony rather than treating them with the degree of skepticism mandated by the medical literature. As the district court noted, the weight of the testimony from various death-row prison officials was limited by their potential bias against the inmates they were charged with guarding, as well as the shortcomings affecting lay opinions about intellectual disability generally. *Hill*, 2014 WL 2890416, at *42–43. And many of the specific prison officials' statements were "rife with contradictions, with themselves and each other." *Id.* at *43.

These flaws might be forgivable under AEDPA deference, but there is one problem with Drs. Olley's and Huntsman's testimony that we cannot overlook: neither of them grappled with the extensive past evidence of Hill's intellectual disability. Both experts, instead, assessed Hill's adaptive skills "as they existed at the time of the hearing"—even though intellectual disability is a static condition. *Id.* at *23; *see Heller*, 509 U.S. at 323; *Williams*, 792 F.3d at 617–19; R. 97 [disc 1] (Suppl. App.) (Page 1125) (Dr. Olley reporting that "[t]he available information on Mr. Hill's *current functioning* does not allow a diagnosis of mental retardation") (emphasis added). At the State's urging, the trial court ruled that it would focus the *Atkins* inquiry on Hill's current functioning, but noted that it would not preclude historical evidence from coming in. R. 97 [disc 1] (Suppl. App.) (Pages 175–81, 217–23, 247–50). As a result, the opinions of Drs. Olley and Huntsman, like the Ohio courts' own assessments, lack a credible foundation.

Dr. Olley recognized the importance of anecdotal evidence when he relied on testimony from prison guards to assess Hill's adaptive skills. But when it came to past anecdotal evidence

of Hill's adaptive deficits, Dr. Olley dismissed it as evidence of low *academic* skills only. R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 783). Acknowledging that Hill's schoolteachers thought he was intellectually disabled, Dr. Olley said that he could not say the same because "[t]he information is simply not available." *Id.* As detailed extensively above, that is simply not true.

The majority finds Dr. Olley's determination to be reliable because Dr. Olley "did not dismiss Hill's past anecdotal evidence; rather, he concluded after reviewing the record that 'there was inadequate information about adaptive behavior that would allow [him] to conclude that there was a significant impairment in adaptive behavior' at the time of the offense." Maj. Op. at 20 (alteration in original) (quoting R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 780)). But that conclusion ignores Dr. Olley's failure to engage with or consider the numerous reports from teachers, mental health professionals, and other relevant observers of Hill's adaptive behavior, directly contravening Dr. Olley's admitted methodology for determining intellectual disability and what constitutes adequate information. *See* R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Pages 696–97) (noting that for retrospective determinations of intellectual disability, experts should rely on records and statements from "teachers," "mental health professionals," and "other people who know the individual well").[10] Those records are replete with observations and diagnoses of significant limitations in adaptive behavior that Dr. Olley never mentioned or explained away as irrelevant or inadequate in the areas of self-care or self-direction. For example, in the area of self-direction, Dr. Olley failed to contextualize the results of the standardized tests administered by mental health professionals with the numerous accounts throughout Hill's childhood and teenage years from teachers, psychologists, and social workers who testified that Hill was easily led and a follower. *Hill*, 2014 WL 2890416, at *30–33. More importantly, Dr. Olley admitted that Dr. Nancy Schmidtgoessling, one of the psychologists who testified during the mitigation phase of Hill's trial, assessed Hill's adaptive behavior when she diagnosed him as intellectually disabled. *See* R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Pages 941–42). But Dr. Olley never explained why he found that diagnosis unreliable.

[10]Dr. Olley explained to the trial court that "our protocol was different" from other cases for which he had served as an expert "in the sense that in speaking among the three psychologists, we were aware of your order to look at Mr. Hill's present functioning." R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 862). He further explained that it was because of the trial court's order that the experts focused on Hill's adaptation to prison life. *Id.*

As for Dr. Huntsman, she, too, did not give much thought to the past anecdotal evidence of Hill's adaptive deficits. She stated that she was retained to decide "whether [Hill] is *now* a mentally retarded individual." R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Page 1052) (emphasis added). When prompted for her opinion of Hill's school records, she stated that these records were not as reliable as the court-conducted tests because teachers' assessments "were being done for a very different purpose." *Id.* at 1046. Never mind that the Ohio Supreme Court had already decided in *White* that school records *are* relevant for an adaptive-deficits analysis. *State v. White*, 885 N.E.2d 905, 916 (Ohio 2008); *see also Heller*, 509 U.S. at 323 (noting that for intellectual disability determinations "there is an 18-year record [of past behavior] upon which to rely"). Never mind that several of the assessments used to evaluate Hill relied on definitions of intellectual disability that match *Lott*'s factors. *See e.g.*, R. 97 [disc 1] (Suppl. App.) (Page 592–93) (finding that Hill qualified for placement into a special education program for intellectually disabled students because he exhibited "significant subaverage intellectual functioning" and deficiencies in at least two areas of adaptive behavior as determined by a multidisciplinary team that included a qualified psychologist). Dr. Huntsman also speculated that Hill had not tried his hardest in school. R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Page 1048).[11] In fact, at one point Dr. Huntsman dismissed the evidence of Hill's adaptive deficits during his teenage years as Hill being "a pretty troubled and pretty troublesome youth" due to his school system record. *Id.* at 1047. Despite Dr. Huntsman's detailed analysis of the reports from prison guards, there is no comparable analysis of the overwhelming historical records detailing Hill's struggles with self-care, self-direction, and academic functioning. Dr. Huntsman testified that, excluding Hill's mother, the record did not contain any non-school records providing evidence of Hill's adaptive skills or deficits. *Id.* at 1090, 1098.[12] This completely ignores the highly relevant non-school records and testimony from Brinkhaven, where social workers observed Hill at all times and noted significant limitations in self-care, academic functioning, and self-direction. *See Hill*, 2014 WL 2890416, at *31. Having disregarded much of the past anecdotal evidence, Dr. Huntsman stated that Hill

[11]Dr. Huntsman did not point to, nor have we been able to discover, any evidence in Hill's school records demonstrating that he intentionally performed poorly in school.

[12]The record also indicates that, if anything, Hill's mother "overestimated [Hill's] adaptive behavior." R. 97 (Suppl. App.) (Page 527).

"probably" was not intellectually disabled at the time of the offense. R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Page 1052) ("I think that the only thing that I've said today that I didn't say previously in my report, because I wasn't asked to address it in my report, is that my opinion is that he was probably not retarded at the time of the offense.").

Even though Drs. Olley and Huntsman conceded that this was a close case, they made no real attempt to reconcile their outcome with Hill's past diagnoses of intellectual disability and the voluminous relevant evidence of Hill's significant adaptive limitations—and in fact, they were effectively told not to do so. As we held in *Williams*, *Atkins* and *Lott* recognized that intellectual disability presents itself in childhood and is a permanent condition. *See Williams*, 792 F.3d at 619–20. Under *Atkins*, courts cannot limit their focus to contemporary accounts while discounting past evidence of intellectual disability. The Ohio trial court's erroneous instruction substantially undermined the Ohio courts' ability to rely reasonably on Dr. Olley's and Dr. Huntsman's conclusions regarding Hill's intellectual disability.

Having set their gaze on Hill's interactions with prison, court, and police officials, Drs. Olley and Huntsman said next to nothing about the substantial evidence in the record from Hill's time both in school and in prison that Hill was easily led, struggled to communicate, struggled with his personal hygiene, and struggled to read. These failures only encouraged the Ohio courts to do the same. Rather than grapple with the extensive record of Hill's intellectual disability, the state trial court made its findings based on Hill's scattered and scripted conspiracy story of the Fife murder, his demeanor in interacting with law enforcement and the legal system, and the supposed sophistication of his crimes. *State v. Hill*, No. 85-CR-317, at 73–77 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported) [R. 97 [disc 1] (Suppl. App.) (Pages 3471–76)]. Those "adaptive strengths" convinced the state trial court that Hill could not be intellectually disabled because he had "remarkable" communication and vocabulary skills and was self-directed. *Id*. at 74 (Page 3472). As shown throughout this discussion, there is substantial evidence in the record to contradict these findings, which are based on evidence—Hill's functioning in a prison setting—prohibited by existing medical guidelines. *See, e.g.*, discussion *infra* Section III.A.3. Unlike the Ohio courts and Drs. Olley and Huntsman, I cannot cast aside years of highly probative evidence and repeated diagnoses of intellectual disability. To do so

flies in the face of then-prevailing medical standards, relevant guidance from the Ohio Supreme Court, and the doctors' own methodologies. Viewed in the context of the entire record and based on clearly established Supreme Court precedent, no fairminded jurist could find their factual determinations to be reasonable.

