No. 21-6428

In the Supreme Court of the United States

DANNY LEE HILL,

Petitioner,

v.

TIM SHOOP, Warden

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
NO EXECUTION DATE

QUESTION PRESENTED

To win habeas relief under the Antiterrorism and Effective Death Penalty Act, often called "AEDPA," a petitioner must make one of two showings. First, under 28 U.S.C. §2254(d)(1), he can win relief by showing that the state court's decision rejecting his claim either contradicted one of this Court's holdings or, in applying one of this Court's holdings, committed an "error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Second, under 28 U.S.C. §2254(d)(2), the petitioner may prevail by showing that the state court's decision rests on a factual determination inconsistent with the factual record. *Rice v. Collins*, 546 U.S. 333, 338–39, 341 (2006).

In this case, Danny Hill seeks habeas relief under *Atkins v. Virginia*, 536 U.S. 304 (2002), which forbids executing intellectually disabled murderers. Ohio state courts rejected Hill's argument, based partly on testimony from two experts who concluded Hill was not intellectually disabled. One of those expert witnesses was a leading expert on the topic of intellectual disability, and had testified *for* inmates in all nine of the previous *Atkins* hearings in which he had participated.

Did the District Court and the *en banc* Sixth Circuit err in holding that Hill failed to prove his entitlement to relief under AEDPA?

LIST OF PARTIES

The Petitioner is Danny Lee Hill, an inmate at the Chillicothe Correctional Institution.

The Respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

Hill's list of directly related proceedings is incomplete. It should include the following proceedings:

1. *State v. Hill*, No. 1985-CR-00317 (Ohio C.P. Oct. 3, 2016) (denying motion for new trial)

2. *State v. Hill*, No. 2016-T-00099 (Ohio Ct. App. Dec. 3, 2018) (affirming denial of new trial motion)

3. *State v. Hill*, No. 2019-0068 (Ohio S. Ct. June 12, 2019) (denying discretionary review)

4. *Hill v. Ohio*, No. 19-6567 (U.S. S. Ct. January 13, 2020) (denying certiorari)

5. *State v. Hill*, No. 90-177 (Ohio S. Ct. Oct. 22, 1992) (staying sentence to permit post-conviction petition)

6. *State v. Hill*, No. 90-177 (Ohio S. Ct. April 9, 1993) (lifting stay and setting execution date)

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INTRODUCTION

More than thirty years ago, Danny Hill and a friend captured Raymond Fife—a twelve-year-old boy—while Fife was biking to a friend's house. They beat him. They strangled him with his own underwear and then lit it on fire, burning his face. They bit his genitals. They raped him. They sodomized him with a stick, repeatedly inserting it so violently that they ruptured internal organs. So brutal was the torture that Raymond vomited on himself. Then, with Raymond still alive, Hill discarded Raymond's battered and burned body in a field, where Raymond's father eventually found his son. Raymond died two days later.

There are no words to describe the terror Raymond endured because of Hill. And Raymond was not the only victim. Imagine what Raymond's parents have endured in the many years since their son's death. Walk for a minute in their shoes. Imagine what Raymond's now-deceased father felt when he found his son's disfigured and discarded body. Imagine what Raymond's mother experienced upon learning of the agony in which her son spent his final hours on Earth. Now imagine having to wait decades for that small amount of solace that would come with seeing justice carried out.

The pain of delay would be legally necessary, though regrettable, if Danny Hill had any legitimate claim to AEDPA relief. He does not. Instead, his certiorari petition asks this Court to issue a factbound reversal of an *en banc* Sixth Circuit decision that is free of error. The Court should deny certiorari so that justice is not delayed any longer.

STATEMENT

1. In 1985, twelve-year-old Raymond Fife left home for a friend's house on a bike. *See State v. Hill*, 64 Ohio St. 3d 313, 313 (1992). He never made it because of Danny Hill. Hill and an accomplice intercepted Raymond. They stripped him, tied his underwear around his neck, burned him, and beat him so badly that his brain hemorrhaged. *Id.* at 314. They also raped him, biting his genitals and "impal[ing]" him "with an object that had been inserted through the anus, and penetrated through the rectum into the urinary bladder." *Id.* When Hill and his accomplice finished with Raymond, they left him for dead in a field. Raymond's father found him hours later, clinging to life. Raymond died two days later. *Id.*

His family has been fighting for justice ever since. *See* Peggy Gallek, *Mother continues fight after court rules killer should not face death due to low I.Q.*, Fox 8 (Feb. 6, 2018), https://perma.cc/48Y3-F2GU. At first, it looked like justice might come swiftly. Not long after the crime, Hill went to the police, hoping "to misdirect the focus of the investigation by implicating others." Pet.App.109–10. The plan failed. Despite Hill's attempts at misdirection, and despite his ability to shift "his alibi to changing circumstances in the course of police interrogation," Pet.App.110, the police determined that Hill committed the crime. The State charged Hill. A three-judge panel convicted him, and sentenced him to die. Ohio's Court of Appeals and Supreme Court affirmed. *Hill*, 64 Ohio St. 3d at 317, 336. This Court denied Hill's certiorari petition. *Hill v. Ohio*, 507 U.S. 1007 (1993). And the state courts denied postconviction relief. *State v. Hill*, 1995 Ohio App. Lexis 2684 *3 (Ohio Ct. App. June 16, 1995), *review denied*, 74 Ohio St. 3d 1456 (1995).

