Case Nos. 99-4317; 14-3718

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEATH PENALTY CASE

DANNY HILL,	:	
	:	On Appeal from the
Petitioner-Appellant,	:	United States District Court
	:	for the Northern District of Ohio
v.	:	
	:	District Case No.
TIMOTHY SHOOP, WARDEN	:	4:96 CV 00795
	:	
Respondent-Appellee.	:	

WARDEN-APPELLEE'S SUPPLEMENTAL EN BANC BRIEF

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
Ohio Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
STEPHEN E. MAHER
Assistant Attorney General
Criminal Justice Section, Capital Crimes Unit
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
bflowers@ohioattorneygeneral.gov

Counsel for Warden Timothy Shoop

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Danny Hill, sentenced to die for one of the most heinous murders in Ohio history, says he is intellectually disabled and thus ineligible for the death penalty. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002). In this habeas case, the question is not whether Hill *is* intellectually disabled. Instead, the Court is presented with a much narrower question: Did the Ohio Court of Appeals, in holding that Hill failed to carry his burden to prove intellectual disability, rely on an application of Supreme Court precedent, or a factual determination, that was wrong beyond fairminded disagreement? *See* 28 U.S.C. §§2254(d)(1) & (2). Because the answer is "no," the Court must affirm the District Court's decision denying Hill relief.

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, 313–14 (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.

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), *online at* https://tinyurl.com/yxrleunt. 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." *State v. Hill*, 177 Ohio App. 3d 171, 192 (2008). 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," *id.*, 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. The Supreme Court of the United States denied Hill's *certiorari* petition. And the state courts denied postconviction relief. *Hill*, 64 Ohio St. 3d at 317, 336; *Hill v. Ohio*, 507 U.S. 1007 (1993); *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, the Supreme Court decided *Atkins v. Virginia*, holding that the Eighth Amendment prohibits executing the intellectually disabled. 536 U.S. at 321. In response, this Court

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 Hill*, 177 Ohio App. 3d at 178. In *Atkins* itself, the Supreme 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 developed in reliance on "clinical 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 agreed, required functioning two standard deviations below the mean—the equivalent to performance in the bottom 2.5 percent of socie-

ty. Hear. Tr., R.97-1, PageID#160, 172–73, 698, 936, 1049–50, 1526; *see* Douglas G Altman & J Martin Bland, *Standard Deviations and Standard Errors*, 331 Brit. Med. J. 903, 903 (2005). To diagnose adaptive deficits, psychologists can use either a composite score on a psychometric test or reported evidence of adaptive behavior. Hear. Tr., R.97-1, PageID#160, 172.

The trial court held an eleven-day hearing to develop the facts pertinent to this analysis. *See Hill*, 177 Ohio App. 3d at 179. Many of those facts came in the form of anecdotes—a consequence of Hill's failing "to cooperate with experts retained to evaluate him." *Id.* at 191. 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, at the time of 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 the *Atkins* case was decided and [a prison official] believed that Hill was 'playing a game' to make others think he was retarded."

Id. at 192. Other anecdotes favored Hill. His school records suggested deficits in "functional academics," "hygiene and self-care," "social skills," and "self-direction." *See Hill v. Anderson*, 960 F.3d 260, 272–73 (6th Cir. 2020) (*per curiam*), *vacated, en banc rehearing granted*, 964 F.3d 590. 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.

Id. 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. *See id.* at 273.

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, prosecutor Dennis Watkins knew this would be a close case. He 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. Hear. Tr., R.97-1, PageID#636, 638, 640. He had previously testified in nine *Atkins* cases, each time testifying *in support of* the defendant's intellectual disability. *Id.*, PageID#644, 726, 748. Not so here. Dr. Olley opined that there was not enough in the record to justify an intellectual-disability diagnosis. *Id.*, PageID#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.*, PageID#861, 783, and that Hill's many years in prison complicated the task because a prison setting makes a full assessment of adaptive behavior "impossible," *id.*, PageID#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.*, PageID#697. So it was important to keep in mind 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.*, PageID#665. Olley concluded that the totality of evidence did not support an affirmative answer.

First, the mixed evidence from Hill's youth stopped short of justifying an intellectual-disability diagnosis. Hill's scores on standardized tests of adaptive behav-

ior—the only tests that looked comprehensively at Hill's functioning—were "not supportive of a diagnosis of" intellectual disability. *Id.*, PageID#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.*, PageID#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 id.*, PageID#664–65, 783. Olley also considered the information in Hill's school records. "Much of" that information suggested adaptive deficits. *Id.*, PageID#940. But these records carried limited weight: they were "anecdotal" and "not written for the purpose of diagnosing mental retardation." *Id.*, PageID#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 intellectually disabled person reach out to the press to make his case, as Hill had. *Id.*, PageID#763. Hill's "language" and "arguing on his own be-

half" were "substantially more sophisticated than any of the other defendants with whom" Olley had worked. *Id.*, PageID#1763 (emphasis added). 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.*, PageID#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.*, PageID#665, 698, 779–83.

