CASE NO. _____

CAPITAL CASE

IN THE UNITED STATES SUPREME COURT

DANNY LEE HILL,

Petitioner,

v.

TIM SHOOP, WARDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether it constitutes an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2) when a state court decision rejecting an *Atkins v. Virginia*, 536 U.S. 304 (2002) claim of intellectual disability does so by focusing on the individual's "present functioning" in the confines of a prison environment, effectively discounting overwhelming historical record evidence and multiple diagnoses of intellectual disability.

II. Whether a state court unreasonably applies *Atkins* when, contrary to the clinical standards in existence at the time adopted as controlling under state law for resolving claims of intellectual disability brought by death sentenced inmates, it treats the primary inquiry as the individual's "present functioning" in a prison environment?

III. Whether it is a miscarriage of justice and a constitutional violation to allow the death sentence to stand when the Warden and the Sixth Circuit Court of Appeals agree Mr. Hill is intellectually disabled?

List of All Parties to the Proceeding

The parties are the same as those listed in the caption.

Corporate Disclosure

There are no corporate disclosures necessary for this case.

List of Proceedings

1. *State of Ohio v. Danny Lee Hill*, Case No. 85-CR-371 (Trumbull County Court of Common Pleas). Charges filed September 17, 1985.
    a. Aggravated Murder in violation of Ohio Rev. Code §2903.01(B)
    b. Kidnapping in violation of Ohio Rev. Code §2905.01(A)
    c. Rape in violation of Ohio Rev. Code §2907.02(A)(1)(3)
    d. Aggravated Arson in violation of Ohio Rev. Code § 2909.02
    e. Aggravated Robbery in violation of Ohio Rev. Code § 2911.01
    f. Felonious Sexual Penetration in violation of Ohio Rev. Code §2907.12(A)(1)(3)
    g. Aggravating circumstances of kidnapping, rape, aggravated arson and aggravated robbery, Ohio Rev. Code §2929.04(A)(7)
    h. Trial: January 21, 1986, before a three-judge panel
    i. Guilty verdict: February 26, 1986, on all charges except aggravated robbery
    j. Mitigation trial: February 26 to March 5, 1986
    k. Death sentence on aggravated murder; 10-25 years' imprisonment for Arson and Kidnapping, life imprisonment for Rape and Felonious Sexual Penetration.

2. Direct Appeal:
    a. *State v. Oho v. Danny Lee Hill*, Case No. 3720, 3745 (11th District Court of Appeals)
        i. Convictions and sentences affirmed November 27, 1989
        ii. Case citation: 1989 WL 142781 unpublished
    b. *State of Ohio v. Danny Lee Hill*, Case No. 1990-0177 (Ohio Supreme Court)
        i. Convictions and sentences affirmed August 12, 1992
        ii. Case citation: 64 Ohio St. 3d 313, 595 N.E.2d 884 (Ohio 1992)

3. Post Conviction:
    a. Petition to Vacate or Set Aside Judgment and/or Sentence Pursuant to Ohio Revised Code §2953.23
        i. Filed with Trumbull County Court of Common Pleas on December 21, 1993
        ii. Denied by the trial court on July 18, 1994
    b. *State of Ohio v. Danny Lee Hill*, Case No 94-T-5116 (11th District Court of Appeals)
        i. Denial of post conviction relief affirmed on June 16, 1995.
        ii. Case citation: 1995 WL 418683
    c. Ohio Supreme Court declined to accept jurisdiction on November 15, 1995, *State of Ohio v. Danny Hill*, Case No. 1995-1577.

4. Habeas Proceedings:
    a. *Hill v. Anderson*, Case No. 96-CV-795, United States District Court for the Northern District of Ohio.
    b. Habeas petition filed December 2, 1996.
    c. Habeas petition denied September 29, 1999.
    d. *Hill v. Anderson*, Case No. 99-4317, Sixth Circuit Court of Appeals.

i. Sixth Circuit held appeal in abeyance and remanded case to the state court for exhaustion of issues under *Atkins v. Virginia*.
ii. Case citation: *Hill v. Anderson*, 300 F.3d 679 (6th Cir. 2002)

5. *Atkins* Proceedings in State court:
    a. Petition to Vacate the Death Sentence under *Atkins* filed on November 27, 2002
    b. *Atkins* Petition denied on February 15, 2006
    c. Denial affirmed on appeal by 11th District Court of Appeals on July 11, 2008, with one judge dissenting. *State of Ohio v. Danny Lee Hill*, Case No. 2006-T-0039, 894 N.E.2d 108 (Ohio Ct. App. 2008).
    d. Ohio Supreme Court declined to accept jurisdiction on August 26, 2009. *State of Ohio v. Danny Lee Hill*, Case No. 2008-1686, 912 N.E.2d 107 (Ohio 2009 table).

6. *Atkins* Proceedings in federal district court, *Hill v. Anderson*, Case No. 96-CV-795:
    a. *Atkins* Habeas Petition filed March 15, 2010.
    b. Habeas Petition denied by the federal district court on June 25, 2014.

7. Habeas Appeal reopened in Sixth Circuit Court of Appeals
    a. Previous habeas appeal and *Atkins* appeal were combined, *Hill v. Anderson*, Case No. 99-4317/14-3718
    b. February 2, 2018: Panel decision granting *Atkins* relief, *Hill v. Anderson*, 881 F.3d 483 (6th Cir. 2018).

8. United States Supreme Court review of Sixth Circuit Court of Appeals decision
    a. Case No. 18-56
    b. Certiorari granted by per curium opinion and remanded to the Sixth Circuit Court of Appeals for further review on January 7, 2019. *Shoop v. Hill*, 586 U.S. ___, 139 S.Ct. 504 (2019).

9. Return to the Sixth Circuit Court of Appeals, *Hill v. Anderson*, Case No. 99-4317/14-3718
    a. Supplemental Briefs filed on April 11, 2019, June 11, 2019, July 2, 2019
    b. Oral argument held December 5, 2019.
    c. Supplemental Brief filed on December 12, 2019.
    d. May 20, 2020: District Court denial of habeas relief regards to *Atkins* is reversed and remanded *Hill v. Anderson*, 960 F.3d 260 (6th Cir. 2020).
    e. Supplemental brief filed on August 24, 2020.
    f. Amicus Brief filed by the Kentucky Protection and Advocacy, Disability Rights Ohio, The Arc of Ohio, Disability Rights Tennessee, and Disability Rights Michigan on October 14, 2020.
    g. En Banc Argument on December 2, 2020.
    h. August 20, 2021: Denial of Writ of Habeas Corpus is affirmed. *Hill v. Shoop*, No. 99-4317/14-3718, 2021 U.S. App. (6th Cir. Aug. 20, 2021).

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The trial court denied the Petition for Post Conviction Relief on February 15, 2006, in an unreported decision. *State of Ohio v. Danny Lee Hill*, Case No. 85-CR-317 Judgment Entry (Appendix A-1).

The Ohio Eleventh District Court of Appeals affirmed in part, revere in part and remand the matter for resentencing. *State of Ohio v. Danny Lee Hill*, Case No. 2006-T-0039, 894 N.E.2d 108 (Ohio Ct. App. 2008). (Appendix A-2).

The District Court of the Northern District of Ohio denied the Writ of Habeas Corpus on June 25, 2014. *Hill v. Anderson*, Case No. 96-CV-795 (Appendix A-3).

The Sixth Circuit Court of Appeals reversed the district court's denial of habeas relief and remand the petition on February 2, 2018. *Hill v. Anderson*, 881 F.3d 483 (6th Cir. 2018). (Appendix A-4)

The Sixth Circuit Court of Appeals reverse the district's court denial of habeas relief with regards to *Atkins* and remand to grant the petition on May 20, 2020. *Hill v. Anderson*, 960 F.3d 260 (6th Cir. 2020). (Appendix A-5).

The Sixth Circuit Court of Appeals affirm the district court's denial of habeas relief on August 20, 2021. *Hill v. Shoop*, 11 F.4th 374 (6th Cir. 2021). (Appendix A-6).

JURISDICTIONAL STATEMENT

Petitioner Danny Lee Hill timely filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Ohio on November 27, 1996. *Hill v. Anderson*, Case No. 96-CV-795. The district court denied that petition on September 29, 1999.

Petitioner Hill appealed that decision to the Sixth Circuit Court of Appeals. After this Court issued *Atkins v. Virginia*, 536 U.S. 304 (2002), the circuit remanded the case to state court. *Hill v. Anderson*, 300 F.3d 679 (6th Cir. 2002).

After exhausting the *Atkins* claim in state court, Petitioner Danny Lee Hill filed an Amended Petition for Writ of Habeas Corpus on March 15, 2010, raising the *Atkins v. Virginia*, related claims. The district court denied that petition on June 25, 2014.