Then began the federal habeas proceedings, which have yet to end. Hill filed his federal habeas petition in 1996. He lost. *Hill v. Anderson*, 1999 U.S. Dist. LEXIS 23332 at *54, *146 (N.D. Ohio Sept. 29, 1999). During his appeal, this Court decided *Atkins v. Virginia*, holding that the Eighth Amendment prohibits executing the intellectually disabled. 536 U.S. 304, 321 (2002). In response, the Sixth Circuit remanded, instructing the District Court to allow Hill to exhaust his *Atkins* claim in state court. *Hill v. Anderson*, 300 F.3d 679, 683 (6th Cir. 2002).

2. Back in state court, Hill filed a post-conviction petition arguing that he was intellectually disabled and that *Atkins* barred his death sentence. *See* Pet.App.90–93. In *Atkins* itself, the Court announced no test for adjudicating intellectual disability; instead, it left the States to develop their own tests. *See* 536 U.S. at 317. By the time Hill returned to state court, the Supreme Court of Ohio had developed a three-part test drawing on "[c]linical definitions" of intellectual disability that *Atkins* "cited with approval." *State v. Lott*, 97 Ohio St. 3d 303, 305 (2002). To prove intellectual disability, Hill would have to prove three elements: "(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*.

Hill's IQ tests proved the first element. The debate, therefore, centered on the latter two, and adaptive functioning in particular. Adaptive functioning measures an individual's "ability to function across a variety of dimensions" of "major life activity." *Brumfield v. Cain*, 576 U.S. 305, 317 (2015) (quotation omitted). And "significant

limitations" in an adaptive skill, every expert at Hill's hearing agreed, required functioning two standard deviations below the mean—the equivalent to performance in the bottom 2.5 percent of society. *See* Tr., R.97-1 at 160, 171–72, 698, 936, 1049–50, 1526; *see also* Douglas G Altman & J Martin Bland, *Standard Deviations and Standard Errors*, 331 Brit. Med. J. 903, 903 (2005). (All record citations refer to the record in the District Court. For example, this brief cites the transcript of Hill's *Atkins* hearing, "R.97-1," which spans 1,882 pages. The brief also cites the appendix of that hearing, "R.99," which spans 4,517 pages. Each document is consecutively paginated, but not part of the PageID# format now available on ECF, as the documents were too large to file that way at the time.) To diagnose adaptive deficits, psychologists can use either a composite score on a psychometric test or reported evidence of adaptive behavior. *See* Tr., R.97-1 at 160, 172–73, 696–97.

The trial court held an eleven-day hearing to evaluate Hill's *Atkins* claim. *See* Pet.App.91. Many of the facts came in the form of anecdotes—a consequence of "Hill's failure to cooperate with experts retained to evaluate him." Pet.App.109. Some of those anecdotes favored the State:

- Hill had previously engaged in serious misconduct (including two rapes) alone, suggesting that he was fully capable of leading himself;
- "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 independently went to the police in hopes of "misdirect[ing] the focus of the investigation by implicating others," and his interviews with police showed an "ability to adapt his alibi to changing circumstances in the course of [a] police interrogation";

- Hill, a few years before the evidentiary hearing, contacted the media, asked to be interviewed, and indeed gave interviews that showed "a high level of functional ability with respect to … language and vocabulary, understanding of legal processes, ability to read and write, and ability to reason independently";

- "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"; and

- "Hill began to behave differently after *Atkins* was decided, and [a prison official] believed that Hill was 'playing a game' to make others think he [was] retarded."

Pet.App.109–11. Other anecdotes favored Hill. His school records suggested deficits in "functional academics, hygiene/self-care, social skills, and self-direction." *See* Pet. App.276, *superseded en banc* Pet.App.311–37. Specifically, they showed that Hill:

- performed far below his age in numerous subjects, that he was hyperactive and struggled to focus, and that he struggled to finish basic tasks like telling time;

- failed to bathe or brush his teeth without being told to do so;

- struggled to make friends or form bonds, and failed to follow authority; and

- was susceptible to peer pressure and exploitation by others, suggesting deficits in self-direction.

Pet.App.276–78. Even outside of school, Hill exhibited adaptive deficits. Evidence suggested that he never lived independently, had a driver's license, held a bank account, or performed well at work without substantial hand holding. Pet.App.278.

A layman might not know what to make of these anecdotes. Fortunately, the trial court did not have to rely on lay inferences. It heard significant testimony from three experts, at least one of whom was a leader in the study of intellectual disability. Because of Hill's low IQ, the State knew this would be a close case. It thus sought

out a leading expert with unimpeachable credentials and demonstrable objectivity: Dr. J. Gregory Olley. Olley was a clinical professor and fellow in the professional organization for intellectual disability. Tr., R.97-1 at 636, 638, 640. He had previously testified in nine *Atkins* cases, each time testifying in support of the defendant's intellectual disability. *Id*. at 644, 726, 748. Not so here. Dr. Olley opined that there was not enough in the record to justify an intellectual-disability diagnosis. *Id*. at 700, 783.