The court heard from two other experts: one appointed by the court and another retained by Hill. *Hill*, 177 Ohio App. 3d at 178. These experts, like Olley, interviewed Hill in prison shortly before the hearing. *Id.* at 178–79. 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." Hear. Tr., R.97-1, PageID#754; *see also id.*, PageID#264–65, 754–63, 1005–06. Yet they came to different conclusions regarding intellectual disability. The court-appointed expert—Dr. Nancy Huntsman, a forensic psychologist with experience diagnosing intellectual disability for courts in northeast Ohio, *id.*, PageID#959–60, 966–67—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.*, PageID#1130; *see also id.*, PageID#1136. Still, after reviewing everything, she found that Hill's "adaptive behavior [was] considerably above" the two-standard-deviation threshold. *Id.*, PageID#1049–50. She noted in particular that Hill's interactions with her involved "remarkable" detail and use of language. *Id.*, PageID#1032.

The only expert who disagreed was the one Hill retained himself, Dr. David Hammer. *Id.*, PageID#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 his ability to conduct a typical adaptive-behavior evaluation. *Id.*, PageID#430–31. And, as noted above, he conceded that Hill malingered during testing. Nonetheless, Hammer believed he could diagnose Hill as disabled based on the records from Hill's youth. *Id.*, PageID#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 intellectually disabled. 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 mentally retarded, not on the State to prove that he is not." 177 Ohio App. 3d at 191. 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. *Id.* at 193–94. 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. *Id.* at 189. 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." *Id.* at 191. No doubt, much of that 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." *Id.* at 192. 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.* at 192–93.

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. *Hill v. Anderson*, 2014 U.S. Dist. LEXIS 86411, *174 (N.D. Ohio, June 25, 2014). This Court reversed, *Hill v. Anderson*, 881 F.3d 483, 501 (6th Cir. 2018), only to be summarily reversed by the Supreme Court. The high Court held that the panel 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 this Court 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. After the same panel awarded relief again, the *en banc* Court agreed to rehear the case.

ARGUMENT

Hill is not entitled to habeas relief under either 28 U.S.C. §2254(d)(1) or 28 U.S.C. §2254(d)(2). This Court should affirm the District Court's judgment.

One note before proceeding: The only state-court decision that matters in an AEDPA case is the last-reasoned state-court decision addressing the claim at issue. *See Magnum Reign v. Gidley*, 929 F.3d 777, 780 (6th Cir. 2019). Here, that is the de-

cision of the Ohio Court of Appeals, which issued the last-reasoned opinion on Hill's *Atkins* claim. Regardless, most or all of what follows could be said of the trial court's decision, too.

I. Hill is not entitled to relief under §2254(d)(1).

Section 2254(d)(1) allows courts to award habeas relief "only if the state court's adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of,' Supreme Court precedent that was 'clearly established' at the time of the adjudication." *Hill*, 139 S. Ct. at 506 (quoting §2254(d)(1)). At the time of Hill's *Atkins* proceedings, the only Supreme Court precedent addressing the Eighth Amendment's application to intellectually disabled defendants was *Atkins* itself. The question, then, is whether the Ohio Court of Appeals' decision was "contrary to" or "an unreasonable application of" *Atkins*. It was not.

First, the state court's 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 v. Taylor*, 529 U.S. 362, 405–06 (2000). Because *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 prohibition, *Hill*, 139 S. Ct. at 507 (alteration in original) (quoting *Atkins*, 536 U.S. at 317), the state court in Hill's case could not have "applie[d] a rule that contradict[ed] the governing law set forth in" *Atkins*. *Williams*, 529 U.S. at 405. And no one has ever argued that the facts in this case are "materially indistinguishable" from the facts in *Atkins*. *Id*. at 406. Even if they were, the state courts here did not "arrive[] at a different result" than *Atkins*, *id*., since *Atkins* did not apply its nonexistent standard to the case before it.

Second, the state courts in Hill's case did not commit an "unreasonable application" of *Atkins*. An "unreasonable application" is one "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The state courts here committed no such error. They assessed Hill's disability using a three-part standard that the Supreme Court of Ohio developed using the "[c]linical definitions of" intellectual disability that *Atkins* "cited with approval," *Lott*, 97 Ohio St. 3d at 305. Given *Atkins*'s delegation of standard-making to state courts, it was not objectively unreasonable to apply the *Lott* test.

True, this Court has held that, "in the *Atkins* context, 'clearly established governing law' refers to … controlling state law decisions applying *Atkins*." *Wil-*

liams v. Mitchell, 792 F.3d 606, 612 (6th Cir. 2015) (citing *Van Tran v. Colson*, 764 F.3d 594, 617–19 (6th Cir. 2014)). The panel relied on that precedent to suggest that any misapplication of the *Lott* test would constitute a misapplication of "clearly established Federal law," and thus permit an award of habeas relief under §2554(d)(1). *Hill*, 960 F.3d at 270 & n.6. The *en banc* Court should take this opportunity to abandon this misguided rule. It contradicts the text of §2254(d)(1), which permits relief only where a state court botched "clearly established Federal law, *as determined by the Supreme Court of the United States*." (emphasis added). The Supreme Court has held that only its own precedent can "clearly establish[]" the law for AEDPA purposes. *Kernan v. Cuero*, 138 S. Ct. 4, 9 (2017) (*per curiam*) (quotation omitted). Because state-court precedent is not Supreme Court precedent, any misapplication of state-court precedent is irrelevant in an AEDPA case.

