UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANNY LEE HILL,	)	
	)	**Case Nos. 99-4317**
Appellant,	)	**14-3718**
	)	
-vs-	)	
	)	
CARL ANDERSON, WARDEN,	)	***DEATH PENALTY CASE***
	)	
Appellee.	)	

APPELLANT HILL'S SUPPLEMENTAL EN BANC BRIEF

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STATEMENT OF ORAL ARGUMENT

By order of this Court, oral argument has been set before the *en banc* Court for December 2, 2020. (Doc 361; 99-4317).

I. INTRODUCTION

In 2018, a panel of this Court held that 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). On appeal, the United States Supreme Court did not disagree with the panel's bottom-line conclusion, but 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 Supreme Court instructed the panel on remand to consider whether its conclusion could be sustained under 28 U.S.C. § 2254(d)(2), i.e., was the state court decision based on unreasonable determinations of fact. *See id*. at 509. 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) (rehearing en banc granted, judgment vacated by *Hill v. Anderson*, 964 F.3d 590 (6th Cir. 2020)).

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 *Lott v. Ohio*, which explicitly "adopt[ed] the clinical definitions cited with approval in *Atkins*." *Williams v. Mitchell*, 792 F.3d 606, 616 (6th Cir. 2015); *see also Lott*, 779 N.E.2d 101, 1014 (Ohio 2002). These clinical guidelines provide, among other things, that intellectual disability consists of three prongs: (1) sub average 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, in accordance with *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.

As explained in his Supplemental Brief, Hill was repeatedly evaluated and consistently diagnosed as intellectually disabled in no fewer than ten (10)

[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).

professional evaluations over the course of his developmental history from ages six to nineteen.[2] *See* Docket No. 343 at pp. 5-17. In fact, prior to *Atkins*, Hill's intellectual disability was conceded by the Ohio trial courts, the juvenile courts, the Ohio Court of Appeals and Supreme Court, and even *this Court*. Faced with the prospect of contesting the extensively documented evidence of deficits in intellectual functioning and adaptive behavior prior to age eighteen, the State's strategy was to persuade the trial court to ignore it. This strategy succeeded. Over Hill's objections that such a ruling was contrary to the clinical guidelines, the trial court agreed with the State that its focus would be on whether Hill was "*presently* mentally retarded," based on his "*current mental status*" rather than on historical information, and instructed the experts to do the same. Supp APX 249-50.

Hill was evaluated by three experts (Drs. Hammer, Huntsman and Olley), who all agreed that Hill has significantly sub average intellectual functioning because his IQ has been consistently measured in the mid-60's across numerous test administrations. Thus, prong one was satisfied. There was a dispute about prongs two (adaptive behavior) and three (onset prior to age 18). Drs. Olley and Huntsman took the trial court's instructions to heart and focused heavily on Hill's *current*

[2] The *Atkins* claim has been thoroughly briefed with this Court, and counsel has previously highlighted the details of Danny's life as it relates to his intellectual disability. With the limited page length allowed, this supplemental brief focuses on legal arguments. Counsel also note whether *Atkins* counsel provided ineffective assistance has not been fully adjudicated.

prison behavior and verbal behavior to support their opinions he did not satisfy the second and third prongs. Supp APX 1126 ("The Court ordered evaluations of Mr. Hill for the purpose of addressing the issue of whether he is *presently* mentally retarded."); 1124-25 ("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."). Only Dr. Hammer eschewed the trial court's directive and adhered to the clinical guidelines by carefully evaluating Hill's historical record. Dr. Hammer found that the record clearly demonstrated significant deficits in adaptive behavior prior to Hill's eighteenth birthday, and Hill therefore satisfied all three prongs of the clinical definition. Supp APX 1110 ("[T]hese records provide an extensive and consistent documentation that Mr. Hill has demonstrated, from an early age, sufficient intellectual and adaptive behavior deficits to qualify for a diagnosis of Mild Mental Retardation."). The trial court rejected Hill's *Atkins* claim, and the Ohio Court of Appeals affirmed in a reasoned opinion issued on July 11, 2008. *State v. Hill*, 894 N.E.2d 108 (Ohio Ct. App. 2008).

III. ARGUMENT

Danny Hill is clearly a person with intellectual disability. The state court's decision to the contrary turns on unreasonable factual determinations, warranting *de*

novo review. Any reasonable review of the record demonstrates 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 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 Hill failed to establish onset of his disability before the age of eighteen.

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

After acknowledging that 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 Hill at the prison over the course of three days in April of 2004. On the second full day of testing, Hill got upset and cried, causing them to abandon their testing plans. Supp APX 1112.

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 Hill's intellectually disabled mother served as the informant and the test administrators reported that she overstated 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 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 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 Hill's mother and grandmother (Supp APX 2527-40, 2593-2605, 2742-68). Moreover, there is nothing scientifically wrong with considering collateral information. Indeed, 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, in the face of 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 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 Hill's failure to cooperate during the joint evaluation. Even had Hill been cooperative, the clinical guidelines in place at the time clearly prohibited an assessment based on 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.[3] 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 Hill's present

[3] As the State's expert, Dr. Huntsman, 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.'").