Olley's opinion turned on his thorough review of Hill's records, meetings with Hill, and further observations. Olley acknowledged that whether to find intellectual disability in this case presented a "close call," *id*. at 861, and that Hill's many years in prison complicated the task because a prison setting makes a full assessment of adaptive behavior "impossible," *id*. at 869. What is more, for anyone "at the cusp" of intellectual disability, as Hill surely was, one would expect to find "mixed" evidence, with some supporting a diagnosis and some not. *Id*. at 697. So it was important to keep in mind, said Dr. Olley, that the relevant question was not whether Hill exhibited adaptive deficits, but whether Hill's adaptive deficits were two standard deviations below the mean. *Id*. at 665. Olley concluded that the totality of evidence did not support a conclusion that Hill's adaptive functioning was that poor.

First, Dr. Olley opined that the mixed evidence from Hill's youth stopped short of justifying an intellectual-disability diagnosis. Hill's scores on standardized tests of adaptive behavior—the only tests that looked comprehensively at Hill's functioning—were "not supportive of a diagnosis of" intellectual disability. *Id*. at 700. The

narrative part of one such test identified only one area of weakness, but noted Hill's "strengths in self-help, dressing self, general socialization, occupation and communication." *Id*. at 1178. Olley explained that, although these tests had to be taken with a grain of salt in light of the fact that Hill's mom (herself possibly intellectually disabled) supplied the data for two of the four tests, they still undercut Hill's claim to some degree. *See i*d. at 664–65, 783. Olley also considered the information in Hill's school records. "Much of" that information suggested adaptive deficits. *Id*. at 940. But these records carried limited weight: they were "anecdotal" and "not written for the purpose of diagnosing mental retardation." *Id*. at 665. Thus, for example, while a record might note "a weakness in self help," that would not necessarily indicate "a weakness that is two standard deviations below average." *Id*. And again, the relevant question was whether Hill met the two-standard-deviation threshold.

Olley next addressed Hill's interviews with media members and police, which undercut Hill's intellectual-disability claim. Olley, in decades of experience, had never seen an inmate with intellectually disabilities reach out to the press to make his case, as Hill had. *Id*. at 763. Hill's "language" and "arguing on his own behalf" in those interviews were "substantially more sophisticated than any of the other defendants with whom" Olley had worked. *I*d. at 1763. Dr. Olley also noted Hill's performance during police questioning in 1985, explaining that, although those with intellectual disabilities "frequently … perform less than optimally under stress," Hill became "more resolute as the questioning went on." *Id*. at 740.

All told, Olley testified, there was not enough in the record to justify a conclusion that Hill's adaptive deficits were more than two standard deviations below the mean. *See id.* at 665, 779–83.

The court heard from two other experts: one appointed by the court and another retained by Hill. Pet.App.90. These experts, like Olley, interviewed Hill in prison shortly before the hearing. Pet.App.90–91. Both, as Olley had, opined that Hill malingered during standardized testing of his adaptive deficiencies: "he knew the right answers but gave the wrong answers on purpose." Tr., R.97-1 at 754; *see also id.* at 264–65, 754–63, 1005–06. Yet they came to different conclusions regarding intellectual disability. The court-appointed expert was Dr. Nancy Huntsman, a forensic psychologist with experience diagnosing intellectual disability for courts in northeast Ohio. *Id.* at 959–60, 966–67. She testified that Hill was not intellectually disabled. Huntsman agreed with the other experts that Hill's incarceration made the adaptive-functioning analysis more difficult, as some questions are "just not relevant" to inmates. *Id.* at 1130; *see also id.* at 1136. Still, after reviewing the entire record, she found that Hill's "adaptive behavior [was] considerably above" the two-standard-deviation threshold. *Id.* at 1049–50. She noted in particular that Hill's interactions with her involved "remarkable" detail and use of language. *Id.* at 1032.

The only expert who disagreed was the one Hill retained himself, Dr. David Hammer. *Id.* at 142, 377–78. Dr. Hammer acknowledged the "absence of reliable" input from people who could speak to Hill's abilities before age eighteen, which impeded the experts' ability to conduct a typical adaptive-behavior evaluation. *Id.* at

430–31. And, as noted above, Dr. Hammer conceded that Hill malingered during testing. Nonetheless, Hammer believed he could diagnose Hill as disabled based on the records from Hill's youth. *See id.* at 172, 194–98, 274, 407, 431.

3. After listening to these experts, the trial court concluded that Hill had not carried his burden to prove intellectual disability. *See* Pet.App.81–84. Hill appealed and, in 2009, the Ohio Court of Appeals affirmed by a divided vote. The majority recognized that "the burden was on Hill to demonstrate that he is [intellectually disabled], not on the state to prove that he is not." Pet.App.109. And it determined Hill had not carried that burden. For one thing, the trial court's conclusions were consistent with that of two highly credible experts. Pet.App.112. For another, the trial court's findings were consistent with four adaptive-deficit tests that Hill took between 1980 and 1984, all of which were consistent with non-disability. *See* Pet.App.106. Finally, Hill forced the trial court to rely on the "thin reed" of anecdotal evidence by failing "to cooperate with the experts retained to evaluate him." Pet.App.109 (quotation omitted).