Petitioner Hill appealed to the Sixth Circuit Court of Appeals. A panel of Sixth Circuit Court of Appeals reversed the district court's denial of habeas relief and remanded on February 2, 2018. *Hill v. Anderson*, 881 F.3d 483 (6th Cir. 2018).

This Court granted the Warden's petition for writ of certiorari and remanded to the Sixth Circuit for reconsideration. *Shoop v. Hill*, 139 S.Ct. 504 (2019).

The panel again reversed the district's court denial of habeas relief with regards to *Atkins* and remand to grant the petition on May 20, 2020. *Hill v. Anderson*, 960 F.3d 260 (6th Cir. 2020).

The Sixth Circuit Court of Appeals sitting *en banc*, vacated the panel decisioin, and affirm the district court's denial of habeas relief on August 20, 2021. *Hill v. Shoop*, 11 F.4th 374 (6th Cir. Aug. 20, 2021.

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fifth Amendment

"No person shall ... be deprived of life, liberty, or property, without due process of law ..." U.S. CONST. amend. V.

United States Constitution, Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…." U.S. CONST. amend. VI.

United States Constitution, Eighth Amendment

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

United States Constitution, Fourteenth Amendment

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XI.

I. INTRODUCTION AND PROCEDURAL HISTORY

In *Hill v. Anderson*, 881 F.3d 483 (6th Cir. 2018), a panel of the Sixth Circuit Court of Appeals held the Ohio court's decision rejecting Danny Hill's claim of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), involved an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1). Although this Court did not opine on Mr. Hill's intellectual disability, the Court held the panel's analysis under section (d)(1) must be vacated because it rested so "heavily" on *Moore v. Texas*, 581 U.S. ___, 137 S. Ct. 1986 (2017), an opinion that indisputably came "years after the decisions of the Ohio courts." *Shoop v. Hill*, 139 S.Ct. 504, 507 (2019). The Court instructed the panel on remand to consider whether its conclusion could be sustained "based strictly on legal rules that were clearly established in the decisions of this Court at the relevant time." *Id*. at 509.

On remand, the panel faithfully followed those instructions and properly concluded that the Ohio court's decision was based on multiple unreasonable determinations of the facts in light of the evidence presented in the State court proceeding. Because section (d)(2) was satisfied, the panel correctly conducted *de novo* review and concluded "[t]he evidence that Hill is intellectually disabled is overwhelming," and "[n]o person looking at this record could reasonably deny that Hill is intellectually disabled under *Atkins*." *Hill v. Anderson*, 960 F.3d 260, 265, 281 (6th Cir. 2020). However, that panel decision was vacated when rehearing *en banc* was granted. *Hill v. Anderson*, 964 F.3d 590 (6th Cir. 2020). A divided *en banc* Sixth Circuit decision (9-7) subsequently affirmed the denial of habeas relief. *Hill v. Shoop*, 11 F.4th 374 (6th Cir. 2021).

The Warden, as represented by the Ohio Solicitor General, conceded at oral argument before the Sixth Circuit that Mr. Hill is intellectually disabled, but still argued that habeas relief was not warranted.

II. STATEMENT OF FACTS

Atkins held that the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender," but left it to the states to "develop[] appropriate ways to enforce" this constitutional restriction. 536 U.S. at 321, 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).[1] The Ohio Supreme Court took up the task of implementing *Atkins*' mandate in *State v. Lott*, 779 N.E.2d 101, 1014 (Ohio 2002),[2] which explicitly "adopt[ed] the clinical definitions cited with approval in *Atkins*." *Williams v. Mitchell*, 792 F.3d 606, 616 (6th Cir. 2015). These clinical guidelines provide, among other things, that intellectual disability consists of three prongs: (1) subaverage intellectual functioning; (2) significant limitations in adaptive skills; and (3) onset during the developmental period. *Lott*, 799 N.E.2d at 1014. Thus, when Danny Hill's *Atkins* case came before the trial court for adjudication, the trial court indicated it would, under *Lott*, follow the substantive standards articulated by the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association ("APA"). But that did not happen.

A. MR. HILL WAS REPEATEDLY IDENTIFIED AS INTELLECTUALLY DISABLED IN MULTIPLE EVALUATIONS CONDUCTED BY QUALIFIED PSYCHOLOGISTS PRIOR TO THE SUPREME COURT'S DECISION IN *ATKINS V. VIRGINIA*.

Danny Hill was first identified as mentally retarded in kindergarten after his teacher referred him for testing because he was intellectually slow, immature, and bullied by classmates. Supplemental *Atkins* Appendix, RE 97-1, at 61 (hereinafter Supp APX). Karen Weiselberg, a school psychologist for the Warren City Schools, conducted an evaluation revealing that Danny

[1] The term "intellectual disability" is now the preferred term for (and has the same meaning as) the Court's term "mental retardation." *See, e.g.*, *Hall v. Florida*, 572 U.S. 701, 704 (2014).

[2] The Ohio Supreme Court overruled *State v. Lott*, in *State v. Ford*, 140 N.E.3d 616, 654 (Ohio 2019) because it was "an improper standard for assessing intellectual disability."

was "a boy whose ability falls within the EMR [Educable Mentally handicapped] classification." Supp APX 62. As a result of Weiselberg's findings, Danny was placed in the special education class for EMR children the following year.

She again evaluated Danny when he was eight years old and had been in the EMR program for three years. Supp APX 63. Testing then revealed Danny's full-scale IQ to be 62, first grade equivalent reading, kindergarten equivalent spelling and arithmetic, and perceptual age of 5 years, 4 months. Weiselberg noted weaknesses in verbal reasoning and abstract thinking skills concluding that he had not advanced in his functioning beyond the kindergarten level. Supp APX 63-64. She cautioned his teachers to "[r]emember Danny will be limited in his ability to generalize, to transfer learning from one situation to another, to do abstract reasoning, or to do much self-evaluation." Supp APX 65. Weiselberg advised that because "Danny is a slower learning child, we will have to make his work as concrete as possible. Be very specific when you give Danny any directions as to what he is to do. Make use of concrete objects to manipulate rather than talking about abstract ideas." Supp APX 65.

Danny continued to struggle in the adjusted curriculum program. Supp APX 554. As his academic struggles continued, Danny became frustrated with school (as do many children with intellectual disability), and he developed behavior problems. Supp APX 67. Annette Campbell, another school psychologist with the Warren City Schools, evaluated Danny when he was thirteen years old. Campbell concluded, "Danny's assessed learning abilities fall into the mentally retarded range." Supp APX 69. She noted weaknesses in, among other things, Danny's ability to recall everyday information, do abstract thinking, perform mental arithmetic, perceive a total social situation, and reproduce symbols using psychomotor speed and coordination. Supp APX 69. Campbell found Danny to be very impulsive, which she noted was "typical of mentally retarded

children," and stated he was "extremely immature and easily led by others into trouble around school. In this milieu of difficulties Danny is finding school frustrating and nonrewarding." Supp APX 69.

Based on Campbell's report and recommendations, Danny was placed in a smaller, self-contained special education class to provide him with more individualized help academically and socially. His short-term goals in this new class included basic tasks such as "to improve his ability to tell time." Supp APX 557. Danny's teachers in the self-contained class noted poor hygiene and difficulty completing his work in a self-directed manner. *See e.g.,* Supp APX 543, 547. When he could not complete his work, Danny responded by acting out. *See e.g.*, Supp APX 544, 545, 546, APX 547, 548.

Campbell evaluated Danny again after he had been in self-contained classes for four months and recommended that Danny be moved to the Fairhaven Program for the Mentally Retarded. Supp APX 514-15. Shortly thereafter, Danny's teacher, Mrs. Tincher, reported his academic and social skills (at age 13) were at a first-grade level. Supp APX 568. Danny could not keep track of his school supplies or complete his lessons without assistance: "If Danny is left unattended, he strays from his task and begins to display immature behaviors, or falls asleep." Supp APX 568. Danny's IEP goals at Fairhaven included working on telling time, learning his address and phone number, and interacting appropriately with peers. Supp APX 573.

The next year, when Danny was 14, his reading remained at a first-grade level and his math skills were at a third-grade level. Supp APX 578. Regarding Danny's social functioning, the special education teacher who completed the IEP stated: "Danny is a bright, perceptive boy with high reasoning ability, but his defiant attitude and refusal to obey any known authority hinders his

learning." Supp APX 578.[3] Danny's goals for this year included blending letter sounds to say words as a unit when reading; telling time to five-minute intervals; and counting change up to $1.00. Supp APX 578.

Campbell again evaluated Danny at age 15. His academic skills remained at a second-grade level in all areas with noted weaknesses in "communication, self-direction, socialization and occupation." Supp APX 71. That same year, a five-person multidisciplinary team with a qualified psychologist evaluated Danny, administering IQ, academic achievement, and adaptive functioning tests, and concluded that Danny continued to qualify for the EMR program. Supp APX 592-93. The team found that Danny suffered from deficits in the following areas of adaptive behavior: occupation, communication, self-direction, and socialization. Supp APX 593. As a result, Danny was assigned to the Developmental Handicap program at Harding High School. Supp APX 596.

