CASE NO. 21-6428

CAPITAL CASE

IN THE UNITED STATES SUPREME COURT

DANNY HILL,

Petitioner,

v.

TIM SHOOP, WARDEN,

Respondent.

REPLY TO THE WARDEN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner Danny Hill's Reply To The Warden's Brief In Opposition

I. Introduction

Petitioner Danny Hill filed his Petition for Writ of Certiorari on November 18, 2021. Warden Shoop filed his Brief in Opposition on December 14, 2021. Mr. Hill offers this reply to that Brief in Opposition. None of the facts of the crime have anything to do with whether Mr. Hill's death sentence is unconstitutional under *Atkins v. Virginia*, 536 U.S. 304 (2002).[1]

While counsel for the Warden may never have used the word "concede," the tone of the briefing and the arguments indicate that fact. The Sixth Circuit opinion even noted the narrow issue in the case:

> Both parties agree that Hill satisfied the first factor, that he had significantly subaverage intellectual functioning. The Warden also admits that any adaptive deficits that Hill does have arose before he turned 18. Thus, the only remaining dispute is whether the Ohio Court of Appeals reasonably determined that Hill failed to prove the second Lott factor—"significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction."

Hill v. Shoop, 11 F.4th 373, 387 (6th Cir. 2021). It is also ironic that while the Warden claims in this briefing that Mr. Hill is not intellectually disabled, the mental health professionals at the same prison facility the Warden presides over have recognized Mr. Hill as intellectually disabled for several years.

[1] Interesting the Warden made a point of stating that Mr. Hill "bit [the victim's] genitals", BIO at 1, when that was acknowledged by the State court to be false evidence. *State v. Hill*, 125 N.E.3d 158 (Ohio Ct. App. 11th Dist. 2018).

II. The Warden Presents A False Narrative.

A. Habeas Relief Is Not Precluded Just Because Two Experts Testified Mr. Hill Was Not Intellectually Disabled In 2004.

The Warden argues that habeas relief is not available because two experts testified at the *Atkins* hearing that Mr. Hill was not intellectually disabled. The records though reflect numerous psychologists over Mr. Hill's life evaluated him and diagnosed him with mental retardation.

The experts were instructed to opine whether Mr. Hill was "currently" intellectually disabled at the time of the hearing in 2004. RE 97-1 Atkins Transcripts at 648-649. Drs. Olley and Huntsman relied on reports of a few select prison staff on Mr. Hill's functioning on death row; the credibility of the staff as "neutral" observers was highly questionable. There was no mention of how the prison identified Mr. Hill as mentally retarded until 2002 when *Atkins* was decided. The doctors did not talk with fellow death row inmates who would have informed them about how much assistance Mr. Hill required.

Nonetheless, the medical community has consistently cautioned against such practice. Death row is a highly structured environment. The ability of an intellectually disabled inmate to function "normally" in that setting does not equate to that same person being about to do so in a community setting.

B. There Are Significant Credibility Issues With The Experts The Warden Relies Upon.

The Warden asserts that Drs. Olley and Huntsman have "unimpeachable credibility" as if that should forestall any criticism of their opinions. Drs. Huntsman and Olley blindly followed the direction of the *Atkins* judge to only evaluate Mr. Hill's "current" functioning as of 2004. Dr. Hammer, the defense expert, was the only expert who followed the clinical guidelines for a proper and medically sound conclusion.

Dr. Huntsman had no specialized training, knowledge, and experience in the area of intellectual disabilities. She had never been involved in a capital post conviction proceeding, and especially never involved in an *Atkins* proceeding before Mr. Hill's case. RE 97-1, Atkins transcript at 1131.

Dr. Olley did possess specialized training and knowledge in intellectual disability. However, he abandoned that training and experience in this case. Dr. Olley should have known better than allow the evaluation to be done by committee where all three experts were present for the evaluation. Dr. Olley should have known better than to allow another person into the examination room to videotape the evaluation, let alone an investigator from the prosecutor's office who had been a police detective involved in Mr. Hill's questioning in 1985. Dr. Olley should have known better than to rely on prison staff for evidence of adaptive functioning. More importantly, Dr. Olley should not have allowed his opinion to be limited to Mr. Hill's "current" functioning. Bottom line, Dr. Olley knew better because of his experience and training, but he failed to conduct a proper evaluation and review of the record. That Dr. Olley was involved in nine *Atkins* cases does not render his opinion superior, as the Warden repeatedly asserts. In none of those was he required to assess present functioning.

The Warden fails to mention Dr. Hammer's specific qualifications. Most notably Dr. Hammer was 1) a Member of Division 33 of the APA, which specifically addresses issues of intellectual disabilities; 2) Director of Services at the Nisonger Center at Ohio State University, where the focus of the center is on intellectual disabilities; 3) Published and taught on intellectual disabilities; and 3) the expert at over 20 capital cases on intellectual disabilities. RE 97-1 Atkins Transcript at 141-154.

C. Contrary To The Warden's Assertion, This Was Not A "Close Case."

There is an abundance of school records, mental health evaluations, and testimonies of several individuals who worked with Mr. Hill. Such historical documentation is critical and important to a proper intellectual disability evaluation. The Warden glosses over the importance of this robust record to justify his position about Mr. Hill's case. Just because Dr. Olley claimed it was a close case, that does not make it so. It was only a close case to those who did not want to find Mr. Hill mentally retarded.

III. Despite The Warden's Best Effort To Reframe The Record, The Abundance Of Facts Supports Habeas Relief.

The Warden agrees this case rises and falls on whether Mr. Hill's adaptive functioning deficits are significant enough to warrant habeas relief. There is no dispute that Mr. Hill suffers from significant intellectual functioning with his IQ in the mid-60s. There is no dispute that Mr. Hill has significant deficient in academics, which is one area of adaptive functioning. Since Mr. Hill has been incarcerated his entire adult life, having been arrested when he was 18 years 7 months old, no adult records concern his adaptive functioning in the community.

The Warden claims that because the records note Mr. Hill's strengths as well as his weaknesses, the testimony by previous experts and witnesses he had deficits in adaptive functioning were "qualified." However, that is exactly what all psychological evaluations encompass – strengths and weaknesses. That negates no finding of significant deficits in adaptive functioning. *See* 2002 AAMR Manual, at 8 (intellectually disabled persons may have "strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation").

Dr. Olley never stated the testimony of the counselors at Mr. Hill's 1986 trial were to be ignored, only those witnesses never said his deficits were two standard deviations below the mean. Those professionals though would not have done that as they were not testifying about standardized tests results at the 1986 trial. Further, any testimony about diagnosis would be the responsibility of the mental health professionals who did testify. Drs. Darnell, Crush, and Schmidtgoessling testified that Mr. Hill had significant deficits in adaptive functioning. It is highly appropriate and standard procedure for experts to rely on the reports and testimony of people aware of the daily functioning of an individual when evaluating for intellectual disabilities. "Significant" in this context translates to the same as two standard deviations below the mean on a standardized assessment.

IV. Conclusion

The only just and proper result is to find that habeas relief is warranted under *Atkins*. The record supports a finding that not only were the state courts' application of the facts unreasonable, but that the state courts application of the law to those facts was unreasonable. To allow the death sentence to stand would be a miscarriage of justice. Mr. Hill requests this Court grant the petition for writ of certiorari, then vacate his death sentence.

Respectfully Submitted,

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