The court acknowledged that plenty of the anecdotal evidence supported Hill. His school records, for example, demonstrated "a history of academic underachievement and behavioral problems," and suggested that he was a "lazy, manipulative, and sometimes violent youth" vulnerable to being "easily led or influenced by others." Pet.App.109. At the same time, other anecdotal evidence supported the trial court's finding that Hill did not exhibit adaptive deficits more than two standard deviations below the mean: he committed serious crimes alone (showing he could be self-led);

some school records portrayed him in a positive light and demonstrated basic skills like writing; Hill showed "self-direction and self-preservation" by trying to implicate others in the killing and by standing up for himself under interrogation; Hill went to the media and gave interviews in which he displayed a "high level of functional ability"; Hill took care of himself and bonded with other inmates in jail; Hill apparently adjusted his behavior in prison in response to the *Atkins* ruling; and the trial court, which "had 'many opportunities'" to observe Hill over an extended period of time, said that it "did not perceive anything about Hill's conduct or demeanor suggesting that he suffer[ed] from mental retardation." *Id.*

4. After the Supreme Court of Ohio denied further review, *State v. Hill*, 122 Ohio St. 3d 1502 (2009), Hill returned to federal court, where the District Court denied relief again, Pet.App.223. The Sixth Circuit reversed, Pet.App.264, only to be summarily reversed by this Court. This Court held that the Sixth Circuit erred by awarding habeas relief based on alleged misapplications of Supreme Court precedent that did not exist at the time of Hill's state-court proceedings. *Shoop v. Hill*, 139 S. Ct. 504, 507 (2019) (per curiam). It remanded for the Sixth Circuit to decide Hill's case based "strictly on legal rules that were clearly established in the decisions of [the Supreme Court] at the relevant time." *Id.* at 509.

5. On remand, the panel did exactly what the Supreme Court told it not to do: rather than relying on "legal rules that were clearly established" by Supreme Court decisions "at the relevant time," the panel awarded relief based on principles supposedly established by *state-court* decisions—principles that relevant Supreme

Court precedent did not establish, clearly or otherwise. *See* Pet.App.274 n.6. The panel further erred by mischaracterizing the record and ignoring the relevant law to conclude that the state court's finding of no-intellectual-disability was factually unreasonable.

The Sixth Circuit agreed to rehear the appeal *en banc* to correct the panel's errors. And it did just that, issuing an opinion affirming the District Court's judgment denying Hill's request for habeas relief. The *en banc* court first considered Hill's claim that the Ohio Court of Appeals unreasonably applied *Atkins* under §2254(d)(1). According to Hill, the Ohio Court of Appeals unreasonably applied *Atkins* by asking whether Hill was intellectually disabled with reference to his adaptive functioning at the time of his *Atkins* hearing instead of asking about his functioning with reference to the time of the crime. Pet.App.316–17. The Sixth Circuit disagreed. As an initial matter, the Ohio courts *had* "considered evidence" from throughout Hill's life, including school records, standardized tests, and medical history. Pet.App.319; *see also* Pet. App.329–30. This made sense: because "intellectual disability is not a transient condition," the Ohio courts properly considered evidence from throughout Hill's life in assessing his intellectual disability as of the time of the *Atkins* hearing. Pet.App. 318. In any event, the Sixth Circuit stressed, a petitioner can win relief under §2254(d)(1)'s unreasonable-application prong only by demonstrating that the state courts misapplied a Supreme Court holding in a manner that was wrong "beyond any possibility for fairminded disagreement." Pet.App.315–16 (quoting *White v. Woodall*, 572 U.S. 415, 419–20 (2014)). Because "*Atkins* does not define the time period when

the" intellectual-disability "inquiry must be made," state courts do not "unreasonably apply *Atkins*" by "evaluating a defendant's intellectual abilities at a later date rather than at the time of the crime." Pet.App.318.

Next, the *en banc* Court rejected Hill's argument that the state courts' no-intellectual-disability finding entitled him to relief under 28 U.S.C. §2254(d)(2). That statute permits federal courts to award habeas relief when a petitioner is in custody because of a state court decision "that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A petitioner meets this standard only when the state-court record "compel[s] the conclusion that the trial court had no permissible alternative" but to reach a conclusion different than the one it reached. *Rice v. Collins*, 546 U.S. 333, 341 (2010). The Sixth Circuit held that Hill could not meet that lofty standard because the state-court record did not *compel* the Ohio courts to deem him intellectually disabled. While some evidence suggested that Hill "has limitations in some adaptive skills," other evidence suggested that "Hill's adaptive abilities were not as lacking as several of the anecdotal accounts suggest." Pet App.331. Further, two experts "thoroughly reviewed the evidence—including records dating back to Hill's childhood"—and concluded that Hill is not intellectually disabled. Pet.App.330. "In view of this expert testimony," the *en banc* Court concluded, "the Ohio Court of Appeals reasonably concluded that Hill is not intellectually disabled." *Id.*

REASONS FOR DENYING THE WRIT

Danny Hill does not argue that his case implicates a circuit split or that it presents any questions of importance to the public generally. Instead, he argues that

the Sixth Circuit misapplied §2254(d)(1) and §2254(d)(2) to the facts of his case. Because the Sixth Circuit correctly applied both statutes, this Court should reject Hill's plea for factbound error correction.