3. Myths and Misrepresentations

To the extent that the Ohio courts addressed past evidence of Hill's adaptive deficits, they misconstrued it or tried to offset it with irrelevant facts. Rather than take this evidence seriously, the Ohio Court of Appeals adopted the trial court's analysis as consistent with its own perception of the record:

> *Public School Records*. Hill's public school records amply demonstrate a history of academic underachievement and behavioral problems. Hill is often described as a lazy, manipulative, and sometimes violent youth. Although there are references to Hill's being easily led or influenced by others, the trial court noted that much of Hill's serious misconduct, including two rapes committed prior to Fife's murder, occurred when he was acting alone. Hill knew how to write and was described by at least one of his special education teachers as "a bright, perceptive boy with high reasoning ability."
>
> *Hill's Trial for the Murder of Raymond Fife*. The trial court observed that the record of Hill's murder trial provided evidence of Hill's ability concerning self-direction and self-preservation. In particular, the court noted Hill's initiative in coming to the police in order to misdirect the focus of the investigation by implicating others and Hill's ability to adapt his alibi to changing circumstances in the course of police interrogation. This last point was also noted by Dr. Olley in his hearing testimony: Hill "stood his ground during that interrogation very, very strongly. * * * He not only modified his story a little bit when he was faced with evidence that couldn't possibly have avoided. * * * That to me is a kind of thinking and planning and integrating complex information that is a higher level than I have seen people with mental retardation able to do."
>
> *Death Row Records*. At the time of the evidentiary hearing, Hill had been incarcerated on death row for 20 years. From this period of time, the trial court considered audiotaped interviews of Hill by Warren's Tribune Chronicle reporter Andrew Gray in the year 2000. These interviews were arranged on Hill's initiative in order to generate publicity for his case. The trial court found Hill's performance on these tapes demonstrated a high level of functional ability with respect to Hill's use of language and vocabulary, understanding of legal processes, ability to read and write, and ability to reason independently.

> The trial court considered the evidence of the various prison officials who testified at the evidentiary hearing. These witnesses consistently testified that Hill was an "average" prisoner with respect to his abilities in comparison with other death row inmates. They testified that Hill interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules. Prison officials offered further testimony in their interviews with the expert psychologists. One official opined that Hill began to behave differently after *Atkins* was decided, and he believed that Hill was "playing a game" to make others think he is retarded. Another official reported that Hill's self-care was "poor but not terrible" and that Hill had to be reminded sometimes about his hygiene.
>
> *Hill's Appearances in Court*. The trial court stated that it had "many opportunities" to observe Hill over an extended period of time and, as a lay observer, did not perceive anything about Hill's conduct or demeanor suggesting that he suffers from mental retardation.

Hill, 894 N.E.2d at 124–25.

These findings are deeply troubling. To start, the Ohio courts' finding "that Hill 'underachieved' academically or in any other adaptive skill as a child is," as the district court remarked, "squarely contradicted by the record." *Hill*, 2014 WL 2890416, at *26. The district court could not find, and neither could I, "one reference in Hill's school records by a teacher, school administrator, psychologist, psychiatrist, or anyone else suggesting that Hill was capable of performing at a substantially higher level but chose not to." *Id*. (footnote omitted). And as the experts in this case testified, evidence of behavioral problems or a conduct disorder simply does not undermine a simultaneous finding of intellectual disability. *See* R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Page 612); R. 97 [disc 1] (Olley Test., *Atkins* Hr'g Tr.) (Page 713) ("[I]f he's having conduct problems in school, that's neither here nor there to a diagnosis of mental retardation."); (R. 97 [disc 1] (Huntsman Test., *Atkins* Hr'g Tr.) (Pages 1102–03). While conceding that "there are references to Hill's being easily led or influenced by others, the trial court noted that much of Hill's serious misconduct, including two rapes committed prior to Fife's murder, occurred when he was acting alone." *Hill*, 894 N.E.2d at 124.[13] The state courts incorrectly discounted the numerous reports that Hill was easily led because he committed

[13]The Ohio courts' use of the word "references" is also a serious mischaracterization of the record. As the district court found, almost every evaluation of Hill in his school records described Hill's tendency to be "easily influenced" by others. *Hill*, 2014 WL 2890416, at *26 n.19. These consistent assessments amount to much more than fleeting "references."

crimes on his own. Under then-prevailing medical standards, Hill's prior criminal behavior is completely irrelevant to any determination of whether he exhibited deficits in adaptive skills. *See Hill*, 2014 WL 2890416, at *26.

The Ohio courts' focus on a note drafted by a teacher *in a school for intellectually disabled children* describing Hill as "'bright' and 'perceptive,' with 'high reasoning ability'" was, as the district court put it, "almost cynical in its selective misrepresentation of the facts." *Hill*, 2014 WL 2890416, at *27. In the same report, Hill's special education teacher noted that Hill, who was thirteen at the time, had the reading skills of a first-grader and the math skills of a third-grader. R. 97 [disc 1] (Suppl. App.) (Page 578). Her proposed goals for Hill were for him to shower regularly, eat and drink in a manner appropriate to school, blend letter sounds to say words altogether out loud, tell time in five-minute intervals, and count change up to $1.00. *Id.* The Ohio courts' statement that Hill knew how to write suffers from the same flaw. At best, it is an erroneous description of Hill's abilities; at worst, it purposefully distorts the record. *See Hill*, 2014 WL 2890416, at *27 (finding that there is "no evidence in the record that Hill could write much more than his name during his school years, and struggled even with that"). More importantly, the Ohio Court of Appeals blatantly omits the uncontradicted evidence from Hill's childhood through teenage years detailing Hill's consistent academic struggles. *See* discussion *supra* Section III.A.1.

The Ohio courts' handling of evidence regarding self-care is equally troubling. The Ohio Court of Appeals's sole reference to Hill's deficits with regard to self-care was its summary of testimony provided by a prison official "that Hill's self-care was 'poor but not terrible' and that Hill had to be reminded sometimes about his hygiene." *Hill*, 894 N.E.2d at 125. Such a statement downplays the record's extensive chronicling of Hill's struggles with hygiene, including the fact that an individual education plan established for Hill when he was nearly fourteen years old included an "[a]nnual [g]oal and [o]bjective" of helping Hill "learn to shower when necessary" and to "put soiled clothing in the appropriate place." R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Pages 280–81, 327). In short, the Ohio Court of Appeals's description of Hill's school records does not contain a single accurate characterization of the evidence that is relevant to determining whether Hill exhibits significant limitations in adaptive behavior.

Instead, we are left to assume that the appellate court and also the trial court were all but oblivious to the ample amount of evidence that credibly establishes Hill's limitations in functional academics, self-care, social skills, and self-direction.

The state trial court also unduly relied on Hill's "initiative in coming to the police" after Fife's death, as well as his alleged efforts to misdirect the investigation and fabricate an alibi while under interrogation, as "evidence of Hill's ability concerning self-direction and self-preservation." *Hill*, 894 N.E.2d at 124. But Hill was not even a suspect before he went to the police, and his statements are what aroused their suspicion. Incriminating oneself is hardly self-preservation. And as the district court noted, "'[s]elf-preservation' is not [even] among the adaptive skills measured under the clinical definitions of intellectual disability." *Hill*, 2014 WL 2890416, at *33. And "self-direction" covers a host of behaviors—including "initiating activities appropriate to the setting" and "demonstrating appropriate assertiveness and self-advocacy skills"—that are either unrelated or directly contrary to Hill's decision to make contact with the police. *Id.* (quoting AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 40 (9th ed. 1992)).

Moreover, contrary to the Ohio courts' findings, Hill's "performance" during the police interrogation revealed him to be "childlike, confused, often irrational, and primarily self-defeating," and Hill's attempts to change his story under pressure failed to "skillfully hid[e] his part" in Fife's death. *Id.* at *34. The police even stated that Hill was suggestible, telling him that "Everytime [*sic*] we suggest something to you, you have a tendency to agree with us." R. 26 (Trial Tr. at 30) (Page ID #2105). Hill often changed his story or "embellished his statement[s] at the slightest suggestion by the police, even when the information at issue was irrelevant or incriminating." *Hill*, 2014 WL 2890416, at *35. These actions "were quite the opposite of adaptive." *Id.* at *34. This is especially true where Hill's decision to approach the police did not "resolve his problems," but "succeeded only in immediately drawing the police's attention to himself." *Id.* I fail to see how such behavior reasonably could be interpreted as exhibiting *skills* in "making choices," "resolving problems," and "demonstrating appropriate assertiveness and self-advocacy skills." AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 40 (9th ed. 1992).

While purportedly relying on prison accounts, the Ohio courts made no mention of Hill's prison *records*. Those records reflect that prison officials always understood Hill to be mentally incapacitated or "slow." As when he was in school, Hill was considered to be illiterate in prison. He was understood to have a "very limited writing ability," and he had other inmates write for him. R. 97 [disc 1] (Hammer Test., *Atkins* Hr'g Tr.) (Page 439). Notes written from Hill to prison officials make clear that he had trouble keeping track of his prison account balance. According to fellow inmates, when Hill was given a task, he had to be carefully supervised because he could not remember how to complete the assigned task. At least one prison official reported that Hill was able to perform his job as a porter because the cleaning supplies were sorted by color, so Hill was not required to read the supplies' instructions. *Id.* at 363, 1381.

Rather than credit the ten intellectual-disability diagnoses that Hill received prior to *Atkins* even being decided, the trial court made its own lay judgment that "there is nothing about [Hill's] general appearance—facial expressions or conduct—suggesting . . . that the Petitioner is mentally retarded." *State v. Hill*, No. 85-CR-317, at 76 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported) [R. 97 [disc 1] (Suppl. App.) (Page 3474)]. The Ohio Court of Appeals defended that lay judgment on the basis that the experts also believed that Hill failed to exhibit significant adaptive deficiencies. *See Hill*, 894 N.E.2d at 125–26.