About two months later Danny was admitted to Brinkhaven Enterprises after he was charged with several felonies. At Brinkhaven, Danny received individualized support and tutoring. Supp APX 2638. In this structured environment, Danny improved. *E.g.,* Supp APX 524, 525, 2640-41. Danny was released from Brinkhaven after seven months because of a "lack of funds within the county," Supp APX 2643, even though people who worked with Danny believed he needed a more structured environment than he could get at home. *See e.g.,* Supp APX 2647. After Danny returned home from Brinkhaven, his behavior problems continued; he rarely went to school, and he was expelled. Supp APX 527, 617.

At age 17, Danny was charged with two counts of rape. As part of the adjudication, Dr. Douglas Darnall, a consulting psychologist with the Juvenile Justice Center, performed a full

[3] The state court of appeals decision took that statement "bright, perspective boy" totally out of context which renders that decision an unreasonable application of the facts.

psychological evaluation for the Trumbull County Juvenile Court. Dr. Darnall concluded "Danny's overall functioning is within the mildly retarded range." Supp APX 527. Dr. Darnall described Danny's improvement in the structured environment of Brinkhaven, and concluded, "it is apparent that Danny needs a highly structured environment. Unfortunately, the record shows that his family cannot provide such an environment." Supp APX 528. Dr. Darnall diagnosed Danny with Mild Mental Retardation under Axis I according to the then-existing DSM criteria. Supp APX 528.

Based on Dr. Darnell's recommendation against bindover, Danny was adjudicated as a juvenile. Danny pled guilty in juvenile court to sexually assaulting two women and he was sent to the Training Center for Youth (TCY). The TCY placement committee evaluated Danny, administering a battery of achievement tests that confirmed he was intellectually disabled. Supp APX 608. R.W. Jackson, Chief Psychologist at TCY, described Danny at age 17 as an "[i]ntellectually limited, socially constricted youth with very few interpersonal skills." Supp APX 530.

At age 18, Danny was sent home again – against the recommendations of multiple people involved in youth services who worked with him and believed he needed a structured environment. *See e.g.,* Supp APX 2668, 2687, 2733. Danny did not want to leave TCY. *See e.g.,* Supp APX 2733, 2602. Nevertheless, Danny was released. Supp APX 2629. Danny moved back in with his mother and enrolled in a tenth-grade special needs program. Supp APX 533, 540.

Approximately six months after Danny's release, 12-year-old Raymond Fife was attacked while he was riding his bike. Fife died two days later. Because of a flawed law enforcement investigation, Danny was charged with capital murder.

In preparation for his capital sentencing hearing, Danny was evaluated by Dr. Nancy Schmidtgoessling. Supp APX 630-33. She reviewed extensive social history records, including

Danny's medical, school, and juvenile records, Supp APX 626, and the school records of his siblings. Supp APX 844. Dr. Schmidtgoessling learned that Danny's mother was also intellectually disabled and his brothers. Supp APX. 845, 875. Using appropriate diagnostic criteria, Dr. Schmidtgoessling diagnosed Danny Hill with mild mental retardation. Supp APX 630, 835.

Dr. Douglas W. Crush evaluated Mr. Hill four months after Dr. Schmidtgoessling and concluded: "Neuropsychological testing indicates intellectual functioning within the mildly retarded range." Supp APX 76.

Besides Dr. Schmidtgoessling, several witnesses testified about Danny's low intellectual functioning and adaptive deficits: Mary Robinson, Danny's grandmother, Supp APX 2600; Vera Williams, Danny's mother, Supp APX 2750; and multiple witnesses from the Department of Youth Services & Probation, Supp APX 2633 (Poindexter); Supp APX 2646 (Brink); Supp APX 2687 (Ayers).

Thus, before *Atkins* was ever decided, ten evaluations conducted by seven qualified psychologists over the course of Danny's life reached the same bottom line: Danny Hill is a person who meets the criteria for a diagnosis of intellectual disability. These evaluations are summarized in the chart below.

Examiner	**Date (Danny's Age)**	**Supp APX**
Karen Weiselberg, Warren City Schools Psychologist	3/20/1973 (6 yrs., 2 mos.)	62
Weiselberg (again)	9/10/1975 (8 yrs., 8 mos.)	64
Annette Campbell, Warren City Schools Psychologist	1/31/1980 (13 yrs., 0 mos.)	69
Campbell (again)	5/19/1980 (13 yrs., 4 mos.)	515
Campbell (again)	4/19/1982 (15 yrs., 3 mos.)	71
Warren City Schools Multidisciplinary Team (including a qualified psychologist)	5/12/1982 (15 yrs., 4 mos.)	593
Dr. Douglas Darnall, Juvenile Justice Center Consulting Psychologist	1/10/1984 (17 yrs., 0 mos.)	527

R.W. Jackson, TCY Chief Psychologist	4/25/1984 (17 yrs., 3 mos.)	530
Dr. Nancy Schmidtgoessling, Hamilton County Court Psychologist	10/25/1985 (18 yrs., 10 mos.)	622
Dr. Douglas W. Crush, Psychologist (private practice)	2/25/1986 (19 yrs., 1 mo.)	76

Based on this body of evidence, Danny's intellectual disability was undisputed in the Ohio courts before this Court's decision in *Atkins*. Danny appealed his conviction and sentence to the Eleventh District Court of Appeals and the Ohio Supreme Court, both of which acknowledged his intellectual disability. The Ohio Supreme Court noted that the trial court issued an order denying Danny's motion to suppress his statements to police as involuntary, explaining:

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

State v. Hill, 595 N.E.2d 884, 888 (Ohio 1992). The trial court also considered Danny's intellectual disability as a mitigating factor but determined the mitigating factors were outweighed by the aggravating factors. The Court of Appeals stated:

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

State v. Hill, 1989 WL 142761, * 32 (Ohio App. 11 Dist. 1989). The court of appeals also noted that Danny presented "considerable evidence as to his passive nature. This evidence suggests that appellant is a 'follower,' easily led (because of his handicap) and influenced by any person with a dominant personality." *Id.*, at * 35.

Mr. Hill was recognized as intellectually disabled by the state of Ohio until *Atkins* was decided. Then Ohio bent over backwards and twisted the evidence and the criteria to justify denying his *Atkins* claim.

B. THE STATE COURT REJECTED MR. HILL'S *ATKINS* CLAIM.

1. THE *ATKINS* HEARING.

Six months after *Atkins* was decided, the Ohio Supreme Court decided *State v. Lott*, setting forth substantive and procedural rules for state court adjudications of *Atkins* claims, including a holding that, in Ohio, "there is a rebuttable presumption that a defendant is not [intellectually disabled] if his or her IQ is above 70." 779 N.E.2d 1011, 1014 (Ohio 2002). Faced with Danny's long, well-documented history of assessments finding he was a person with intellectual disability, which included acknowledgements to the effect in prior state court opinions, the State sought to limit the *Atkins* court's review of the available evidence to *solely* whether Danny was "currently" intellectually disabled (at the time of the *Atkins* hearing), rather than at the time of the crime or some other previous point in time.[4] The *Atkins* court ultimately agreed with the State's position and issued an order stating "this Court, in deciding Petitioner's claim, will determine whether Petitioner is presently mentally retarded and therefore death penalty ineligible." Supp APX. 247. The court found that "[n]either *Atkins* nor *Lott* are instructive as to when the so-called *Atkins* exclusion should apply," *id.*, and stated "it would be virtually impossible to apply standards articulated as recently as 2002 to retroactively determine Petitioner's mental status in 1986.

[4] The State asserted that Danny had been tested with the WAIS-III at age 33 (while incarcerated at the Mansfield Correctional Institution) where he received full-scale IQ score of 71 which, pursuant to *Lott*, created "a rebuttable presumption that Petitioner is not now mentally retarded." Supp APX 176. The circumstances surrounding that testing proved to be suspect. There was no purpose for Danny to be tested then and it is not clear who ordered the testing. The State claimed they were not aware of whom administered the test, which is patently false.

Therefore, this Court will evaluate Petitioner's *Atkins* claim based on his current mental status." Supp APX. 249. The *Atkins* court noted that it would not preclude Danny from offering evidence concerning his childhood and adolescent years, "[h]owever, the Court's final determination, based on the evidence presented, will be whether or not Petitioner is *presently* mentally retarded and therefore ineligible for the death penalty as an *Atkins* excludable." Supp APX. 250 (emphasis added). The *Atkins* court instructed the expert witnesses to do the same.