Before proceeding any further, the Warden pauses to correct a misrepresentation in Hill's petition. Hill accuses the Warden's counsel of "conced[ing] at the *en banc* oral argument and in circuit briefing that Mr. Hill is intellectually disabled." Pet.36. That would not be relevant to the AEDPA questions that this case presents even if it were true. But it is false, and patently so. The Warden has consistently maintained that Hill is *not* intellectually disabled. And his counsel said nothing at argument or in briefs filed with the Sixth Circuit that could even conceivably be misconstrued as conceding intellectual disability. Tellingly, Hill does not support his assertion with any citation.

I. The Sixth Circuit correctly rejected Hill's habeas petition.

A. Danny Hill is not entitled to relief under 28 U.S.C. §2254(d)(1).

Hill contends that the *en banc* court erred when it refused to award relief under §2254(d)(1). Recall that the Ohio Court of Appeals, in applying *Atkins v. Virginia*, "evaluate[d] Hill's intellectual abilities at the time of the *Atkins* proceedings" in Hill's case, instead of asking whether Hill was intellectually disabled at some earlier point in time, such as the date of his state-court trial or the date of the crime. Pet.App.319. According to Hill, the Ohio Court of Appeals' focus on "present functioning" constituted an unreasonable application of *Atkins*, entitling Hill to relief under §2254(d)(1). Pet.ii. He is wrong.

1. Section 2254(d)(1) allows courts to award habeas relief only to petitioners in custody because of a state-court "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." 28 U.S.C. §2254(d)(1). The "phrase 'clearly established Federal law, as determined by the Supreme Court' … refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., op.) (quoting §2254(d)(1)); *accord Shoop v. Hill*, 139 S. Ct. 504, 505–06 (2019) (per curiam). At the time of the Ohio Court of Appeals' decision, the only Supreme Court precedent addressing the Eighth Amendment's application to intellectually disabled defendants was *Atkins* itself. And the holding in *Atkins* is quite narrow. Of particular relevance here, *Atkins* announced "no comprehensive definition of 'mental retardation,'" and instead "left 'to the State[s] the task of developing appropriate ways to enforce the constitutional restriction.'" *Hill*, 139 S. Ct. at 507 (alteration in original) (quoting *Atkins v. Virginia*, 536 U.S. 304. 317 (2002)). So while the case held that the Eighth Amendment forbids executing the intellectually disabled, it never held that States must assess intellectual disability in any particular manner. *Id.*; *see also Williams v. Mitchell*, 792 F.3d 606, 625 (6th Cir. 2015) (Gibbons, J., concurring in part and in the judgment).

The Sixth Circuit correctly concluded that the Ohio Court of Appeals' decision was neither "contrary to" nor "an unreasonable application of" the holding in *Atkins*.

First, the Ohio Court of Appeals' decision was not "contrary to" *Atkins*. A ruling is "contrary to" Supreme Court precedent only if it either: (1) rests on "a rule that contradicts the governing standard set forth in" Supreme Court "cases"; or (2) "confronts a set of facts that are materially indistinguishable from a decision of" the Supreme Court and "nevertheless arrives at a result different from [its] precedent." *Williams*, 529 U.S. at 405–06 (O'Connor, J., op.). Because *Atkins* announced "no comprehensive definition of 'mental retardation,'" *Hill*, 139 S. Ct. at 507, the Ohio Court of Appeals case could not have "applie[d] a rule that contradict[ed] the governing law set forth in" *Atkins*, *Williams*, 529 U.S. at 405 (O'Connor, J., op.). And the facts in this case, everyone agrees, are not "materially indistinguishable" from the facts in *Atkins*. *Id*. at 406. Even if they were, the Ohio Court of Appeals did not "arrive[] at a different result" than *Atkins*, *id*., since *Atkins* did not apply its non-existent standard to the case before it—instead, it remanded for the Virginia Supreme Court to fashion and apply a test for intellectual disability, 536 U.S. at 321.

Second, the Ohio Court of Appeals did not unreasonably apply *Atkins*. To qualify as an "unreasonable application" of a holding of this Court, a state court's application must be "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, 102–03 (2011) (quotation omitted). The Ohio Court of Appeals committed no such error. *Atkins* contains no holding that a defendant's intellectual abilities must be determined with reference to the time of the crime rather than the time of the *Atkins* hearing. Indeed, *Atkins* never

confronted the question because the defendant there had been considered disabled "throughout his life." 536 U.S. at 309 n.5. As such, "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*." Pet.App.318. In fact, since *Atkins* treated intellectual disability as "a permanent condition," *Mitchell*, 792 F.3d at 626 (Gibbons, J., concurring in part), it strongly suggested that "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," Pet.App.318. A fairminded jurist could thus conclude that *Atkins* itself imposes no obligation to "evaluat[e] a defendant's intellectual abilities at the time of the offense." *Id*. Therefore, the Ohio Court of Appeals could not have unreasonably applied *Atkins* under §2254(d)(1), even if it had determined Hill's adaptive functioning based on his functioning at the time of the state hearing.

2. Hill's §2254(d)(1) argument fails to rebut any of this. Instead, he makes an argument that rests on a misreading of the state-court record. In particular, Hill says that the trial court instructed the experts to "limit their review" to Hill's adaptive functioning at the time of the *Atkins* hearing, thereby barring them from considering "the vast majority of the information necessary for a reliable assessment." Pet.35. Hill contends that the Ohio Court of Appeals unreasonably applied *Atkins* by affirming an *Atkins* analysis focused myopically on evidence from one point in time.