Perhaps most disturbing, three psychologists who testified at Hill's pre-*Atkins* mitigation hearing concluded that Hill was intellectually disabled and had extremely poor adaptive functioning. On appeal, the Ohio Supreme Court and Court of Appeals found these psychologists' testimony credible and concluded that Hill was intellectually disabled. *See State v. Hill,* 595 N.E.2d 884, 901 (Ohio 1992); *State v. Hill*, Nos. 3720, 2745, 1989 WL 142761, at *6, *32 (Ohio Ct. App. Nov. 27, 1989). It was only after *Atkins* came down, and Hill was again assessed for intellectual disability in renewed state-court proceedings, that the Ohio courts reversed course. *See Hill*, 300 F.3d at 682 (remanding this case to the Ohio courts so that Hill could exhaust his *Atkins* claim, while recognizing that the "Ohio courts reviewing his case have [already] concluded that Danny Hill is retarded and voluminous expert testimony supported this conclusion" (citation omitted)). Yet the Ohio Court of Appeals does not attempt to address this highly relevant evidence. *See* Maj. Op. at 15.

Unfortunately, the majority papers over, when it does not outright ignore, the Ohio Court of Appeals's egregious mischaracterizations and omissions of probative favorable evidence. Like the Ohio courts, the majority flagrantly downplays the overwhelming evidence in Hill's juvenile records that sets out Hill's limitations in adaptive functioning. For example, the majority describes Hill's school records as merely "suggest[ing] that [Hill] struggled academically as a child." Maj. Op. at 13. But unanimous observations from teachers, social workers, and psychologists that Hill consistently performed far below his age-level in almost every academic arena do not constitute a "suggestion" of a deficit. They are uncontradicted evidence of a significant limitation. The majority admits that the Ohio Court of Appeals's "short summary of [Hill's school records]" omits evidence concerning Hill's skills in academics, self-direction, and self-care. *Id.* at 12. But again, it attempts to erase the significance of this error by portraying the evidence as only possibly "relevant to determining whether Hill had significant limitations in two or more adaptive skills." *Id.* at 14. That characterization cannot stand in the face of clearly established law that instructs us to rely on "the documentation and other evidence of [intellectual disability]" that has accumulated during the individual's first eighteen years when assessing intellectual functioning. *Williams*, 792 F.3d at 620 & n.4 (quoting *Heller*, 509 U.S. at 322) ("[E]vidence of intellectual disability from earlier in life is directly relevant to present-day intellectual disability determinations.").

The majority refuses to recognize the substantial effect of these errors on our determination of whether the Ohio Court of Appeals's conclusion that Hill did not have significant limitations in two or more adaptive skills was more than just incorrect but was unreasonable. Several courts have recognized that errors of this magnitude can fatally undermine the factfinding process, rendering the resulting factual finding unreasonable. *See Taylor v. Maddox*, 366 F.3d 992, 999–1001 (9th Cir. 2004) (holding that a state court's clear misapprehension or misstatement of the record that "goes to a material factual issue that is central to petitioner's claim" and a state court's "failure to consider and weigh relevant evidence" that is "highly probative and central to the petitioner's claim" can render "the resulting factual finding unreasonable"), *abrogated on other grounds by Cullen v. Pinholster*, 563 U.S. 170 (2011); *Byrd v. Workman*, 645 F.3d 1159, 1171–72 (10th Cir. 2011) (following *Taylor*); *Gray v. Zook*, 806 F.3d 783, 791 (4th Cir. 2015) ("When a state court apparently ignores a

petitioner's properly presented evidence, its fact-finding process may lead to unreasonable determinations of fact under § 2254(d)(2)."); *see also Miller-El*, 537 U.S. at 346 (finding it concerning under § 2254(d)(2) that a "state court also had before it, and apparently ignored" probative evidence that was central to a petitioner's claim of a constitutional violation). The Ohio Court of Appeals did not just plainly misstate and grossly mischaracterize the record. Its misstatements and mischaracterizations are of highly probative evidence related to Hill's adaptive functioning, which is central to his *Atkins* claim. Furthermore, the Ohio Court of Appeals's treatment of the historical record and of Hill's functioning in prison contained inexcusable omissions of evidence that not only are inconsistent with its findings but also are "sufficient to support [Hill's *Atkins*] claim when considered in the context of the full record." *Taylor*, 366 F.3d at 1001, 1007–08. As detailed above, the Ohio courts' reliance on the conclusions of Drs. Olley and Huntsman cannot serve to mitigate or cure these errors.

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The evidence that Hill is intellectually disabled is overwhelming. It is clear from the record that Hill was universally considered to be intellectually disabled and seriously lacking in adaptive skills by schoolteachers, administrators, social workers, psychologists, the juvenile court system, and even (previously) the Ohio Supreme Court. Hill consistently performed very poorly in school (functional academics); there was consistent documentation that he had trouble maintaining proper hygiene despite reminders (self-care); he had trouble making friends and responding appropriately to authority figures (social and communication); and he was described as a follower, easily led, and vulnerable to exploitation by adults (self-direction). The record shows that these deficits largely continued into adulthood, particularly with respect to self-care and functional academics. Nevertheless, the state courts and the experts they retained failed to grapple with this extensive social history, choosing instead to favor the accounts of prison guards and personal observations.

The Ohio courts' legal conclusions breach the most basic tenets of *Atkins*, and their factual findings cannot be sustained on this record. *Atkins*, on its most basic level, forbids the execution of persons who are intellectually disabled. It requires courts to look at all relevant evidence of intellectual disability—and certainly evidence of manifestations before the age of 18.

This is not a case where evidence of intellectual disability comes out after conviction. Hill was diagnosed as intellectually disabled from a very young age. He attended special education classes. He could not be counted on to bathe. Yet, the Ohio courts were impressed by his ability to incriminate himself to the police and to rehash a scripted story in a cloak of competency. They valued the conflicting opinions of prison guards interacting with Hill in a highly structured setting over professional reports and diagnoses recorded over a lifetime. Even if *Atkins* alone poses no bar to offsetting adaptive deficiencies with adaptive strengths, the Ohio courts failed to grapple with the evidence in the record indicating that Hill's perceived strengths were actually weaknesses. As the Ohio Court of Appeals itself stated at the penalty phase, "The record is replete with competent, credible evidence which states that [Hill] has a diminished mental capacity. He is essentially illiterate, displays poor word and concept recognition and, allegedly, has deficient motor skills." *Hill*, 1989 WL 142761, at *32. There is no getting around it—Hill is intellectually disabled. To deny the obvious is unreasonable. Thus, respectfully, I dissent.

B. Ineffective Assistance of Counsel

Because I believe that we should grant habeas relief on Hill's *Atkins* claim, I would pretermit Hill's claim of ineffective assistance by his *Atkins* counsel. However, because the majority reaches Hill's ineffective-assistance-of-counsel claim, I write to express my views on its analysis. The district court held that Hill's ineffective-assistance-of-counsel claim is barred by 28 U.S.C. § 2254(i), which prohibits a petitioner from seeking habeas relief because of the ineffectiveness of his counsel at a post-conviction proceeding. *Hill*, 2014 WL 2890416, at *52–53. At the heart of this issue is a deeply important constitutional question: whether petitioners bringing *Atkins* claims that arise after their initial appeals due to the retroactivity of *Atkins* have a Sixth Amendment right to the effective assistance of counsel. An answer in the affirmative would trump any statutory instruction that seemingly bars such a claim. The majority, in denying Hill's claim on the merits, decides not to resolve this issue. Maj. Op. at 23. However, I believe that the importance of the issue warrants addressing why we should conclude that Hill had the right to effective assistance of counsel during his *Atkins* hearing.

The Warden's argument and the district court's conclusion that § 2254(i) prevents Hill from bringing a habeas claim based on the ineffectiveness of his *Atkins* counsel rests on the

foundation that Hill's *Atkins* hearing qualifies as a post-conviction proceeding. Thus, under the Supreme Court's general rule, Hill had "no constitutional right to an attorney" and consequently "cannot claim constitutionally ineffective assistance of counsel in such [a] proceeding[]." *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). However, in *Hooks v. Workman*, the Tenth Circuit, the only other circuit to review this issue, "concluded that defendants in *Atkins* proceedings have the right to effective counsel secured by the Sixth and Fourteenth Amendments" even when the *Atkins* proceeding takes place after a defendant's conviction due to the retroactivity of *Atkins*. 689 F.3d 1148, 1183–84 (10th Cir. 2012). Consequently, the Tenth Circuit held that, in such circumstances, a defendant's ineffective-assistance-of-counsel claim "[was] properly . . . subject to federal habeas review under 28 U.S.C. § 2254." *Id.* at 1174. I find the Tenth Circuit's reasoning to be persuasive. The Supreme Court's fundamental-fairness jurisprudence also mandates that we conclude that Hill's claim is cognizable under § 2254. When examined in the context of Supreme Court habeas and capital-punishment caselaw, *Atkins* should be read as establishing a special exception regarding the right to counsel for intellectual-disability determinations due to the high stakes of the penalty involved: the irrevocable taking of a person's life.