Three experts conducted new evaluations in anticipation of the *Atkins* hearing: Dr. David Hammer, for the defense; Dr. Greg Olley, for the prosecution; and, Dr. Nancy Huntsman, for the court. The *Atkins* court ordered them to conduct their evaluation jointly at the prison.[5] All three experts found significantly sub-average intellectual functioning. *See* Supplemental *Atkins* Appendix, RE 97-1 Atkins Transcripts (hereafter Atkins Transcripts) at 156 (Hammer); *id.* at 839 (Olley); *id.* at 1123–24 (Huntsman). However, the experts disagreed on whether Danny had established the existence of deficits in adaptive functioning and onset before age 18.

The defense expert, Dr. David Hammer, found both. *Id.* at 173. After reviewing the entire record, *id.* at 680, he identified deficits in social-emotional functioning, self-care, and work habits, Supp APX 1117.[6] Dr. Hammer described Danny's record in detail in his testimony, Atkins Transcripts at 193-210, and created a list of all of the historical evidence supporting Danny's diagnosis of intellectual disability. Supp APX 1106-10. He explained how special education teachers deemed Danny "immature in comparison to other students," Atkins Transcripts at 223–24, how a juvenile court psychologist concluded that Danny was "highly suggestable" and "d[id] not think of consequences," *id.* at 341, how correctional officials "constantly ha[d] to remind [Hill]

[5] It appears this procedure was not utilized in any other *Atkins* case in Ohio.
[6] By statute, the entire trial court record and evidence was part of the post-conviction record for the court to review. O.R.C. §2953.21(C).

to take showers [and] brush his teeth," *id.* at 232, and how Danny needed color-coded aids to complete his job in prison, *id.* at 363. Based on this evidence, Dr. Hammer described Danny as "highly suggestible" and a "follower." *Id.* at 233–34, and concluded that his deficits manifested before age 18, *id.* at 377. Thus, Danny had an intellectual disability. *Id.* at 156.

The state's expert, Dr. Gregory Olley, focused on Danny's current functioning, *see e.g.*, Atkins Transcripts at 674 ("Judge Curran's order, as I understood it to us was to demonstrate mental retardation at the present time."); Supp APX 1124 ("The current evaluation was carried out to determine whether Mr. Hill is functioning at the level of mental retardation *today*... The available information on Mr. Hill's *current functioning* does not allow a diagnosis of mental retardation…" (emphasis added)). In his view, the record contained "inadequate information about adaptive behavior," *id.* at 780, even though it "tend[ed] to suggest deficits." *Id.* at 940. Focusing on Danny's vocabulary, which is not a recognized area of adaptive functioning, Olley opined that Danny made "sophisticated requests" using "legal language." *Id.* at 727. However, Olley acknowledged he never tested whether Danny actually understood these words. *Id.* at 926. Olley also focused on the police interrogation, indicating that he believed Danny "stood his ground . . . very, very strongly," *id.* at 726, "only modified his story a little bit when he was faced with evidence that he couldn't possibly have avoided," *id.* at 725, and "clearly was not a person who was being manipulated or pressured." *Id.* at 737–38. Olley also found no onset before age 18, *id.* at 934, though he did not interview anyone who knew Danny before he turned 18. *See* Supp APX 1118.

The court's expert, Dr. Nancy Huntsman, agreed with Olley. *Id.* at 1044. She "didn't do a really detailed analysis" of the record because she "didn't want to contaminate [her] perspective." *Id.* at 1079. Accordingly, she did not interview anyone who knew Danny in the developmental

period. *See* Supp APX 1127–30. She instead relied upon correctional officers, *id.* at 1140, despite admitting that "the environment on death row is hardly one in which one would expect to acquire many of the skills [associated with adaptive functioning]." *Id.* Dr. Huntsman also focused on vocabulary, Atkins Transcripts at 1029, arguing that Danny's "complex sentences" contained "incredible detail," *id.* at 1025, even though they left the listener in "utter confusion." *Id.* at 1131. She thus dismissed Danny's extensive history in special education, arguing that the school "reward[ed]" students for "doing more poorly." *Id.* at 1047. Based on this view of the evidence, she found no adaptive deficits, no onset before 18, and thus no intellectual disability. Supp APX 1141.

2. THE TRIAL COURT'S DECISION.

The state court judge that presided over Danny's post-conviction proceedings (*Atkins* court) concluded – not surprisingly – that the evidence presented "satisfied Prong 1 of the forensic definition of MR." Supp APX 3452. Given that Danny had been administered full scale IQ tests on at least nine occasions and every single one of his scores was in the intellectual disability range, and the unanimity of expert opinion among those who testified at the state court hearing, a finding that Danny met his burden of proof in regard to significantly sub-average intellectual functioning was a given.

The court then turned to the second (adaptive deficits) prong. The court's assessment was skewed by its belief that by failing to fully cooperate with the three examiners during their evaluation, Danny had "intentionally corrupted the process" and "rendered impossible the task of the three psychologists in conducting an adaptive behavior assessment." Supp APX 3457. This is puzzling given that clinical standards at the time of the hearing were clear that the person being evaluated for intellectual disability is not the best, and certainly not the most reliable, source for

an assessment of their own deficits. Nevertheless, the *Atkins* court deemed Danny's "lack of cooperation" to be "critical" to its analysis of prong two because that left the examiners (and the court) with only "Vineland testing scores from [Hill's] school days" and "selective anecdotal evidence of isolated conduct reports." Supp APX 3457. Although the record contained hundreds of pages, including multiple evaluations of Danny by disinterested professionals assessing his functioning during the developmental period, the *Atkins* court stated the available evidence was a "thin reed" to determine whether Danny had met his burden of proof. *Id.*[7]

Then, turning to what the *Atkins* court labeled "anecdotal evidence" of Danny's adaptive deficits, the court, cited the Texas Court of Criminal Appeals' now discredited decision in *Ex Parte Briseno*, 135 S.W. 3d 1, 8 (2004) for the proposition that the prong 2 inquiry was "exceedingly subjective." When addressing what it referred to as Danny's "early years," Supp APX 3466, the *Atkins* court ignored or minimized the voluminous evidence of Danny's academic failure, gullibility, and difficulties communicating. Instead, the *Atkins* court selectively picked instances of "disruptive" behavior and classified Danny as a "loner" who was not "easily led," "lazy," and a known liar. Supp APX 3467-68.

Next, the *Atkins* court focused on Danny's criminal history and the murder of Raymond Fife, concluding that his criminal behavior did not constitute the "profile of a docile or tractable

[7] The State's expert (Olley) and Court's expert (Huntsman) did not attempt to interview anyone who knew Danny during the developmental period. Moreover, as for the multiple Vineland scales administered during some of Danny's educational evaluations, all three experts concluded that the scores were not reliable and/or particularly informative for their assessment of prong 2. Dr. Hammer testified that the SIB-R is preferred in modern psychology over the Vineland. Atkins Transcript at 434. Dr. Huntsman stated the Vineland was a "bad instrument" and "was ill-regarded… was not a very reliable measure for anybody." Atkins Transcript at 944, 948. Dr. Olley testified the Vineland was "not a very good test," and acknowledged that the majority of the Vineland scores likely overstated Danny's functioning because his mother was the informant, and she also has significant intellectual limitations. Atkins Transcript at 392.

individual." Supp APX 3469. The *Atkins* court reasoned that Danny demonstrated "self-direction" by going to the police department and claiming to have information about Fife's murder. The *Atkins* court opined further that Danny possessed "at least average communication skills" based on his interrogation by law enforcement because, for example, he knew basic details such his name, address, the time-of-day certain events transpired, and because he did not "capitulate" during the interrogation and was able to "interact with his interrogators." Supp APX 3470.

Turning to Danny's years on death row the court concluded he "demonstrated maturity inconsistent with a mentally retarded individual." Supp APX 3471. The basis for this conclusion was the judge's again highly selective reliance on aspects of Danny's interactions with reporter Andrew Gray, and unwarranted projection that Danny had a sophisticated understanding of the Supreme Court's discretionary review system and the state and federal court systems. Supp APX 3473. The *Atkins* court also focused on statements made by several employees at Mansfield Correctional Institution, which indicated that Danny could perform certain work tasks, use the commissary, read and talk – again ignoring or discounting overwhelming evidence of Danny's sub-standard functioning even in the highly restrictive environment of a maximum-security prison, which is not suitable for an adaptive deficits assessment. Supp APX 3475-76.

In referring to Danny's personal appearance at the *Atkins* hearing, the court also concluded there was "nothing about his general appearance—facial expressions or conduct—suggesting (at least to a layman) that the Petitioner is mentally retarded." Supp APX 3474.[8]

[8] For essentially the same reasons the court concluded Danny also had failed to establish the age of onset prong. Supp APX 3479-81.