This argument fails because the state courts and the experts all considered evidence from throughout Hill's life. The parties produced, and the experts considered, "evidence of Hill's past abilities including Hill's medical history, public school

records, and prior standardized test result." Pet.App.319. Drs. Olley and Huntsman testified that Hill was not intellectually disabled as a juvenile, at the time of the crime, *or* at the time of the *Atkins* hearing. *See* Tr., R.97-1 at 779–83, 1051–54. Dr. Olley's supplemental expert report concluded that "records from [Hill's] *childhood* fail[ed] to substantiate a childhood diagnosis of" intellectual disability. *Atkins* App'x, R.99 at 3088 (emphasis added). Beyond that, the experts were adamant that they considered every bit of available evidence from Hill's youth. *See, e.g.*, Tr., R.97-1 at 665, 714, 1129, 1133, 1175–76, 1182. One expert even called "foolish" the idea that a professional could make a diagnosis "without reviewing all of the information available." *Id.* at 1129. The trial court considered all this evidence and expressly concluded that Hill was not disabled *regardless* of whether one focused on Hill's adaptive functioning at the time of the *Atkins* hearing, at "the period of the crimes," or during "the pre-18 period." Pet.App.81–83. What is more, both the trial court and the Ohio Court of Appeals acknowledged that, under Ohio's then-applicable approach to enforcing *Atkins*, defendants had to prove onset of intellectual disability before age eighteen. *See* Pet.App.81; *see also* Pet.App.104, 112–13. Since the standard they applied *required* considering Hill's pre-adulthood functioning, it is inconceivable that they would have limited their evidentiary review to evidence from the period immediately surrounding Hill's *Atkins* hearing, which took place many years after his eighteenth birthday.

*

In sum, the Sixth Circuit properly rejected Hill's §2254(d)(1)'s argument.

B. Danny Hill is not entitled to relief under 28 U.S.C. §2254(d)(2).

Hill further argues that the Sixth Circuit improperly applied §2254(d)(2). He is wrong again.

1. Section 2254(d)(2) permits courts to award habeas relief only in cases where the state court's adjudication of a petitioner's 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." 28 U.S.C. §2254(d)(2). This is an extraordinarily demanding standard. For one thing, a state court's factual finding may be deemed "unreasonable," for purposes of §2254(d)(2), only when all "[r]easonable minds reviewing the record" would agree that the state court erred. *Rice*, 546 U.S. at 341. If there is "evidence in the state-court record can fairly be read to support" the state court's "factual determination," §2254(d)(2) provides no relief. *Wood v. Allen*, 558 U.S. 290, 301–02 (2010). Further, even if the petitioner identifies some "unreasonable" factual finding, he must also show that the state court's decision was "based on" that finding. §2254(d)(2). In other words, he must show that the finding actually affected the state court's ruling. *Carter v. Bogan*, 900 F.3d 754, 768 (6th Cir. 2018); *Byrd v. Workman*, 645 F.3d 1159, 1171–72 (10th Cir. 2011).

Hill cannot prove his entitlement to relief under these standards. As an initial matter, the only factual finding at issue here is the Ohio Court of Appeals' determination that Hill failed to carry his burden of proving significant limitations in adaptive functioning. After all, everyone agrees that Hill proved "significantly subaverage intellectual functioning" (the first of the three elements of intellectual disability under the Ohio test for disability), and everyone agrees that any adaptive deficits (the

second element) arose before age eighteen (the third element) *if* they arose at all.

The Ohio Court of Appeals' decision finding that Hill failed to carry his burden as to adaptive deficits was not "unreasonable." The anecdotal evidence—some of which supported a finding of intellectual disability and some of which did not, Pet. App.109–11—hardly "compel[s] the conclusion" that Hill carried his burden, *Rice*, 546 U.S. at 341. And the reasonableness of the state court's decision is bolstered by "credible testimony" from two "experts who concluded that Hill's adaptive capabilities are greater than those of a person with" an intellectual disability. Pet.App.108. Again, §2254(d)(2) forbids awarding relief unless all "[r]easonable minds reviewing the record" would agree that the state court erred. *Rice*, 546 U.S. at 341. When a credible expert reaches a particular conclusion—and when the habeas petitioner fails to put on evidence contradicting that analysis beyond reasonable debate—the conclusion is necessarily one that "reasonable minds" could reach.

Hill did nothing in his *Atkins* hearing to show that Dr. Olley's testimony (or Dr. Huntsman's) was so inherently flawed that the trial court could not reasonably rely on it. Nor could he have. Dr. Olley had nearly four decades' experience and a track record that established his fairmindedness in this case: Olley had testified in nine previous *Atkins* hearings, diagnosing the defendant as intellectually disabled each time. Tr., R.97-1 at 644, 726, 748. Dr. Huntsman, for her part, had diagnosed more than 250 defendants who had suspected intellectual limitations. *Id.* at 968. Both experts fully considered the evidence from Hill's youth. *See id.* at 665, 779, 1175; *see also* Pet.App.330–31. And even Hill's own expert lent credibility to the

conclusions of Olley and Huntsman by implying that Hill's diagnosis presented a close question. *See* Tr., R.97-1 at 156, 284.