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 Hill's lack of effort—that left these experts with a faulty basis for their opinions.

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. Moreover, 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) Hill's Trial for the Murder of Raymond Fife; (3) Death Row Records; and, (4) Hill's Appearances in Court.

a. Public School Records.

Regarding 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 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 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 that school officials explicitly related Hill's behavior problems *to his intellectual disability*.[4] The state court made absolutely no mention of the six professional

[4] 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

evaluations reported in 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 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 many references in the school records to 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," 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

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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.

about having MR/ID. First, there is not enough available information; second, there is a lack of normative information."). That 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 Hill never scored 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 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 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 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 Hill's adaptive behavior was on par with his peers. 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.

b. Hill's Trial for the Murder of Raymond Fife.

Next, the state court found 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. 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 Hill was able to "hold his own" during the interrogation is simply incorrect. A review of the interrogation transcript reveals Hill offered rambling, confusing answers to even short, concrete questions and readily accepted the police's version of events. Even the officers interrogating told 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.

c. Death Row Records.

At the time of 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 Hill and Andrew Gray, a newspaper reporter, showed "a high level of functional ability with respect to 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 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 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 very 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 are able to observe. The state court's conclusions in this section once again rely heavily on verbal behavior, which is clinically inappropriate. Thus, all of the court's findings here are useless for determining the actual question at issue. Even so, 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 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. Hill struggled to such an extent that Gray eventually took the documents and read them aloud himself. *Id*. at 1288. The state court's conclusion that Hill was intimately familiar with sophisticated legal processes is not supported by the record either. During the interview, 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 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 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 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 Hill is not a person with intellectual disability. For example, the prison records demonstrate:

- The prison long recognized that Hill was illiterate. Supp APX 1485, 1486, 1511, 1512, 1553, 1579, 1784, 1788, 1824.
- The prison identified Hill as mentally retarded when he first arrived on death row and thereafter. Supp APX 1789, 1815, 1817, 1819-20.
- Hill has had problems with his hygiene throughout his incarceration. Supp APX 1396, 1568, 1573, 1645, 1646.
- 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.
- Hill had to ask for family phone numbers. Supp APX 1483, 1484, 1571, 1818.
- Hill lacked the skills for the job cleaning the range. Supp APX 1325.
- Hill's prison job as a porter involved distributing cleaning supplies that were sorted by color, so Hill did not have to read the supplies' instructions. Atkins Transcript 363, 1381.

Finally, the state court's conclusion that Hill's self-care was "poor but not terrible," bears disturbing resemblance to the court's reliance on the "bright, perceptive boy" comment from 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 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").

d. Hill's Appearances in Court.

The state court concluded its analysis by relying on the trial court's "'many opportunities' to observe 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 previously 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 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 already 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 Hill's "present functioning." The trial court effectively gutted 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.[5] The Supreme 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

[5] 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).

evaluating this decision, the Supreme 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 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 the Supreme 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 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 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 Hill is entitled to relief.

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

The issue before this Court is narrow. There is no dispute that prong one is satisfied. The only remaining question is whether Hill has established deficits in adaptive functioning that manifested prior to age eighteen. Hill had to show deficits in two out of ten adaptive skill areas under the clinical definitions the state courts purported to apply. 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 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 Hill suffers from significant deficits in social skills, communication, self-direction, self-care, and work. Therefore, Hill satisfies prong two.

Prong three of the definition of intellectual disability is also satisfied. Virtually all of the social history records (literally thousands of pages) were collected before Hill's eighteenth birthday. In addition, the original trial testimony related directly to the developmental period, since Hill was arrested and charged with the capital crime only shortly after his eighteenth birthday. Thus, the record also clearly establishes Hill's deficits in both intellectual functioning and adaptive behavior manifested before the age of eighteen. Upon *de novo* review, this Court should issue the writ of habeas corpus because Hill is a person with intellectual disability and therefore *Atkins* forbids his execution.

IV. CONCLUSION.

Habeas relief is warranted and appropriate under 28 U.S.C. §2254(d)(2). This Court should once again find that Hill is entitled to relief on the *Atkins* claim, and other claims raised in the original brief. Alternatively, the Court should remand for further proceedings either in the federal district court or in state court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify the above brief in 14-point Times New Roman font, and is no more than 25 pages in length, as directed by the Court's briefing schedule, and, therefore, complies with Fed. R. App. P. 32(a)(7)(B).

/s/ Vicki Ruth Adams Werneke
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CERTIFICATE OF SERVICE

I certify that on August 24, 2020, a true copy of the foregoing **Appellant Hill's Supplemental En Banc Brief** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's electronic filing system.

/s/ Vicki Ruth Adams Werneke
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