First, as *Hooks* makes clear, the nature of an *Atkins* proceeding clearly compels a determination that the Sixth Amendment's guarantee of effective assistance of counsel attaches to the proceeding. For petitioners like Hill, an *Atkins* proceeding is "'postconviction' only in the strict chronological sense." *Id.* at 1183. Because *Atkins* was decided in 2002, after Hill had been convicted and sentenced in 1986, Hill's *Atkins* hearing was "'the first designated proceeding' at which he could raise a claim of mental retardation." *Id.* (quoting *Martinez v. Ryan*, 566 U.S. 1, 11 (2012)). That Hill had not and could not previously litigate his substantive constitutional right not to be executed due to his intellectual disability "underscores the importance of providing a capital defendant with the opportunity to fully present his constitutional issue, even in the postconviction context." *State v. Lorraine*, No. 2003-T-0159, 2005 WL 1208119, at *6 (Ohio Ct. App. May 20, 2005). Moreover, because the *Atkins* hearing was Hill's first time arguing the merits of his constitutional claim, Hill did not "have a brief from counsel or an opinion of the court" on the issue, rendering Hill "ill equipped to represent [himself]." *Martinez*,

566 U.S. at 11 (quoting *Halbert v. Michigan*, 545 U.S. 605, 617 (2005)).[14] Consequently, "the usual rationale for denying a right to counsel in postconviction proceedings is inapposite." *Hooks*, 689 F.3d at 1183.[15] In the death-penalty context, a defendant's first opportunity to argue that the State should not impose a capital sentence is always accompanied by the Sixth Amendment right to effective assistance of counsel. There is no reason why that should not be the case here.

Although initiated by a civil petition in cases like Hill's, an *Atkins* claim is intimately associated with a capital criminal prosecution and its sentencing proceeding. Both the Supreme Court and the Sixth Circuit recognize that an Eighth Amendment prohibition on the execution of intellectually disabled persons imposes a substantive restriction on "the State's power to punish." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins*, 536 U.S. at 304; *see Atkins*, 536 U.S. at 321; *Hill*, 300 F.3d at 681–82. Because an *Atkins* hearing goes to the essential question of whether the State can impose the death penalty at all, it is "inextricably intertwined with sentencing" and therefore cannot simply be categorized as a civil proceeding. *Hooks*, 689 F.3d at 1184; *see also Montgomery*, 577 U.S. at 205–06; *Austin v. United States*, 509 U.S. 602, 608–09 n.4 (1993) (noting that "protections associated with criminal cases may apply to a [civil proceeding] if it is so punitive that the proceeding must reasonably be considered criminal"). And it is beyond question that an *Atkins* hearing is a critical stage of a criminal proceeding, holding "significant consequences for the accused." *Bell v. Cone*, 535 U.S. 685, 696 (2002); *Hooks*, 689 F.3d at 1184 ("We are hard-pressed to imagine a more 'significant consequence[] for the accused' than a determination of whether the State has the power to take his life." (alteration in original) (quoting *Bell*, 535 U.S. at 696)). Thus, in his *Atkins* proceeding, Hill has the Sixth Amendment right to effective assistance of counsel guaranteed to all critical

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[14]The trial court also suggested that Hill's "case may present a first time opportunity for an Ohio common pleas court to determine whether the *Atkins* decision bars the execution of a particular Death Row Inmate." R. 97 [disc 1] (Suppl. App.) (Page 177).

[15]I join the Tenth Circuit in querying "whether the retroactive applicability of *Atkins* to cases on collateral review . . . makes void, as a matter of law, any '*post* conviction' character that an *Atkins* proceeding might have." *Hooks*, 689 F.3d at 1183–84 n.18; *see also Montgomery v. Louisiana*, 577 U.S. 190, 205 (2016) (noting "that the retroactive application of substantive rules does not implicate a State's weighty interests in ensuring finality of convictions and sentences" because "no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose").

stages of criminal proceedings, including sentencing proceedings. *See Montejo v. Louisiana*, 556 U.S. 778, 786 (2009); *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

Additionally, the Fourteenth Amendment's fundamental-fairness jurisprudence compels us to conclude that *Atkins* hearings occurring due to retroactivity require effective assistance of counsel. Importantly, neither *Martinez* nor *Coleman* forecloses applying the Fourteenth Amendment's fundamental-fairness concerns to this issue. As *Martinez* notes, "*Coleman v. Thompson*, left open . . . a question of constitutional law" and "suggested, though without holding, that the Constitution may require States to provide counsel in initial-review collateral proceedings because 'in [these] cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction.'" *Martinez*, 566 U.S. at 8 (second and third alterations in original) (quoting *Coleman*, 501 U.S. at 755). And *Martinez* declined to answer that constitutional question. *Id.* at 9.

As discussed above, Hill's *Atkins* posture is akin, but not identical, to an initial-review collateral proceeding. No Supreme Court caselaw explicitly precludes applying due-process considerations to this issue. In fact, the Supreme Court's Due Process jurisprudence implicitly and explicitly mandates that fundamental fairness requires the effective assistance of counsel as a procedural safeguard in *Atkins* proceedings, even if they occur after a petitioner's conviction and initial sentencing due to chronological happenstance. In assessing what due process requires for the post-conviction collateral proceedings at issue in *Coleman*, *Murray v. Giarratano*, 492 U.S. 1 (1989), and *Pennsylvania v. Finley*, the Supreme Court held that "the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer." 481 U.S. 551, 557 (1987). Unlike the discretionary post-conviction collateral proceedings at issue in those cases, "the Constitution requires state collateral review courts to give retroactive effect to [substantive rules]," which includes any procedural requirements, such as hearings, that "give[] effect" to the Supreme Court's "substantive holding." *Montgomery*, 577 U.S. at 200, 210. Unlike other post-conviction claims that states are allowed to bar, states are constitutionally required to provide hearings for non-frivolous *Atkins* claims. Unlike collateral attacks that attempt to "upset the prior determination of guilt," *Finley*, 481 U.S. at 555 (quoting *Ross v. Moffit*, 417 U.S. 600, 611 (1974)), an *Atkins* claim seeks to demonstrate that the imposed

sentence is in fact void. *See Montgomery*, 577 U.S. at 203 ("[A] court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced."). Defendants like Hill are in a "fundamentally different position." *Finley*, 481 U.S. at 559. They seek to vindicate a constitutionally mandated right and to litigate their first opportunity to challenge the State's effort to deprive them of their life.

Due to Hill's unique position, at the very least, fundamental fairness mandates that he receives effective assistance of counsel. "[F]undamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (quoting *Ross*, 417 U.S. at 612). "[T]he lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination." *Ford*, 477 U.S. at 417 (Marshall, J.) (plurality opinion). This is particularly so in the Eighth Amendment context where "[t]he stakes are high." *Id.*; *see also id.* at 425 (Powell, J., concurring in part and concurring in the judgment) ("Due process is a flexible concept, requiring only 'such procedural protections as the particular situation demands.'" (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976))).

The nature of an *Atkins* hearing evinces a clear need for effective assistance of counsel. One reason is because of the penalty at issue. The Supreme Court has consistently recognized the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). In turn, the Court has held that determining "whether [a] petitioner should be executed at all," requires "heightened procedural requirements." *Ford*, 477 U.S. at 425 (Powell, J., concurring in part and concurring in the judgment); *see Murray*, 492 U.S. at 8–9 (noting that heightened protections are needed when a court and jury "decide the question[] of . . . punishment"). Among the myriad of procedural protections afforded to defendants in capital proceedings to ensure fairness and reliability, the most basic and fundamental is the right to effective counsel. As the Supreme Court explained in *Powell v. Alabama*, "[t]he right to be heard," especially for "those of feeble intellect," "would be, in many cases, of little avail if it did not comprehend the

right to be heard by counsel." 287 U.S. 45, 68–69 (1932); *see also Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938) (stating that the right to counsel "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty"). Without the assistance of counsel, in cases like Hill's, the defendant often remains unequipped to develop and litigate effectively the factual and legal basis for an *Atkins* claim and already is at a disadvantage due to confinement and intellectual disabilities. Under these conditions, when the defendant has the burden of proof, the fairness and reliability of an *Atkins* proceeding must be called into question. To hold that defendants do not have a right to counsel in an *Atkins* hearing, when it is the first opportunity to determine whether the State has the power to execute a petitioner under the applicable law, would require us to ignore the great weight of Supreme Court precedent that instructs us that a proceeding determining the irreversible punishment of death necessitates additional procedural protections. The loss of the right to counsel would ensure that "justice will not 'still be done.'" *Johnson*, 304 U.S. at 462 (citation omitted).

Second, a claim of intellectual disability makes defendants like Hill different from other petitioners, even other capital petitioners, because "some characteristics of [intellectual disability] undermine the strength of the procedural protections that [the Supreme Court's] capital jurisprudence steadfastly guards." *Atkins*, 536 U.S. at 317. Persons with intellectual disabilities "have diminished capacities to understand and process information, to communicate, . . . [and] engage in logical reasoning." *Id.* at 318. To force them to litigate their condition without the aid of counsel by definition leaves them subject to an increased risk of wrongful execution. *See id.* at 306–07 (noting that these "impairments can jeopardize the reliability and fairness of capital proceedings"). And any perceived competence could lead judges and juries to find a lack of a disability, just as the Ohio courts did with Hill. Furthermore, due to the infirmities of those who are intellectually disabled, the risk that they might be executed in violation of the Eighth Amendment is heightened if their counsel provides ineffective assistance. For an action in which the State's legitimacy must be unassailable, the failure to recognize a constitutional right to counsel in *Atkins* hearings occurring post-conviction would inflict grievous doubts on the legitimacy of the State to take the life of one of its citizens.