In light of all this, the Sixth Circuit correctly concluded that the record left room for reasonable disagreement regarding the question whether Hill was intellectually disabled. From that, it follows that Hill did not prove his entitlement to relief under §2254(d)(2).

2. In arguing otherwise, Hill points to a slew of supposed flaws in the Ohio Court of Appeals' opinion. None is even relevant in light of the just-discussed expert opinions, which prove that the evidence before the state courts did not compel a finding of intellectual disability. Even putting that aside, Hill's arguments all fail. Some of the supposedly flawed factual determinations are not factual determinations at all. The determinations that are factual in nature are entirely reasonable. So Hill provides no sound basis for reversing the Sixth Circuit.

"Thin reed." Hill says the state court made an unreasonable factual finding when it described the anecdotal evidence about Hill's disability as a "thin reed" on which to make an adaptive-functioning diagnosis. *See* Pet.App.109; Pet. 21–24. He is wrong for three reasons. *First*, this comment is a characterization of the record, not a factual "determination" of the sort that could implicate §2254(d)(2). *Second*, the state court's holding is not "based on" this characterization, §2254(d)(2), and instead rests (in part) on the evidence being characterized. *Third*, the characterization is correct, at least arguably. The court's point was that, because of "Hill's failure to cooperate" with the experts hoping to take "standardized measurements," those

experts were forced to rely on a record consisting "largely" of anecdotal evidence. Pet. App.109. The lack of standardized measurements made it harder for Hill to carry his burden. *Id.* That conclusion is far from unreasonable—the experts said the same thing. Tr., R.97-1 at 430–31, 754, 780, 783.

Hill retorts that "the overwhelming majority of the record was not 'anecdotal' at all." Pet.22. But he supports this by citing a very small portion of an exceptionally large record. And some of the evidence he cites *is* anecdotal—reports in school records, for example. *See e.g.*, Pet.27. Thus, Hill fails to show that the state court unreasonably concluded that the experts were made to assess Hill's adaptive deficits using "collateral, largely anecdotal evidence." Pet.App.109. What is more, the non-anecdotal pieces of evidence that Hill identifies—in particular, the psychological tests performed in school and for the mitigation phase of Hill's direct proceedings—are largely irrelevant. For example, Dr. Olley testified that Dr. Schmidtgoessling, who evaluated Hill at the mitigation phase of his capital trial, did not do any adaptive-deficits testing. *Id.* at 933–34. And Dr. Huntsman explained that the evaluations conducted during Hill's schooling were made for a "very different purpose"—namely, determining how best to educate Hill given his deficits. *Id.* at 1046. None of these evaluations focused on the question whether Hill exhibited adaptive-functioning deficits two standard deviations below the mean, because it simply did not matter to the questions being asked. The Ohio Court of Appeals was not estopped from agreeing with Drs. Olley and Huntsman's intellectual-disability determinations simply because different individuals years earlier reached a different conclusion when asking

a different question.

Hill next claims that the "clinical guidelines in place at the time" of the *Atkins* hearing "clearly prohibited an assessment of Mr. Hill's behavior in a prison setting," making his failure to cooperate with the experts' attempts at testing his adaptive deficits irrelevant. Pet.23. Hill cites no clinical guidelines from the time of the *Atkins* hearing that strictly prohibited, instead of cautioning against, considering an inmate's functioning in prison. And indeed, even Hill's own expert wanted to assess Hill's functioning through testing as part of the total picture, despite Hill's decades in prison. *See, e.g.*, Tr., R.97-1 at 403, 405. Regardless, because the experts were not able to perform any such analysis, the state courts did not rely on the evidence Hill says they were barred from considering.

Evidence from Hill's youth. Hill also claims that the state court erred by considering only certain parts of the record. Pet.25–31. As an initial matter, this accusation gives rise to a §2254(d)(1) argument, not a §2254(d)(2) argument: it asserts that the court *legally* erred by looking at the wrong evidence. (Since *Atkins* "did not definitively resolve" how to assess adaptive deficits, *Hill*, 139 S. Ct. at 508, this supposed error would not entitle Hill to relief under §2254(d)(1).) More fundamentally, Hill gives no basis for assuming that the Ohio Court of Appeals ignored anything in the record. And the court's thorough discussion evinces a careful review of the record, Pet.App.105–13, particularly since the court conceded the existence of information *supporting* Hill. For example, the court noted that "Hill's public school records amply demonstrate a history of academic underachievement and behavioral

problems." Pet.App.109. (Read in context, the court used the word "underachievement" as a euphemism for poor performance, not to suggest that Hill performed below his actual abilities. *Contra* Pet.25.)

Hill says it was "sinister" for the Ohio Court of Appeals to quote a teacher who called Hill a "bright, perceptive boy with high reasoning ability." Pet.27 (quoting Pet. App.109). As an initial matter, the Ohio Court of Appeals' verbatim restatement of evidence is not itself an unreasonable factual determination. More to the point, there is nothing "sinister" about quoting this evidence. The teacher's description suggests that Hill performed well relative to his fellow students, at least some of whom were presumably intellectually disabled. That supports Dr. Olley's determination that Hill's adaptive deficits were close to, but not beyond, the two-standard-deviation threshold.