The *Atkins* court also ignored the extensive prison records filed by the State that reflected Danny's adaptive deficits even in the highly structured environment of death row. Supp APX 1304-1851. The review of the prison records revealed:

- The prison long recognized Danny as illiterate. Supp APX 1485, 1486, 1511, 1512, 1553, 1579, 1784, 1788, 1824.
- The prison recognized Danny as mentally retarded when first arrived on death row and thereafter. Supp APX 1789, 1815, 1817, 1819-20.[9]
- Danny has had problems with his hygiene throughout his incarceration. Supp APX 1396, 1568, 1573, 1645, 1646.
- Danny asked frequently for his account balance with the cashier's office and had frequent problems with his account. Supp APX 1484, 1485, 1486, 1556, 1557, 1560, 1565, 1568, 1571, 1574, 1575, 1576, 1577.
- The prison knew that other inmates wrote for him, and one case manager had to write a letter to his mother for him. Supp APX 1484, 1510, 1784, 1788.
- Danny often had to ask for his mother's and other family members' telephone numbers. Supp APX 1483, 1484, 1571, 1818.
- One work evaluation indicated Danny lacked the skills for the job cleaning the range. Supp APX 1325.

The *Atkins* court finding that Danny was an "average" death row inmate and therefore not suffering from any "current" deficits in functioning was not just an unreasonable application of the facts, but a blind eye to the record before the court.

3. THE OHIO COURT OF APPEALS DECISION.

The state court of appeals decision parroted the decision of the *Atkins* court. *State v. Hill*, 894 N.E.2d 108 (Ohio App. 11 Dist. 2008). After accepting the determination that Danny met the significantly sub-average intellectual functioning prong, 894 N.E.2d at 121, it repeated that the prong 2 deficits could not be obtained from Danny due to his "lack of effort." 894 N.E.2d at 122. This purportedly forced the *Atkins* court to rely on "collateral, largely anecdotal evidence to determine the level of Hill's adaptive functioning" that it repeated (erroneously) was a "'thin reed'"

[9] The prison currently identifies Mr. Hill as intellectually disabled with significant deficits in daily functioning.

on which to determine whether Danny had satisfied prong 2 of the criterion for intellectual disability. *Id*.

The court of appeals described the "anecdotal evidence" in virtually the exact terms as the *Atkins* court, focusing on: (1) Danny's school records which detailed a history of "academic underachievement" but also statements that Danny knew how to write and was described by one teacher as a "bright perceptive boy with high reasoning ability." 894 N.E. 2d at 124; (2) the trial for the murder of Raymond Fife where according to the court of appeals, Danny demonstrated "initiative" in approaching the police and attempting to present a false alibi, and his interrogation where he was, again according to the court of appeals, able to stand his ground and modify his story when faced with contrary evidence; (3) interviews with a newspaper reporter (Andrew Gray) which "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" 894 N.E.2d at 126; (4) testimony of death row prison guards who, although acknowledging Danny's poor hygiene, described him as an "average" prisoner who interacted with other inmates, obeyed prison rules and kept track of his commissary account; (5) Danny's appearance in court, which led the *Atkins* court to conclude that he did not observe "anything about Hill's conduct or demeanor suggesting the he suffers from [intellectual disability]" *Id.;* and, (6) the expert opinions of Dr. Olley and Dr. Huntsman that, in their view, Danny's "adaptive skill deficiencies" did not meet the "second criterion." *Id.* Thus, the court of appeals concluded there was "abundant, competent and credible evidence to support the trial court's conclusion that Hill does not meet the second criterion for [intellectual disability]." *Id*.[10]

[10] Like the trial court, the state court of appeals relied upon the same evidence in concluding that Danny failed to establish that he met the third (onset before age 18) criterion. *Id*.

III. WHY THE WRIT SHOULD BE GRANTED

Danny Hill is clearly a person with intellectual disability as even the Warden conceded during the *en banc* briefing and argument. The state court's decision to the contrary turns on unreasonable factual determinations and an unreasonable application of *Atkins*, warranting *de novo* review, and habeas relief. Any reasonable review of the record demonstrates Mr. Hill's entitlement to relief under *Atkins*, and a denial of that claim is indefensible.

A. 28 U.S.C. § 2254(d)(2) IS SATISFIED.

The Ohio Court of Appeals' decision was based on multiple "unreasonable determination[s] of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The state court's critical factual determinations fall into three broad categories: (1) the state court unreasonably concluded that the experts were forced to rely on a "thin," "largely anecdotal" record because Mr. Hill was not cooperative; (2) the state court purported to evaluate the historical record but focused almost entirely on irrelevant information and grossly mischaracterized the factors it did discuss; and, (3) the court unreasonably concluded Mr. Hill failed to establish onset of his disability before the age of eighteen.

As the majority noted, the Warden "admits that any adaptive deficits that Hill does have arose before he turned 18," therefore the only issue in dispute is whether the state court decision on the adaptive function prong was unreasonable. *Hill*, 11 F.4th at 387. While the majority opinion ultimately found the state court decision was not unreasonable and habeas relief was not warranted, "[a]dmittedly, there is evidence in the record that shows Hill has limitations in some adaptive skills such as self-care, functional academics, and self-direction." *Id.*, at 394. The majority recognized the state court decision was flawed in several significant areas.

First, the majority noted "Hill's school records suggest that he struggled academically as a child." *Id.*, at 388. The majority noted the state court summary of Mr. Hill's school records in its decision did not include all the evidence that "may be relevant to determining whether Hill had significant limitations in two or more adaptive skills." *Id.*, at 389.

Second, the majority questioned the accuracy of the finding of "self-direction" by the state court by using Mr. Hill's conduct during questioning by the police for the murder. "In looking at the evidence, it is unclear that Hill's conduct demonstrated self-direction or self-preservation." *Id.*, at 389. It is remarkable that a salient fact such as this can be both "unclear," yet reasonable for purposes of a §2254(d)(2) analysis. The state court's assessment of Mr. Hill's conduct during police questioning was not reasonable as it was a totally bastardization of the meaning of the adaptive skill of self-direction. Self-preservation has nothing to do with that area of adaptive functioning. In addition, a fact not addressed by the state court of appeals decision, nor by the majority, was Mr. Hill's statements to the police were not voluntary and knowing, and he did not have the capacity to fully understand his rights when he was being questioned by the police. *Id.*, at 430-31.

The majority was troubled that the state court of appeals' decision failed to mention the testimony of the three experts – Dr. Douglas Darnall, Dr. Nancy Schmidtgoessling, and Dr. Douglas Crush – who testified at Mr. Hill's mitigation trial in 1986. All three experts testified at the mitigation trial that Mr. Hill was intellectually disabled. "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." *Id*, at 390 (emphasis added) (internal citation omitted). But still the majority did not find the state court decision unreasonable.

Finally, the majority noted that the state court of appeals decision relied quite heavily on Mr. Hill's prison records and time on death row. Mr. Hill had been on death row over twenty years at the time of the *Atkins* hearing. As the majority admitted, "his time incarcerated may be an imperfect indicator of his functional abilities." *Id.*, at 390. Even so, there is abundant evidence in the prison records supporting a finding of intellectual disability, and the prison has identified Mr. Hill in the past and now presently as a person with intellectual disabilities. But still the majority did not find the state court of appeals decision unreasonable.

The majority opinion recognizes the rich factual record that was presented at the *Atkins* hearing in support of a finding of intellectual disability and noted serious flaws in the state court decision. The state court of appeals decision does not deserve the deference the majority opinion bestows upon it.

1. THE STATE COURT UNREASONABLY DETERMINED THE RECORD WAS A "THIN REED" BECAUSE OF MR. HILL'S FAILURE TO COOPERATE.

After acknowledging that Mr. Hill's subaverage intellectual functioning was undisputed, the state court began its analysis of adaptive behavior by stating that no reliable standardized test results could be obtained due to "Hill's lack of effort." *Hill*, 894 N.E.2d at 189. The experts conducted a joint evaluation of Mr. Hill at the prison during three days in April of 2004. On the second full day of testing, Mr. Hill got upset and cried, causing them to abandon their testing plans. Supp APX 1112. Mr. Hill's school records contained four administrations of the Vineland Social Maturity Scale, which is a measure of adaptive behavior, but the experts felt most of these results were not reliable, in part because Mr. Hill's intellectually disabled mother served as the informant and the test administrators reported that she overstated Mr. Hill's abilities. Supp APX 527, 845. The state court concluded:

> 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.

Hill, 894 N.E.2d at 191. This conclusion was unreasonable because: (1) the available record was not "largely anecdotal"; (2) the evidence was not "thin" by any stretch of the imagination; and (3) the experts were not forced to rely on insufficient information because of Mr. Hill's failure to cooperate with testing.