Whatever procedures a state devises to give effect to the Supreme Court's substantive holding in *Atkins*, the Supreme Court's reasoning in *Atkins* and its fundamental fairness jurisprudence already have established a constitutional floor, which includes effective assistance of counsel. Due to the nature of the penalty and the "special risk of wrongful execution" that intellectually disabled defendants face, *Atkins*, 536 U.S. at 321, the risk of a wrongful sentence is intolerably high without the assistance of counsel. That is a risk that the Due Process Clause cannot tolerate. And it is a risk that we, as a society, cannot tolerate. *See Gardner*, 430 U.S. at 357–58.

Following *Hooks* and based on the above discussion, it is clear that "the right to counsel flows directly from, and is a *necessary* corollary to, the clearly established law of *Atkins*." *Hooks*, 689 F.3d at 1184. I acknowledge, as does the Tenth Circuit, that the Supreme Court has never explicitly said that defendants have a right to counsel in *Atkins* proceedings or identified an *Atkins* proceeding as a critical stage. *Id*. But the Court's recognition in *Atkins* of the impairments caused by intellectual disability and their effects on the reliability and fairness of capital proceedings, as well as the Court's Due Process jurisprudence at the time of *Atkins*, dictate only one conclusion. In a proceeding in which one of our fundamental rights, the right to life, can be extinguished by the State, the Sixth Amendment and due process demand, at the very least, the right to effective assistance of counsel as a safeguard to ensure a court's determination in an *Atkins* proceeding is fundamentally fair. *See id.* at 1185. I see no other constitutionally permitted outcome.

"[F]undamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). In this context, not only would § 2554(i) curtail a constitutional right, but also it would run afoul of the central purpose of the constitutional writ that it governs. For these reasons, we should conclude that Hill had a right to effective assistance of counsel during his *Atkins* hearing and thus § 2254(i) does not bar his claim.

IV. CONCLUSION

Long before the Supreme Court decided *Atkins*, teachers, administrators, psychologists, and even the Ohio courts all determined that Danny Hill is intellectually disabled. Voluminous records and observations detail Hill's significant struggles with academics, self-care, and other adaptive skills. At the time of Hill's sentencing, none of those determinations carried any constitutional significance in barring the State from imposing the death penalty as Hill's sentence for his conviction. But they mattered. That changed after *Atkins* held that the Eighth Amendment bars the execution of intellectually disabled defendants. Now their consequence also carried constitutional heft. Faced with a potential restriction on the ability of Ohio to execute Hill, the Ohio courts reversed course and heedlessly discounted or disregarded the historical evidence they once respected and considered. The question before us is whether this sea change was an unreasonable application of *Atkins* and resulted in an unreasonable factual determination. Somehow, the majority here answers no, brushing a thin veneer of deference over the Ohio courts' glaring omissions and mischaracterizations of the record and blatant alteration of *Atkins*'s requirements. But the basic tenets of *Atkins* and the record evidence compel us not to discount or disregard the Ohio courts' unreasonable determinations. They matter. Respectfully, I dissent.

APPENDIX

V. Suppression of Pretrial Statements to the Police

In addition to challenging his eligibility for the death penalty after *Atkins*, Hill raised several challenges to his conviction in his habeas petition. Because we remanded his case to the state court after *Atkins* was decided in 2002, we did not reach the merits of those claims. *Hill v. Anderson*, 300 F.3d 679 (6th Cir. 2002). We do so now and **AFFIRM** his conviction.

Hill contends that the Ohio courts unreasonably applied clearly established federal law in determining that Hill's statements to police were admissible. Hill maintains that his statements were "involuntary and false" because: his intellectual disability made him especially vulnerable to police coercion; his intellectual deficiencies were known by the police, including interrogators Sergeant Thomas Stewart, Sergeant Dennis Steinbeck, and his physically abusive uncle, Detective Morris Hill; the police made statements to Hill that led him to believe that denying guilt was "hopeless"; and Hill lacked the intellectual capacity to understand the legal consequences of the statements he made (and the police recorded) while he was at the Warren police station.

Because the Ohio courts rejected this claim on the merits as part of Hill's direct appeal, *see Hill*, 595 N.E.2d at 890-91; *Hill*, 1989 WL 142761, at **5-8, Hill must show that the state courts' decisions involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. S*ee* 28 U.S.C. § 2254(d)(1). "[A]n unreasonable application of th[e Supreme Court's] holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (citation and quotation marks omitted).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that "[a] suspect in custody must be advised . . .[,] 'prior to any questioning[,] that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010)

(quoting *Miranda*, 384 U.S. at 479). This holding was necessitated by the Supreme Court's acknowledgement that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be accorded his privilege under the Fifth Amendment not to be compelled to incriminate himself." *Dickerson v. United States*, 530 U.S. 428, 434-35 (2000) (citation, quotation marks, and ellipses omitted). Thus, "[w]hen police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief." *Oregon v. Elstad*, 470 U.S. 298, 317 (1985); *see also Lego v. Twomey*, 404 U.S. 477, 487-88 (1972) ("[*Miranda*] excludes confessions flowing from custodial interrogations unless adequate warnings were administered and a waiver was obtained.").

In this case, it is undisputed that Hill was given *Miranda* warnings and signed a waiver prior to making the recorded statements that he sought to suppress at trial. Hill's challenge, then, is to the validity of that waiver. He argues that because his waiver was not knowing, intelligent, and voluntary, it was invalid.

A suspect may waive his *Miranda* rights only if "the waiver is made voluntarily, knowingly and intelligently." *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (citation and quotation marks omitted).

> The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation [reveals] both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. (citations and quotation marks omitted). For a waiver to be knowing and intelligent, the suspect must be "fully advised of [his] constitutional privilege[s]." *Colorado v. Spring*, 479 U.S. 564, 574 (1987). To be voluntary, a confession may not be "the product of coercion, either physical or psychological." *Rogers v. Richmond*, 365 U.S. 534, 540 (1961). However, "[p]loys to mislead a suspect or lull him into a false sense of security that do not rise to the level of

compulsion or coercion to speak are not within *Miranda*'s concerns." *Illinois v. Perkins*, 496 U.S. 292, 297 (1990); *see, e.g.*, *Oregon v. Elstad*, 470 U.S. 298, 317 (1985) ("[T]he [Supreme] Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily.") (citation omitted).

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary . . . .'" *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Although a suspect's mental condition may be a "significant factor in the 'voluntariness' calculus," that "mental condition, by itself and apart from its relation to official coercion, should [n]ever dispose of the inquiry into constitutional 'voluntariness.'"[11] *Id.* at 164.

On December 16, 1985, the Ohio state trial court held a hearing on Hill's motion to suppress his audio- and video-taped statements to the police.[12] At the suppression hearing, witnesses testified to the following facts.

On September 12, 1985, two days after Fife was attacked, Hill went to the Warren Police Department and approached Sergeant Stewart to talk about that "boy being beat up in the field." R. 28, PageID# 2748-49. Stewart, who was a friend of Detective Hill and had known (Danny) Hill since he was approximately six years old, agreed to talk to Hill in the "Narcotics Room." *Id.* at 2750-51, 2782. Stewart testified that Hill had come to the police station voluntarily, i.e., that no one had "brought him in," and Hill's testimony corroborated this assertion. *Id.* at 2751; R. 29, PageID# 3130.

Once in the Narcotics Room, Hill told Stewart that he had seen another boy, Reecie Lowery, riding the bike of the boy "who was beat up." R. 28, PageID# 2751-52. When Stewart asked Hill, "How do you know it's the boy's bike?", Hill responded, "I know it is." *Id*. at 2752.

[11]Under Supreme Court precedent, a person who meets the standard for intellectual disability may not be executed. As discussed extensively above, we find that Hill is intellectually disabled and is entitled to have the writ issue with respect to his sentence. However, the requirements for determining whether someone is intellectually disabled under *Atkins* and *Lott* are different from the requirements for determining whether a waiver is knowing and voluntary under *Miranda*. And a person who is intellectually disabled may still be able to knowingly and voluntarily waive his *Miranda* rights.

[12]The transcript of the suppression hearing can be found in the district court record at R. 28 and R. 29 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28, 1997). Because the pagination in the original transcript is unclear, we will cite to the pagination used by the district court.

Hill then told Stewart about the bike's location and encouraged Stewart to "go out and get the bike" before Lowery put it back in the wooded field where Fife was attacked. *Id.* After Hill told Stewart that he was willing to show him where the bike was located, Stewart and Hill began talking about various persons, including Tim Collins and Tim Combs (Hill's co-defendant). Hill insinuated that both Collins and Combs liked boys and might have been the ones who attacked Fife. At some point during their talk, Hill mentioned that Fife was choked with his underwear. *Id*. at 2756-57.

Eventually, Stewart drove Hill to look for the bike, but because it was raining and visibility was poor, Stewart and Hill did not go to the wooded field. Instead, Hill showed Stewart where Combs lived. *Id*. at 2753-54. After dropping Hill off at his house, Stewart compiled a report that he shared with his fellow officers, including Sergeant Steinbeck. *Id*. at 2755, 2757-58.

The next day, September 13, 1985, Steinbeck went to Hill's home around 9:30 or 10:00 in the morning to follow-up on the information that Hill had given to Stewart. Steinbeck asked Hill to come talk to him at the police station and Hill agreed. *Id*. at 2762-63, 2881. Hill was driven to the police station in the front seat of Steinbeck's police cruiser and was not booked, fingerprinted, or placed under arrest. Steinbeck read Hill his *Miranda* rights aloud, asked Hill if he understood those rights, and had Hill sign a waiver of his *Miranda* rights before questioning Hill off and on for approximately three hours. *Id*. at 2863-64, 2882-84. During those three hours, Hill never asked for the questioning to stop, tried to leave, or asked to see an attorney. *Id.* at 2865-66, 2885-89. After talking to Hill, Steinbeck transcribed a copy of Hill's statement, which also included a recital of his *Miranda* rights. However, Hill did not sign the statement that day because Steinbeck had forgotten to ask him to do so after telling Hill he could go home with his mother. *Id*. at 2866-69, 2889-90.