Hill thinks the Ohio courts "undervalue[d]" certain evidence and gave "undue weight" to other evidence. Pet.26. But the question here is not about how best to weigh the evidence. Instead, §2254(d)(2) allowed the Sixth Circuit to rule for Hill only if the record *compelled* an intellectual-disability finding. As already explained, the record did not compel any such finding. To the extent Hill is complaining that the Ohio Court of Appeals failed to *discuss* some evidence in its opinion, his complaint is baseless. Federal habeas courts "have no authority to impose mandatory opinion-writing standards on state courts." *Johnson v. Williams*, 568 U.S. 289, 300 (2013). Requiring state courts to relate every detail in a 6,000-page record like the one here would convert §2254's deferential review into a trap for state courts.

Hill's behavior in police interviews. Hill takes issue with the state court's finding that he "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.'" Pet.27 (quoting Pet.App.109–10). That finding cannot be unreasonable, because it was supported by Dr. Olley's expert testimony. Tr., R.97-1 at 740. Regardless, even Hill says his behavior is relevant insofar as it demonstrates "skills related to making choices," "resolving problems confronted in familiar and novel situations," and "demonstrating appropriate assertiveness and self-advocacy skills." Pet.27–28 (quoting 1992 AAMR Manual at 40). It was not unreasonable—not wrong beyond debate—to conclude with the support of expert testimony that Hill's attempting to implicate others and his asserting his innocence under police examination demonstrated those traits. And that is true even if his "rambling" answers, Pet.28, were not what one would expect from a person of average or high intelligence.

Prison records. Hill next faults the Ohio courts for concluding that Hill functioned well in prison. Pet.28–29. That conclusion was supported by testimony from prison guards and prison records. *See* Tr., R.97-1 at 1252–53, 1377–78. Hill goes so far as to claim that the Ohio courts' conclusions about an interview he set up with a reporter while in prison were "contradicted" by the reporter. Pet.29. Yet Dr. Olley—who had decades of experience diagnosing intellectual disability—specifically pointed to this same interview as evidence that Hill's language and "[a]rguing on his own behalf" were "substantially more sophisticated" than the language and self-

preservation displayed by the many intellectually disabled defendants the doctor had worked with in his career. Tr., R.97-1 at 1763.

While other evidence of Hill's conduct in prison pointed the other way, Pet.30, it was not "unreasonable" for the state court to credit the testimony and cite it as one piece of information supporting the conclusion that Hill did not carry his burden to prove intellectual disability. What is more, the State's expert and the court's expert conceded this evidence was of limited value, *see* Tr., R.97-1 at 869, 1130, 1136, and they did not give the evidence significant value.

Appearance. Hill also faults the Court of Appeals for noting the trial court's statement 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" was intellectually disabled. Pet.App.111; Pet.30–31. This is another §2254(d)(1) argument: Hill is disputing the legal relevance of this observation, not the observation's accuracy. Even putting that aside, one accurate recitation of a qualified ("as a lay observer") observation that the Ohio Court of Appeals qualified further (calling it "anecdotal," Pet.App.109, 111), does not show that the Court of Appeals erred beyond debate in concluding that Hill failed to carry his burden of proof.

Onset by age 18. Finally, Hill argues that the Ohio Court of Appeals unreasonably found that Hill failed to prove the onset of intellectual disability before the age of eighteen. Pet.31. This argument makes no sense. Intellectual disability, everyone agrees, "is a permanent, relatively static condition," *Heller v. Doe by Doe*, 509

U.S. 312, 323 (1993), that produces "lifelong impairments," *Roper v. Simmons*, 543 U.S. 551, 602 (2005) (O'Connor, J., dissenting). Therefore, once the Ohio Court of Appeals (reasonably) concluded that Hill's adaptive functioning was too strong to permit an intellectual-disability diagnosis, it had no choice but to conclude that Hill failed to prove the onset of intellectual disability before age eighteen. Its finding was in no way unreasonable. To the extent Hill means to suggest that the trial court forbade the experts from considering any evidence of intellectual disability from Hill's youth, *see* Pet.31, he is incorrect for reasons already discussed.

* * *

Hill takes one view of the record, while the Ohio courts, relying on two experts, took another view. Because that alternative view is supported by record evidence, the Sixth Circuit correctly concluded that Hill is not entitled to relief under §2254(d)(2).

II. Denying certiorari would ameliorate, not aggravate, a great injustice.

Hill concludes by insisting that allowing his death sentence to stand would constitute a "fundamental miscarriage of justice." Pet.36 (quotation omitted). In fact, injustice would result only from reviewing, and thus prolonging, this case.

"Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). This habeas case has been pending since 1996. And it has reached this point only after this Court and the *en banc* Sixth Circuit were made to intervene to correct plainly erroneous panel decisions granting relief to Hill. This case has gone on too long already. The friends and surviving family of Raymond Fife "deserve better" than even

more delay in the carrying out of a sentence lawfully imposed almost thirty-five years ago. *See Brumfield v. Cain*, 576 U.S. 305, 349 (2015) (Thomas, J., dissenting). While Hill will die in prison no matter what happens in this case, no court should "presume to tell parents whose life has been forever altered by the brutal murder of a child that life imprisonment is punishment enough." *Glossip v. Gross*, 576 U.S. 863, 897 (2015) (Scalia, J., concurring).

CONCLUSION

The Court should deny Hill's petition for a writ of *certiorari*.

Respectfully submitted,

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