First, the overwhelming majority of the record was not "anecdotal" at all. The record contains six professional psychological assessments ordered by the Warren City Schools (Supp APX 62, 64, 69, 515, 71, 593), three expert evaluations ordered by the courts (Supp APX 527, 622, 76) and one expert evaluation performed by the Chief Psychologist at the Training Center for Youth (Supp APX 530), all of whom had no reason to offer anything other than their best professional judgment and unanimously agreed that Mr. Hill is intellectually disabled. The record also contains extensive school records, juvenile justice and prison records (Supp APX 61-72, 489-513, 524-621, 980-1012, 1310-1985, 2769-2812), and *sworn testimony* from three expert evaluators (Supp APX 622-87, 782-918), multiple school and youth services officials (Supp APX 77-96, 688-728, 923-42, 2611-2741), and Mr. Hill's mother and grandmother (Supp APX 2527-40, 2593-2605, 2742-68). There is nothing scientifically wrong with considering collateral information. Direct observations from people who have had an opportunity to observe a defendant's typical behavior in the community during the developmental period are precisely the kind of evidence required for a reliable assessment of intellectual disability. AAMR User's Guide 17-23. To the extent the court was expressing a concern that "anecdotal" information could be subjective, the clinical guidelines specifically address this issue by instructing evaluators to collect

and consider *as much information as possible* and rest their conclusions soundly on a convergence of data, not to limit their review of the evidence to a narrow band of "present functioning" in the confines of a highly structured prison setting, as the trial court did here. AAMR Manual 86 ("The addition of different sources of data provides a basis for more informed professional judgment." This approach "emphasizes the importance of *convergent validity*, or the consistency of information obtained from different sources and settings.").

Second, no one could reasonably categorize the record as "thin." The experts agreed that the historical documents in this case were more extensive than they were used to encountering "by a fairly large measure." Atkins Transcript 1196, *see also id*. at 833-34. As Dr. Hammer explained:

> Most people who we see at the clinic . . . I will get maybe something that is about, maybe an inch or at most an inch and a half. Right now I have a portable brief case that is jammed full of materials that is probably at least eight to ten inches thick.

Id. at 606. If the record here was "thin," it was only because the trial court, contrary to then existing clinical guidelines, *ensured it would be* by ignoring the historical evidence and instructing the experts to do the same. As the district court noted, "the state-court record was hardly a 'thin reed.' At well over 6,000 pages, it was voluminous. . . . [T]he true 'thin reed' in this case was the information that was available concerning Mr. Hill's adaptive functioning at the time he filed his *Atkins* claim [i.e., his 'present functioning'], the focus of the evaluation." *Hill v. Anderson*, No. 4:96-cv-00795, 2014 WL 2890416, at *24 (N.D. Ohio June 25, 2014).

Third, the experts were not forced to rely on inadequate information because of Mr. Hill's failure to cooperate during the joint evaluation. Even had Mr. Hill been cooperative, the clinical guidelines in place at the time clearly prohibited an assessment based on Mr. Hill's behavior in a prison setting. All three experts explained the problems with assessing behavior in prison:

- "Since a large portion of the items on this and most other standardized measures of adaptive behavior are not possible to be observed in a prison environment and because no

independent, reliable informant of Mr. Hill's adaptive behavior prior to his incarceration was available, all three psychologists agreed that an independent, valid standardized adaptive behavior instrument could not be completed for Mr. Hill." Supp APX 1112 (Hammer).

- Assessing prison behavior is "not what an assessment of adaptive behavior asks us to do. It asks us to assess the person relative to their typical community." Atkins Transcript 868 (Olley).

- "[T]he formal assessments of adaptive behavior for someone Mr. Hill's age are really designed for people who are not living in the confined and confining environment of death row." The tests are "just not relevant" to the prison setting. *Id*. at 1130 (Huntsman).

In addition, the clinical guidelines instruct practitioners *not* to rely solely on self-reported information from the person being assessed and *never* to rely solely on a standardized measure of adaptive behavior even if one can be obtained.[11] AAMR Manual 85, 74-75. Instead, the assessment should rely on information collected from "multiple informants and multiple contexts," including a "thorough review" of the subject's social history and school records. AAMR User's Guide 14, 18-19; AAMR Manual 95. Drs. Olley and Huntsman did not adhere to the clinical guidelines. Instead, as instructed by the trial court, they focused heavily on Mr. Hill's present functioning, including prison behavior, criminal behavior and verbal behavior. *See, e.g.*, Atkins Transcript 743 (Dr. Olley stating that he relied on verbal behavior because "Judge Curran's directions to us was to determine mental retardation *currently*. And this was a current piece of information"); *id.* at 862 ("we were aware of [the judge's] order to look at Mr. Hill's *present function*. And that is why we conducted the evaluation at that time, and why we interviewed six people at the prison, and why we toured the prison facilities."). It was therefore the trial court's erroneous decision—not Mr. Hill's lack of effort—that left these experts with a faulty basis for their opinions.

[11] As the State's expert, Dr. Olley acknowledged, the results of any self-reported answers would be suspect because it is assumed "the individual is not a good reporter of his own behavior." Atkins Transcript 759; *see also*, AAMR User's Guide 21 ("Recognize that self-ratings have a high risk of error in determining 'significant limitations in adaptive behavior.'").

2. THE STATE COURT FOCUSED ON IRRELEVANT INFORMATION AND MISCHARACTERIZED THE RECORD.

After erroneously concluding that the available record was but a mere "thin reed" of "anecdotal evidence," the Ohio Court of Appeals then purported to analyze the record, but discussed only a small, selective handful of details that are largely irrelevant to the issue of intellectual disability. The court grossly mischaracterized the record to reach several of its highly selective conclusions. The court divided its comments into four sections, which it labeled: (1) Public School Records; (2) Mr. Hill's Trial for the Murder of Raymond Fife; (3) Death Row Records; and (4) Mr. Hill's Appearances in Court.

i. Public School Records.

Regarding Mr. Hill's extensively documented school history, the Ohio court concluded: (1) the records "amply demonstrate academic underachievement and behavioral problems"; (2) "[a]lthough there are references to Hill being easily led or influenced by others," the trial court noted that he committed crimes while apparently acting on his own; and (3) "Hill knew how to write" and was described by at least one teacher as "'a bright, perceptive boy with high reasoning ability.'" *State v. Hill*, 894 N.E.2d 108, 192 (Ohio Ct. App. 2008). As the district court observed, a finding that Mr. Hill "'underachieved' academically or in any other adaptive skill as a child is squarely contradicted by the record." *Hill*, 2014 WL 2890416 at *26. A careful review of the record shows not a single "reference in Hill's school records by a teacher, school administrator, psychologist, psychiatrist, or anyone else suggesting Mr. Hill was capable of performing at a substantially higher level but chose not to." *Id*. The state court's conclusion also ignored the experts' unanimous testimony that evidence of behavioral problems does not undermine a diagnosis of intellectual disability (Atkins Transcript 612, 713, 1102-03), and it did not address the fact that school officials explicitly related Mr. Hill's behavior problems *to his intellectual*

disability.[12] Indeed, the state court made absolutely no mention of the six professional evaluations reported in Mr. Hill's school records, nor did it address the numerous letters, reports and documents generated by teachers, counselors, principals and special education aids who all recorded data and personal observations relevant to multiple areas of Mr. Hill's adaptive behavior throughout his developmental period. The state court's opinion also contained no discussion or analysis of Dr. Hammer's opinions based on the underlying record.

The state court dismissed the overwhelming large number of references in the school records to Mr. Hill being easily led by noting he committed two rapes on his own. This conclusion grossly undervalues the sheer number of people (virtually every person who has ever encountered Danny Hill) and their uniform descriptions of him as "suggestible," "easily led," and a "follower." It likewise gives undue weight to evidence of criminal behavior which, according to the clinical guidelines, should not be considered when determining adaptive skills. AAMR User's Guide 22 ("Do not use past criminal behavior or verbal behavior to infer a level of adaptive behavior or about having MR/ID. First, there is not enough available information; second, there is a lack of normative information."). The fact that Mr. Hill "knew how to write" is also irrelevant under the clinical definitions as it is well-accepted that people with intellectual disability can learn to read, write and achieve academically up to about a sixth-grade level (although Mr. Hill never scored

[12] For example, a school evaluation at age 13 states, "Danny's assessed learning abilities fall into the mentally retarded range." He read at a second-grade level. His math skills were at a first-grade level. His handwriting was "immature for his chronological age." School was "extremely frustrating to Danny. . .. The fighting he has been in in school is usually cases where he is led into it by others." He was "extremely immature and is easily led by others into trouble around school. In this milieu of difficulties Danny is finding school frustrating and nonrewarding." Supp APX 69. That same year, Danny's teacher reported "[h]is academic ability seems to be at a first-grade level, as do his social skills. . .. 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." Supp APX 568.

above a third-grade level on any standardized measure of academic achievement). DSM-IV-TR 44.