On September 16, 1985, both Steinbeck and Detective Hill went to Hill's home, ostensibly to ask Hill to sign his statement from September 13 and to ask Hill's mother for a written statement regarding Hill's alleged alibi. After putting up some initial resistance to speaking to the police again, Hill, at the behest of his mother, agreed to come down to the police

station, this time accompanied by his mother. Hill was not placed under arrest, booked, fingerprinted, or handcuffed. *Id*. at 2869-70, 2890-92, 2899-2901, 2930-32.

In the interrogation room, and apparently separated from his mother, Hill was verbally advised of his *Miranda* rights by Detective Hill. *Id*. at 2871, 2901-02, 2933. Hill indicated that he understood his rights. *Id*. at 2902. Although not initially present, Sergeant Stewart eventually encountered Sergeant Steinbeck and Detective Hill in the interrogation room with (Danny) Hill. *Id*. at 2758, 2872, 2908. At some point, officers told Hill they did not believe he was telling the truth, and Stewart told Hill that he needed to be honest if he had "anything to do with [Fife's murder]." *Id*. at 2872, 2909-10. Officers also told Hill that it would "benefit him" to tell them the truth, believing that Combs would likely blame the attack on Hill alone. *Id*. at 2909.

Apparently at Hill's request, Detective Hill was left alone with his nephew. According to (Danny) Hill, while he and Detective Hill were alone, Detective Hill "threw [him] against the wall," slapped him across the face, and told him that he "better tell" the police what happened. *Id*. at 2759, 2810-11, 2859, 2910, 2936-37, 2953. Hill also testified that his uncle kicked him under the table in order to prompt Hill to (1) consent to his statement being taped and (2) begin talking to police at the beginning of the taping.

Detective Hill, unsurprisingly, described the time he spent alone with his nephew very differently, testifying:

> At that point in time, you know, I set [sic] there, and I tried to let Danny know that wasn't anyone [sic] going to hurt him. No one was going to do anything to him, but [I also told him] the fact that I kn[e]w that he was involved in the homicide, and I wanted to get the truth out of him. At that point in time, he looked at me and tears started to come from his eyes. When tears started coming from his eyes, he told me . . . , "I was there. I was in the field when he got murdered." When the young Fife kid got murdered.[13]

R. 28, PageID# 2937. When Detective Hill emerged from the interrogation room a few minutes later, he told the other officers that Hill was going to cooperate and tell them what happened. At the time Detective Hill made this announcement, Hill was either crying or had tears in his eyes. *Id*. at 2759, 2811, 2839, 2873, 2937-38.

[13]Detective Hill also denied kicking his nephew.

At Stewart's suggestion, Hill gave the police permission to tape his statement. *Id*. at 2759-60, 2873-76, 2912. Sergeant Steinbeck, Sergeant Stewart, and Detective Hill were all present when Hill gave this initial audiotaped statement, as well as when Hill gave a second statement that was videotaped by Detective James Teeple. *Id*. at 2874-75. According to Stewart, Hill was not crying during the taped statement itself. About halfway through the audio-taping, the police asked Hill to sign the statement he had given to Steinbeck on September 13. *Id*. at 2903. Hill was also read his *Miranda* rights once more at some point prior to giving the second, videotaped statement. *Id*. at 2876, 2923, 2963-64. While giving his statements, Hill never asked to stop the interrogation, requested an attorney, or asked to leave. Sometime after the interrogation, Hill was placed under arrest based on the details included in his statements. *Id*. at 2776.

When asked questions about the nature of the interrogation generally, both Detective Hill and Sergeant Stewart denied that the police threatened or made promises to Hill during the interrogation, and asserted that Hill never asked for a lawyer. *Id*. at 2760, 2772, 2935, 2938. When prompted by the prosecutor about Hill's previous encounters with the police, Detective Hill estimated that by the date of the September 16, 1985 interrogation, Hill had been arrested by the Warren Police Department "[a]pproximately 15 to 20 times." *Id*. at 2929. Both Detective Hill and Sergeant Steinbeck testified that they had arrested Hill on prior occasions and had read him his *Miranda* rights "[m]any times." *Id*. at 2876, 2928-29. And two of the prosecution's exhibits at the suppression hearing included a waiver form and voluntary statement—both of which included a recitation of *Miranda* rights—signed by Hill on March 6, 1984, which was approximately a year-and-a-half before the September 16, 1985 interrogation.

In adjudicating this claim, the state appellate court rejected Hill's argument that his waiver of his *Miranda* rights was invalid. *Hill*, 1989 WL 142761, at *5. Acknowledging that it needed to make "discrete inquiries" as to both the "knowing and intelligent" and "voluntary" aspects of Hill's waiver, the appellate court considered these criteria in turn.

With regard to the knowing and intelligent factor, the appellate court noted that although the "lack of mental acuity . . . can interfere with an accused's ability to give a knowing and intelligent waiver," there is no bright line rule for distinguishing between "those capable of an

intelligent waiver from those who lack the ability to do so." *Id.* The appellate court also acknowledged the Supreme Court's admonition in *Connelly* that a suspect's mental condition, by itself, does not necessarily prevent him from effectively waiving his *Miranda* rights. *Id.* In analyzing the facts of Hill's case specifically, the appellate court opined:

> [Hill] admittedly suffers from some mental retardation (although the evidence presented is divergent as to the severity of the handicap) and has had concomitant difficulties in language comprehension throughout his formal education. [Hill] is categorized as being mildly to moderately retarded. Evidence was presented which indicates that appellant is illiterate and this court acknowledges that literal recognition of each word contained in the "*Miranda* Rights" and/or "waiver form" may be beyond [Hill's] mental comprehensive capacity.
>
> However, from the record here, particularly during the suppression hearing, this court is also aware (as was the trial court below) of the long and multi-faceted exposure [Hill] has had with the state's criminal justice system. The evidential table in this case also demonstrates that [Hill] exhibited a functional capacity to understand these rights, including the right to appointed counsel. This was evident from the exchange that occurred during the audio and video tape sessions. The officers who interrogated [Hill] had either significant contact with him and/or had questioned him on prior occasions and had developed informed estimates as to [Hill's] ability to understand, albeit in a vernacular sense, all aspects of the *Miranda* warning. The audio and video tapes of [Hill's] interrogations disclose that [Hill] was capable of understanding the questions put to him and of responding intelligently.
>
> Moreover, the behavior of [Hill] during the police investigation belies the notion that he was no more than a malleable victim of police suggestion. [Hill] possessed the requisite intelligence to implicate other persons in the murder and was capable of modifying his story when inconsistencies were demonstrated to him. Additionally, [Hill] qualified and corrected the police officers' misstatements of the factual scenario which he had related to them. He also was able to follow "verbal concepting," displaying an understanding of the officers' direction of questioning and the dialogue utilized during the interrogation.

Hill, 1989 WL 142761, at *6. Based on the aforementioned concerns, and citing the Supreme Court's decisions in *Miranda* and *Lego* in support, the state appellate concluded that Hill's waiver was knowing and intelligent. *Id.*

In addressing voluntariness, the appellate court rejected Hill's argument that his waiver was involuntary "as a result of his mental [infirmities] and the coercive action of the police." *Id.* First, the court noted that Hill's IQ was not necessarily dispositive as to whether he was

incapable of voluntarily waiving his *Miranda* rights, particularly since he had been read those rights in his many prior encounters with police. *Id.* at **6-7. In addressing Hill's argument that his intellectual deficiencies made him vulnerable to the police officers' "psychological ploys," the appellate court noted that Hill was read his *Miranda* rights multiple times on September 13 and 16, 1985, and "appeared articulate and coherent as he answered questions." *Id.* at *8. Finally, in concluding that the record was "devoid of evidence indicating that the custodial interrogation of [Hill] violated his constitutional rights," the appellate court reasoned that because (among other things): (1) Hill originally approached the police on September 12 of his own accord; (2) Hill was read his *Miranda* rights numerous times without ever being placed under arrest; and (3) "[t]he recorded conversations [between Hill and the police] d[id] not suggest the use of any improprieties by the police," Hill's *Miranda* claim was without merit. *Id.* at **9-10.

The Ohio Supreme Court ruled similarly, stating: "Upon a careful review of the record, we can discern no coercive or overreaching tactics employed by the police during questioning." *Hill*, 595 N.E.2d at 890. In making this finding, the court explicitly acknowledged that before Hill turned 18, Detective Hill "would at times physically discipline [his nephew] at the request of [Hill's] mother."[14] *Id.* In fact, the court appeared to credit Detective Hill's version of events—i.e., that "[Hill] stated to [Detective] Hill that he was 'in the field behind Valu King when the young Fife boy got murdered.'" *Id.* The court also found, based on the Supreme Court's ruling in *Connelly* and Hill's "his prior dealings with the criminal process as a juvenile," that Hill's "mental aptitude did not undercut the voluntariness of his statements or his waiver of *Miranda* rights." *Id*. Finally, the Ohio Supreme Court rejected Hill's contention that his waiver was rendered involuntary by virtue of the police's tactics during the interrogation. *Id.* at 891 ("Upon a careful review of the testimony and the audiotape and videotape statements, we do not find that the interrogation tactics used by the police officers, even in light of [Hill's] mental capacity, rendered the statements involuntary, or that the officers improperly induced [Hill] to make incriminating statements.").

[14] Hill was 18 at the time of the September 16, 1985 interrogation, and Detective Hill testified at the suppression hearing that he had not physically disciplined his nephew since at least six to eight months prior. R. 28, PageID# 2976.

Reviewing the state courts' decisions under § 2254(d)(1), the district court found that Hill's arguments that he should be granted habeas relief on this claim were without merit. *Hill v. Anderson*, No. 4:96-cv-00795, 1999 U.S. Dist. LEXIS 23332, at **78-92 (N. D. Ohio Sept. 29, 1999).

Applying AEDPA's deferential review standard, we ask whether the state courts unreasonably applied Supreme Court precedent in finding that Hill's waiver of his *Miranda* rights was voluntary, knowing, and intelligent. *See* 28 U.S.C. § 2254(d)(1). *Connelly* tells us that a compromised mental state does not, "by itself and apart from its relation to official coercion," vitiate a defendant's ability to waive his *Miranda* protections. *See* 479 U.S. at 164. And *Miller v. Fenton*, 474 U.S. 104 (1985), directs us to treat state-court findings on "subsidiary questions, such as the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with the *Miranda* warnings" as "conclusive" on habeas review if they are "fairly supported in the record." *Id.* at 117.

In light of these admonitions, the state courts' conclusion that Hill effectively waived his *Miranda* rights was not "unreasonable" as that term has been defined by the Supreme Court. The state courts could plausibly credit Detective Hill's account of his interrogation techniques over Hill's allegations of physical abuse to find a lack of undue coercion and could point to Hill's prior experiences with the criminal justice system and the *Miranda* process as evidence that Hill understood the nature of his waiver.

Although the required deference to the state courts' finding compels our holding on this issue, we wish to express our consternation with this result. The record contains ample evidence demonstrating that Hill's waiver was neither voluntary nor knowing. Hill was interrogated, in private, by a police-officer uncle who admitted to disciplining Hill physically in the past, and who allegedly "'threw [Hill] against the wall,' slapped him across the face, and told him that he 'better tell' the police what happened" during the course of the interrogation. *Supra* p. 28. Hill's uncle then purportedly kicked Hill under the table to induce his consent to a videotaped confession and kicked Hill again when he was reluctant to begin the confession. When considered alongside Hill's intellectual disabilities, Detective Hill's behavior raises grave questions about the voluntariness of Hill's waiver.

And while Hill was certainly exposed several times to *Miranda* warnings, we are not convinced that he ever registered the warnings' meaning. During the suppression hearing the state trial court held in 1985, Hill's attorney asked Hill a number of basic questions about his understanding of *Miranda*:

Q: [W]hat are your Constitutional Rights?
A: I don't know.
Q: What's the word constitution mean?
A: I don't know.
Q: What's the word appointed—
A: When you point at somebody.
Q: You point at somebody?
A: Yeah.
. . . .
Q: When the police talked to you, did you go ahead and talk to them?
A: Yes.
Q: Why?
A: They police. [sic] You're supposed to talk to them.
Q: You have to talk to them?
A: Yep!
Q: Do you know what's an attorney? [sic]
A: I don't know.

R.29, PageID# 3114-16.

It is difficult, in light of this testimony, to accept the state courts' determination that Hill "exhibited a functional capacity to understand [his] rights." *Hill*, 1989 WL 142761, at *6. Nevertheless, because of the procedural posture of this case, we are compelled to affirm the district court.

Accordingly, we **AFFIRM** the district court's denial of habeas relief as to his suppression claim.

VI. Inflammatory Statements by the Prosecutor During Hill's Bench Trial

Hill also makes a prosecutorial misconduct claim based on the prosecutor's allegedly inflammatory statements to the three-judge panel that convicted Hill and sentenced him to death.

This claim is governed by § 2254(d)(1). As indicated above, Hill must show that the state court's decision "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

The full-text of the "inflammatory statements" challenged by Hill may be found in his opening brief. Some of those comments included:

- A reference to Raymond Fife being a 12-year-old boy from the community who had a "right to live," a right to "be in school," and a right "to be here today";
- Statements that Hill was an "animal," who "destroyed and devoured" Fife, and "would make the Marquis de Sade proud";
- A statement that "you don't necessarily have fingerprints on everything" with reference to the apparent lack of Fife's fingerprints on his bike;
- The prosecutor's opinion about which expert witness on a particular issue was "more qualified";
- A statement that Detective Hill did not want to testify against his nephew;
- A reference to Hill being a "poor, dumb boy" who nonetheless violently raped two women and therefore "relishe[d] . . . inflicting pain and torture [on] other human beings";
- A statement that Hill put Fife through a "living hell," that Fife "had no justice while he was living," and that justice demanded a guilty verdict;
- The prosecutor's opinion that defense counsel had not shown "any mitigating factors" and that the aggravated factors "clearly outweigh[ed] the absence of any mitigation";
- Two more references to Hill's history of sexual assault, which the prosecution argued belied the idea that Hill had "difficulty with his motors skills";
- A rambling soliloquy about how the prosecution would have liked to called Fife as a witness so he could describe the beating, strangulation, and sexual assault he endured, but Fife was "not here to testify about that thanks to [Hill]." The prosecutor also stated that Fife, if alive, would have testified about how he missed his family and his friends;
- A reference to Hill as "this manifestation of evil, this anomaly to mankind, this disgrace to mankind."

In adjudicating this claim as part of Hill's direct appeal, the Ohio Supreme Court (1) noted that trial counsel never objected to any of the "complained-of comments," (2) opined that those comments were therefore subject to plain error review only, and (3) concluded that the prosecutor's statements amount to "neither prejudicial error nor plain error[.]" *Hill*, 595 N.E.2d at 898. The Ohio Supreme Court also noted that in Ohio, "[courts] indulge in the usual

presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *Hill*, 595 N.E.2d at 898 (quoting *State v. White*, 239 N.E.2d 65, 70 (1968)).

The district court rejected Hill's prosecutorial misconduct claim as well, reasoning that:

> [Hill's] case was tried before a three judge panel [that] presumably was able to remember the evidence presented at trial and not be misled by any of the prosecutor's statements. Most of the statements were harmless . . . . Three judges should have been able to disregard any intended undue influence.[15]

1999 U.S. Dist. LEXIS 23332, at *110. Accordingly, the district court concluded that the Ohio Supreme Court's determination that "no prejudicial or plain error occurred . . . was not an unreasonable application of clearly established law." *Id.* at **110-11.

In assessing whether the Ohio Supreme Court's decision involved an unreasonable application of federal law, the relevant Supreme Court holding is the Court's decision in *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), which held that "a prosecutor's improper comments will be held to violate the Constitution only if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parker v. Matthews*, 576 U.S. 37, 45 (2012) (quoting *Darden*, 477 U.S. at 181). The Supreme Court has also held that "the *Darden* standard is a very general one, leaving courts 'more leeway in reaching outcomes in case-by-case determinations.'" *Id.* at 48 (citation, quotation marks, and ellipses omitted).

In *Darden*, the Supreme Court found that comments similar to some of those made by the prosecutor in this case—particularly allusions to the death penalty and the defendant being an "animal"—were improper. 477 U.S. at 179-80. Those comments, unlike the comments in this case, were made before a jury, not a three-judge panel. *Id.* at 170-71. Nonetheless, the Supreme Court noted that these improper statements did not "manipulate or misstate the evidence, [or] implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id.* at 182.

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[15]The state appellate court, in adjudicating this claim, similarly noted that although some of the prosecutor's comments would have "perhaps [been] prejudicially erroneous in a jury trial, [that] was not so [in Hill's case]." *Hill*, 1989 WL 142761, at *15.

In this case, it is clear that the prosecutor's comments were emotionally charged and designed to paint Hill in a bad light. However, it does not appear that they misstated the evidence in the case or implicated Hill's constitutional rights. Further, any efforts to play on the emotions of the three-judge panel would likely have been futile. Although they may not adopt a presumption as strong as the one "indulged" by the Ohio courts, federal courts similarly presume that a judge, as the trier of fact, can readily identify credible evidence, *United States v. Thomas*, 669 F.3d 421, 425 (4th Cir. 2012), give proper weight to the evidence, *Caban v. United States*, 728 F.2d 68, 75 (2d Cir. 1984), and understand what law is relevant to his or her deliberations, *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986). And Hill has put forth no evidence indicating that the three-judge panel that tried his case was incapable of discerning what constitutes admissible evidence and parsing such evidence out from any inflammatory or irrelevant[16] comments by the prosecutor.[17] For these reasons, we conclude that the decision by the Ohio Supreme Court was not an unreasonable application of clearly established law.

We **AFFIRM** the district court's denial of habeas relief as to Hill's prosecutorial misconduct claim.

VII. The Trial Court's Failure to Hold a Pretrial Competency Hearing

Lastly, Hill argues that the trial court's failure to inquire about Hill's competency denied him a fair trial under the due process clause of the Fourteenth Amendment. Here, the term "trial court" refers to the court that tried Hill's underlying offenses in 1985 and 1986.