Finally, the state court's conclusion that "at least" one teacher described Mr. Hill as a "bright, perceptive boy with high reasoning ability" was especially sinister in its selectivity. The state court did not mention this teacher worked with Mr. Hill at the Fairhaven Program for The Mentally Retarded, failed to note that the teacher reported that her fifteen-year-old student was reading at a first-grade level, and ignored that the teacher's stated goals for Mr. Hill included, among others, "blend letter sounds to say word as a unit," "perform addition and subtraction facts to 100," "use correct sentence structure in conversation," "follow class rules," "work without being disruptive," "shower regularly" and "use deodorant." Supp APX 578. These facts are evident on *the very same page* from which the state court quoted the "bright, perceptive boy" language—one does not even have to examine the rest of the record to see this comment does not mean Mr. Hill's adaptive behavior was on par with his peers. Mr. Hill's school records contain no other references, by any person, to him being "bright," "perceptive" or anything similar. Such willful ignorance of the record by the state court can constitute nothing other than an unreasonable determination of fact, given the evidence.

ii. Mr. Hill's Trial for the Murder of Raymond Fife.

Next, the state court found Mr. Hill demonstrated skill in "self-direction and self-preservation" by approaching the police to implicate others in Fife's murder, and an "ability to adapt his alibi to changing circumstances in the course of police interrogation" when he "'stood his ground . . . very, very strongly.'" *Hill*, 894 N.E.2d at 192. "Self-preservation" is not an area of adaptive behavior. AAMR Manual 82. Moreover, "self-direction" does not simply mean an ability to appear at a given place. Rather, this area involves "skills related to making choices," "resolving

problems confronted in familiar and novel situations," and "demonstrating appropriate assertiveness and self-advocacy skills." 1992 AAMR Manual at 40. Mr. Hill's decision to implicate himself in a crime in which he was not a suspect was hardly good self-advocacy. The state court's conclusion that Mr. Hill was able to "hold his own" during the interrogation is simply incorrect. A review of the interrogation transcript reveals Mr. Hill offered rambling, confusing answers to even short, concrete questions and readily accepted the police's version of events. Even the officers interrogating told Mr. Hill "[e]verytime [*sic*] we suggest something to you, you have a tendency to agree with us." ECF No. 96, PageID 2105. Regardless, verbal behavior does not affect adaptive behavior, and the state court's use of verbal behavior as a proxy for a thorough, careful assessment of adaptive behavior was contrary to the clinical guidelines. AAMR User's Guide 22.

iii. Death Row Records.

At the time of Mr. Hill's *Atkins* hearing, he had been incarcerated for twenty years. The state court drew four critical conclusions from this time period: (1) recorded interviews between Mr. Hill and Andrew Gray, a newspaper reporter, showed "a high level of functional ability with respect to Mr. Hill's use of language and vocabulary, understanding of the legal processes, ability to read and write, and ability to reason independently"; (2) various prison employees testified that Mr. Hill was, in their opinion, an "average" prisoner; (3) "Hill interacted with other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules"; and (4) "Hill's self-care was 'poor but not terrible,'" and "Hill had to be reminded sometimes about his hygiene." *Hill*, 894 N.E.2d at 192. Essentially all of these findings are irrelevant to intellectual disability because a person's functioning in the highly structured setting of a prison environment bears no relationship to the clinical guidelines for assessing

adaptive behavior. AAMR Manual 198. People with intellectual disability often adapt well to the prison setting. Laypeople, including prison guards, are not properly trained to determine whether an individual suffers from intellectual disability. Atkins Transcript 423, 1206. They may also be biased against inmates; they are not comparing an inmate's adaptive skills to the general population; and they do not have the same opportunity to observe adaptive behaviors in the community that teachers, parents, friends, and similar collateral witnesses typically can observe. The state court's conclusions in this section once again rely heavily on verbal behavior, which is clinically inappropriate. Thus, the court's findings here are useless for determining the actual question. Many of the state court's factual findings from this time period are flatly contradicted by the record.

The state court's conclusion that the Gray tapes showed Mr. Hill's skill at reading is directly contradicted by Gray himself, who stated "[w]hen he reads his court documents and legal briefs, he stumbles over and mispronounces the larger words, revealing a grade school reading level." Atkins Transcript 1286. Mr. Hill struggled so much that Gray eventually took the documents and read them aloud himself. *Id*. at 1288. The state court's conclusion that Mr. Hill was intimately familiar with sophisticated legal processes is not supported by the record either. During the interview, Mr. Hill stated, "[t]he U.S. Supreme Court, they ain't hearing nothing." (July 13 Taped Interview at 1:08:38). To claim this statement shows Mr. Hill "is well aware of the U.S. Supreme Court's discretionary power to grant or deny the issuance of the writ of certiorari," as the trial court did, stretches the record beyond any reasonable interpretation. Supp APX 3473.

In addition, although the state court purported to rely on Mr. Hill's prison behavior, it did not mention the many prison records submitted for the court's review. These records directly contradict the court's conclusions that Mr. Hill maintained a prison job, kept track of his

commissary account, and obeyed prison rules seemingly without difficulty. They also undermine the state court's ultimate conclusion that Mr. Hill is not a person with intellectual disability. For example, the prison records demonstrate:

- The prison long recognized that Mr. Hill was illiterate. Supp APX 1485, 1486, 1511, 1512, 1553, 1579, 1784, 1788, 1824.
- The prison identified Mr. Hill as mentally retarded when he first arrived on death row and thereafter. Supp APX 1789, 1815, 1817, 1819-20.
- Mr. Hill has had problems with his hygiene throughout his incarceration. Supp APX 1396, 1568, 1573, 1645, 1646.
- Mr. Hill asked frequently for his account balance with the cashier's office and had frequent problems with his account. Supp APX 1484, 1485, 1486, 1556, 1557, 1560, 1565, 1568, 1571, 1574, 1575, 1576, 1577.
- Other inmates and staff wrote for letters and grievances for him. Supp APX 1484, 1510, 1784, 1788.
- Mr. Hill had to ask for family phone numbers. Supp APX 1483, 1484, 1571, 1818.
- Mr. Hill lacked the skills for the job cleaning the range. Supp APX 1325.
- Mr. Hill's prison job as a porter involved distributing cleaning supplies that were sorted by color, so Mr. Hill did not have to read the supplies' instructions. Atkins Transcript 363, 1381.

Finally, the state court's conclusion that Mr. Hill's self-care was "poor but not terrible," bears disturbing resemblance to the court's reliance on the "bright, perceptive boy" comment from Mr. Hill's special education teacher. The state court's citation to this one comment, as if it single-handedly resolves this issue, is alarming because it so unreasonably dismisses the weight of the prison records themselves (which contradict this sole, cherry-picked testimony) and Mr. Hill's extensive school records, which likewise document a persistent theme of difficulty with personal hygiene. *See, e.g.*, Atkins Transcript 233 ("the theme of hygiene is all the way throughout").

iv. Mr. Hill's Appearances in Court.

The state court concluded its analysis by relying on the trial court's "'many opportunities' to observe Mr. Hill over an extended period of time," during which it "did not perceive anything about Hill's conduct or demeanor suggesting that he suffers from mental retardation." *Hill*, 894 N.E.2d at 193. This conclusion is simply rank stereotyping at its worst. There are "[n]o specific

personality or behavioral features," nor are there any "specific physical features" associated with intellectual disability. DSM-IV-TR 44. No one can tell by simply looking whether an individual suffers from mild intellectual disability. The state court's belief to the contrary has no scientific grounding in the clinical literature, which defines intellectual disability as a multi-dimensional concept that demands holistic consideration. AAMR Manual 8. The Ohio Court of Appeals' decision to rely on the trial judge (who had never adjudicated an *Atkins* claim) and his lay misconceptions of how people with intellectual disability should look and act was objectively unreasonable.

3. THE STATE COURT UNREASONABLY CONCLUDED THAT MR. HILL FAILED TO ESTABLISH ONSET BY AGE EIGHTEEN.

The Ohio Court of Appeals dispensed with prong three in two short sentences, finding "[t]he trial court's conclusion [on prong 3] mirrors its findings under the first two criteria" and that evidence had been "discussed above." *Hill*, 894 N.E.2d at 194. According to the clinical guidelines, the only appropriate way to assess prong three is to: (1) conduct "a thorough social history" that includes "the investigation and organization of all relevant information about the person's life status, trajectory, development, functioning, relationships, and family"; (2) undertake a "thorough review of school records"; and (3) perform "a longitudinal evaluation of adaptive behavior that involves multiple rater, very specific observations across community environments (especially in regard to social competence), school records, and ratings by peers during the developmental process." AAMR User's Guide 18-22. There was no way the experts could follow these guidelines while simultaneously adhering to the trial court's instruction to focus only on Mr. Hill's "present functioning." The trial court effectively gutted Mr. Hill's ability to meet the requirements of prong three and then blamed him for the inevitable outcome. The state court's approval of this flawed logic was unreasonable beyond any objective measure.