This claim is governed by § 2254(d)(1). As indicated above, the Supreme Court has held that to obtain relief under § 2254(d)(1), the petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error

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[16]For example, the three-judge panel disclaimed any reliance on Hill's "prior crimes . . . in reaching its verdict." *See Hill*, 595 N.E.2d at 893.

[17]Hill's reference to a single line in the panel's opinion that referred to Hill and Combs' "blood lust characterized by a series of acts of torture, rape, and murder," does not change this conclusion. The rest of the opinion describes Fife's injuries, and the means by which they were inflicted (based on the evidence at trial), in great detail. The opinion also indicates that the judges were struck by the "total lack of remorse" shown by Hill appearing at the police station to seek a reward after Fife's death. Looking at the document as a whole, there is no indication that the comment with which Hill takes issue was derived from the prosecutor's statements rather than the judges' own assessments of the offenses.

well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). In assessing competence, the relevant question is whether the defendant's "mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Indiana v. Edwards*, 554 U.S. 164, 170 (2008). If the defendant's mental condition meets this description, the courts may not try him.[18] *Id*.

Hill maintains that because the trial court knew that he had "limitations in vocabulary, ability to calculate, and ability to draw" and "could not recognize or understand a majority of the words on the *Miranda* waiver form," the trial court should have "conduct[ed] further inquiry into [Hill's] competency to stand trial." Hill's Br. at 124-25. With regard to this final issue, Hill requests that this Court determine "not whether the state court was unreasonable in finding Danny competent to stand trial, but whether it was unreasonable under *Pate*[19] and *Drope*[20] not to make such an inquiry in the first instance." *Id*. at 124. Hill also argues, with no elaboration and minimal citation to the record,[21] that the Ohio Supreme Court "unreasonably applied *Pate* and *Drope*" in determining that Hill was competent to stand trial. *Id*. at 125.

The Warden, for his part, asserts that "[a]lthough Hill is intellectually limited, his demeanor at trial was such that the trial court had no reason to *sua sponte* assess Hill for competence to stand [trial]." The Warden also argues that:

> The trial record gives every indication that Hill was compliant, cooperative and appropriately attentive to the proceedings. Moreover, the trial judge had ample opportunity to assess Hill's ability to navigate through the trial proceedings, where Hill testified extensively during a pre-trial suppression hearing, and also had a direct colloquy with the trial court for acceptance of the jury waiver. In

[18]Again, our conclusion that Hill is intellectually disabled and thus ineligible for execution under *Atkins* does not mean that Hill was incompetent to stand trial or that the trial court should have presumed his incompetence and ordered a competency hearing *sua sponte*. The two inquiries are different, and even *Atkins* recognizes that "[m]entally retarded persons frequently . . . are competent to stand trial." 536 U.S. at 318.

[19]*Pate v. Robinson*, 383 U.S. 375 (1966).

[20]*Drope v. Missouri*, 420 U.S. 162 (1975).

[21]This issue occupies three pages in Hill's opening brief and just over a page in his reply brief. The only record citation in the opening brief seeks to demonstrate that Hill "could not recognize or understand a majority of the words on the *Miranda* waiver form."

> addition, none of the three mental health experts who testified for the defense at trial expressed a concern about Hill's competence to stand trial.

Warden's Br. at 97. Hill's reply brief does not address these contentions.

Neither the state appellate court nor the Ohio Supreme Court opinions from Hill's direct appeal noted Hill's competency argument as one of his nineteen assignments of error and twenty-five propositions of law, respectively. *See generally State v. Hill*, 595 N.E.2d 884 (Ohio 1992); *State v. Hill*, Nos. 3720, 3745, 1989 WL 142761 (Ohio Ct. App. Nov. 27, 1989). Instead, the only similar claims addressed by these courts pertained to Hill's arguments that he could not knowingly and voluntarily waive his right to counsel or his right to a jury trial due to his alleged intellectual disability. *See, e.g.*, *Hill*, 595 N.E.2d at 890-91, 895; *Hill*, 1989 WL 142761, at **3, 5-7, 13-14. The district court found that Hill raised the issue of competency only under state law, not federal law, and that Hill did not raise the competency claim under federal law until filing for state post-conviction relief. *Hill*, 1999 U.S. Dist. LEXIS 23332, at **92-93. On this basis, the district court concluded that Hill's competency claim was procedurally defaulted. *Id.* at **93-94 (citing *State v. Hill*, No. 94-T-5116, 1995 WL 418683 (Ohio Ct. App. June 16, 1995)). The Warden argues that even if Hill's claim was not procedurally defaulted, it fails on the merits. We agree.

On December 16, 1985, the trial court held a hearing on Hill's motion to suppress his statements to the police. Defense counsel called Hill as a witness to testify with respect to "the circumstances under which [he] gave statements to the police department." R. 29, PageID# 3101. In response to the trial court's questions, Hill indicated that he understood the purpose and nature of the hearing. *Id.* at 3103-04. He went on to testify about the means by which he arrived at the police station, as well as his inability to leave police custody prior to the arrival of his mother on Friday, September 13, 1985. On Monday, September 16, 1984, Hill returned to the police station at his mother's behest with his uncle, Detective Hill, and another police officer, Sergeant Steinbeck. As discussed earlier, Hill testified that while he and Detective Hill were alone, Detective Hill threw Hill against the wall, slapped him, and told him to tell the police what had happened. Hill also claimed that after being physically abused by his uncle, he told the

police what they wanted to hear because he was afraid of both Detective Hill and the other officers. *Id*. at 3114, 3118-19.

Defense counsel, for his part, attempted to demonstrate that Hill could neither read nor write and that Hill signed the *Miranda* waiver without understanding its contents or knowing what it meant; meanwhile, the prosecutor attempted to demonstrate that Hill had been to the Warren police department many times before based on theft-related crimes and was therefore familiar with the department's *Miranda* form. *Id*. at 3107-09, 3115, 3121-23, 3152-53, 3155. On cross-examination, Hill testified that he signed the *Miranda* waiver because the police told him to do so. *Id*. at 3135-37. Hill's testimony ended following questions from the trial court about Hill's alleged physical abuse at the hands of Detective Hill.

Hill appeared before the trial court once more on January 7, 1986, this time to waive his right to a jury trial. *See Hill*, 595 N.E.2d at 889. The trial court's colloquy with Hill, which was designed to determine whether Hill's waiver was knowing and voluntary, included an explanation of the jury selection system, the role of the jury, the jury waiver's effect on some of Hill's pending motions, defense counsel's possible motives for seeking to waive Hill's right to a jury trial, and the differences between a jury and three-judge panel in terms of number of persons, familiarity with the law and the facts of the case, and demographic composition. The trial court read the waiver aloud to Hill and suggested the Hill go over the waiver with his attorney. Waiver of Jury Trial Hr'g Tr. at 10-11.[22] Hill indicated that he had discussed the issue of waiver with both his attorney and his mother, and there was a 25-minute recess in which the attorney and Hill's mother apparently discussed the waiver with him further. *Id*. at 5-6. After the recess, Hill affirmatively stated that he wanted to be tried by the three-judge panel. *Id*. at 12.

A review of Hill's testimony during the December 16, 1985, suppression hearing reveals that Hill claimed to understand the nature of the hearing and was able to answer questions posed by the prosecutor, defense counsel, and the trial court. Hill stated more than once when he did not understand or did not know the answer to a question, either on his own or with attorney prompting. He also appeared to understand the role of the trial judge. Hill's interactions with

[22]The transcript of the jury waiver hearing can be found in the district court record at R. 30 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28. 1997).

the trial court at the January 7, 1986 hearing on his waiver of jury trial also failed to raise any red flags regarding competence. Although the trial court did most of the talking, Hill did not express any confusion about the nature of the waiver, and was given an opportunity to go over the considerations discussed by the trial court with his attorney and mother before and during the hearing. After Hill conferred with his attorney, the following exchange took place:

> COURT: All right. Danny, you've been talking with your lawyer now, have you not, for the last 25 minutes or so?
> DEFENDANT HILL: Yeah.
> COURT: And did he go over this matter of a jury trial with you?
> DEFENDANT HILL: Yeah.
> COURT: And you want to tell me now what decision you've made after talking this over.
> DEFENDANT HILL: I want to have—
> COURT: What do you want to do? Who do you want to try it? Three judges—
> DEFENDANT HILL: Three judges.
> COURT: —or do you want the jury?
> DEFENDANT HILL: You.
> COURT: I hope you understand—you mean myself and two other judges?
> DEFENDANT HILL: (Nods head affirmatively.)

Id. At no point during the hearing did Hill behave in a manner, or make a statement indicating, that he did not understand the nature of the waiver.

On this record, there is no indication that Hill did not understand the nature of the proceedings against him or that he could not consult with defense counsel to assist in his case. *See Edwards*, 554 U.S. at 170. Although Hill is correct that the record suggests that he was functionally illiterate at the time of the suppression hearing, Hill cites no authority for the proposition that trial courts should equate illiteracy to incompetence. He also cites no authority for the proposition that because there were other signs that he was intellectually limited, i.e., his limited vocabulary or "ability to draw similarities," the trial court should have doubted his competence to stand trial and ordered a competency hearing *sua sponte*. As indicated above, the trial court had at least two opportunities to observe Hill and interact with him directly, and these incidents did not suggest that Hill was incompetent to stand trial under *Pate*, *Drope*, or the more recent Supreme Court case, *Edwards*.

For the aforementioned reasons, we **AFFIRM** the district court's denial of habeas relief as to Hill's due process claim.