4. SECTION 2254(D)(2) IS SATISFIED.

28 U.S.C. § 2254(d)(2) authorizes federal habeas relief for an otherwise meritorious constitutional claim if the state court's adjudication of the claim 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. *Id.*[13]

This Court has found even a single unreasonable factual determination sufficient to satisfy section 2254(d)(2). In *Wiggins v. Smith*, the Court held that the Maryland state court that rejected Wiggins' ineffective assistance of counsel claim "based its conclusion, in part, on a clear factual error," which led the state court to "assum[e]" counsel's purportedly strategic decision not to present certain mitigating evidence was adequately informed. 539 U.S. 510, 528 (2003). The record did not support the state court's assumption and it was therefore "incorrect." *Id*. The Court declared the state court's mistake "unreasonable" under § 2254(d)(2) and held "[t]his partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court's decision." *Id*.

In *Brumfield v. Cain*, the Court pointed to two of the state court's "critical factual determinations" as unreasonable within the meaning of section 2254(d)(2). 576 U.S. 305, 313 (2015). The Louisiana state court denied Brumfield's request for an evidentiary hearing to pursue an *Atkins* claim, finding Brumfield failed to offer sufficient evidence to raise a "reasonable doubt" about his intellectual disability. In evaluating this decision, this Court focused on "two underlying factual determinations on which the trial court's decision was premised—that Brumfield's IQ score was inconsistent with a diagnosis of intellectual disability and that he had presented no

[13] Unlike subpart (d)(1), subpart (d)(2) has no "clearly established federal law" requirement; its focus is exclusively on the state court's performance as a *determiner of the facts*, and proof of a defect in that area alone is enough to authorize *de novo* review of a claim under § 2254(a).

evidence of adaptive impairment." *Id*. Finding the record inconsistent with both of these factual conclusions, the Court declared them unreasonable, explaining:

> [a]s we have observed . . . '[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review,' and 'does not by definition preclude relief.' Here, our examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable.

Id. (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see also Miller-El v. Dretke*, 545 U.S. 231 (2005) (finding the state court's conclusion that juror strikes were not race-based was unreasonable where the state court ignored evidence of the prosecutor's failure to strike similarly situated jurors who would have been ideal for the prosecution).

Consistent with this Court's guidance, the circuit courts have found section 2254(d)(2) satisfied where the state court's factual findings result from the court's misrepresentation, ignorance and discounting of the evidence. *See, e.g.*, *Burgess v. Commissioner, Alabama Dept. of Corr.*, 723 F.3d 1308, 1313 (11th Cir. 2013) (finding the state court's determination that petitioner had not shown deficits in adaptive behavior "impossible to reconcile with the record"); *Milke v. Ryan*, 711 F.3d 998, 1007 (9th Cir. 2013) (holding state court's determination was unreasonable because the court ignored evidence of misconduct by a key witness and "fail[ed] to consider all the evidence that was presented to it"); *Jones v. Murphy*, 694 F.3d 225, 237-38 (2d Cir. 2012) (holding that the state court's decision was based on a misconstruction of the record regarding petitioner's request to represent himself); *Julian v. Bartley*, 495 F.3d 487, 494 (7th Cir. 2007) (finding state court's factual determination unreasonable because it acknowledged trial counsel's initial advice to petitioner that his maximum sentence was sixty years, but ignored the record evidence that counsel later revised this advice and told petitioner he faced only thirty years).

Here, the state court's factual finding was unreasonable at every turn. The trial court told the experts to ignore the rich historical evidence of Mr. Hill's intellectual disability. The Ohio Court of Appeals relied on those opinions and ignored the vast majority of the record clearly establishing adaptive deficits to affirm the trial court's decision. By narrowing the focus to Mr. Hill's present functioning (in the environment of the prison setting), the Ohio courts effectively eliminated the very facts that form the core of any reliable intellectual disability assessment. The appellate court justified its reliance on clinically irrelevant factors such as prison behavior, criminal behavior and verbal behavior based on the false notion there was little else to consider. The court also misrepresented the overall weight of the available record, ignored key information, and misconstrued critical facts to come to its unreasonable decision that Danny Hill is not a person with intellectual disability. Under these circumstances, § 2254(d)(2) is satisfied, *de novo* review is appropriate, and Mr. Hill is entitled to relief.

B. THE EVIDENCE OVERWHELMINGLY SHOWS DANNY HILL IS A PERSON WITH INTELLECTUAL DISABILITY.

There is no dispute that prong one is satisfied. The Warden has conceded the dispute is whether the state court of appeals decision concerning Mr. Hill's adaptive functioning was reasonable or not. *Hill*, 11 F.4th at 387. All three experts agreed he had significant deficits in functional academics. Supp APX 23, 69 (Hammer); 783 (Olley); 1112 (Huntsman). There can be no doubt that Mr. Hill has significant deficits in several additional adaptive skill areas. The record establishes he had poor personal hygiene; he was immature, passive, highly suggestible and easily led and exploited by others; he behaved in socially inappropriate ways and had difficulty making friends; he had difficulties with communication; he has never lived independently outside a structured environment, and numerous experts and lay witnesses testified that he needed a rigid structure and additional support to function in everyday life. At a minimum, the record establishes

that Mr. Hill suffers from significant deficits in social skills, communication, self-direction, self-care, and work.

Virtually all the social history records (literally thousands of pages) were collected before Mr. Hill's eighteenth birthday. In addition, the original trial testimony related directly to the developmental period, since Mr. Hill was arrested and charged with the capital crime only shortly after his eighteenth birthday. Thus, the record also clearly establishes Mr. Hill's deficits in both intellectual functioning and adaptive behavior manifested before the age of eighteen. The Sixth Circuit was incorrect in affirming the denial of habeas relief.

C. 28 U.S.C. § 2254(d)(1) IS SATISFIED.

In *Atkins*, this Court instructed the states to "develop[] appropriate ways to enforce" *Atkins*' mandate prohibiting the execution of offenders who, like Mr. Hill, are intellectually disabled. 536 U.S. at 321. The Ohio Supreme Court decided that Ohio would implement that instruction by following the clinical framework set out by then-existing clinical guidelines of the AAMR and APA. *See Lott*, 779 N.E.2d at 1014. But the state court decision rejecting Mr. Hill's *Atkins* claim deviated significantly from the clinical guidelines the Ohio Supreme Court instructed it to follow. The most fundamental deviation was the trial court's mandate, made at the State's request, that the evaluators limit their review to Mr. Hill's "present functioning," thereby excluding the vast majority of information necessary for a reliable assessment of intellectual disability. The state court used its narrow focus on present functioning to justify the broad and misplaced weight it gave to Mr. Hill's prison behavior, verbal behavior, and demeanor – analytical errors that likewise contravene the clinical standards in place at the time. "*Atkins* supports the conclusion that intellectual disability is not a transient condition." *Hill*, 11 F.4th at 386 (citing *Williams v. Mitchell*, 792 F.3d 606, 619 (6th Cir 2019) ("past evidence of intellectual disability is relevant to an analysis

of an individual's present intellectual functioning."). Past evidence of intellectual disability was therefore highly relevant to the issue before the state court. And, more importantly, by improperly narrowing the focus of its legal inquiry, the state court gave short shrift to and ignored the large body of evidence that typically forms the heart of a reliable clinical assessment. As a result, the state court's adjudication of Mr. Hill's intellectual disability claim "resulted in a decision that was contrary to or involved an unreasonable application of" *Atkins*, 28 U.S.C. §2254(d)(1).

D. FAILURE TO VACATE MR. HILL'S DEATH SENTENCE IS A FUNDAMENTAL MISCARRIAGE OF JUSTICE

Despite the procedural barriers created by AEDPA, the failure to vacate Mr. Hill's death sentence is a "fundamental miscarriage of justice." *Sawyer v. Whitley*, 505 U.S. 333 (1992). The Warden, as represented by the Ohio Solicitor General, conceded at the *en banc* oral argument and in the circuit briefing that Mr. Hill is intellectually disabled, but still argued that his death sentence should be affirmed because of AEDPA deference. The majority decision agreed on several points that the state court of appeals decision was misleading, incorrect, unclear, and incomplete on several aspects of its review of Mr. Hill's record. But the majority found the state court decision was not unreasonable for purposes of §2254(d)(2).

The Ohio courts found Mr. Hill to be intellectually disabled before *Atkins v. Virginia*, after a review of his school records and psychological reports. But when his condition meant he was no longer death eligible under *Atkins*, the state courts determined Mr. Hill was therefore no longer intellectually disabled on the same record, with the addition of his prison records.[14] Mr. Hill is innocent of the death penalty because of his intellectual disability. That at its most fundamental

[14] As the majority noted, prison records are discounted as "they provide little insight into how the defendant would function in the general community." *Hill*, 11 F.4th at 390.

level must be a miscarriage of justice that this Court needs to remedy. To allow the execution of an intellectually disabled man should not be tolerated.

IV. CONCLUSION

Habeas relief is warranted and appropriate under 28 U.S.C. §2254(d)(1) and (2). This Court should find that Mr. Hill is entitled to relief on the *Atkins* claim and grant the petition for writ of certiorari.

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