Regardless, the state courts in Hill's case did not contradict or unreasonably apply state-court precedent. The panel held otherwise, reasoning that the Ohio Court of Appeals "exclude[d] or discount[ed]" evidence from Hill's youth. *Hill*, 960 F.3d at 270. As explained later, the Ohio Court of Appeals did not fail to consider such evidence. The panel's contrary conclusion boils down to a disagreement over the Ohio Court of Appeals' *weighing* of the relevant evidence. That disagreement is irrelevant: because the Ohio Court of Appeals did not apply the wrong gov-

erning standard, reach a different conclusion than an Ohio Supreme Court case involving materially identical facts, or apply any Ohio Supreme Court case in a way that was wrong beyond fairminded debate, *Harrington*, 562 U.S. at 103, it did not contradict or unreasonably apply state-court precedent.

II. Hill is not entitled to relief under §2254(d)(2).

A. Section 2254(d)(2) permits relief *only* in cases where the state court's adjudication of a 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." The petitioner must identify a factual determination so obviously wrong that all "[r]easonable minds reviewing the record" would agree that the state court erred. *Rice v. Collins*, 546 U.S. 333, 341 (2006). In other words, the record must "*compel* the conclusion that the [state] court had no permissible alternative" but to arrive at a conclusion other than the one it reached. *Id.* (emphasis added); *see Carter v. Bogan*, 900 F.3d 754, 768 (6th Cir. 2018); *accord* 28 U.S.C §2254(e)(2). If *any* "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); *see Burt v. Titlow*, 571 U.S. 12, 20 (2013). Petitioners must also show that the state-court decision was "based on" the unreasonable factual determination—that the error affected the ultimate decision. §2254(d)(2); *see also*

Carter, 900 F.3d at 768; *Byrd v. Workman*, 645 F.3d 1159, 1171–72 (10th Cir. 2011).

B. Hill is not entitled to relief under §2254(d)(2). 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 *Lott*), 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, *Hill*, 177 Ohio App.3d at 191–92; *Hill*, 960 F.3d at 272–74—hardly "compel[s] the conclusion" that Hill carried his burden. *Rice*, 546 U.S. at 341. That is especially so since the three experts, including Hill's own, admitted that they could not conduct a standardized adaptive-behavior test on Hill at the time of the hearing.

Regardless of what one thinks of the anecdotal evidence, however, Hill's case under §2254(d)(2) fails as a matter of law because the state court's conclusion aligns with "credible testimony" from two "experts who concluded that Hill's adaptive capabilities are greater than those of a person with mental retardation."

Hill, 177 Ohio App. 3d at 191. 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 conducts an analysis—and when the defendant failed to put on evidence contradicting that analysis beyond reasonable debate—it is not *unreasonable* for the trial court to rely on that expert testimony. Such testimony *per se* establishes the ability of "reasonable minds" to agree with the state court's finding, defeating any §2254(d)(2) claim. *See O'Neal v. Bagley*, 743 F.3d 1010, 1023 (6th Cir. 2013); *Carter*, 900 F.3d at 771; *Apelt v. Ryan*, 878 F.3d 800, 837 (9th Cir. 2017); *Larry v. Branker*, 552 F.3d 356, 370 (4th Cir. 2009).

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. Hear. Tr., R.97 1, PageID#644, 726, 748. Dr. Huntsman, had diagnosed more than 250 defendants who had suspected intellectual limitations. *Id.*, PageID#968. Both experts fully considered the evidence from Hill's youth. *See id.*, PageID#665, 779, 1175. And even Hill's own expert lent credibility to the conclusions of Olley and Huntsman by conceding that Hill's diagnosis presented a diffi-

cult question. *See id.*, PageID#156, 284.

In cases arising under §2254(d)(2), "courts strain the limits of reasonableness by rejecting expert opinions based exclusively on the courts' own inexpert analysis." *Van Tran*, 764 F.3d at 610. That is exactly what the panel did here. For example, the panel declared that Drs. Olley and Huntsman "ignored evidence of adaptive deficiencies from Hill's school years, or set it aside as irrelevant to the task at hand," and that these experts never "grappled with the extensive past evidence of Hill's intellectual disability." 960 F.3d. at 274, 277. That is false; they considered this evidence and deemed it insufficient to diagnose intellectual disability. *See above* 7–9. The rest of the panel's attempt to discredit the expert analysis amounts to very little: the long discussion, though dressed up with numerous citations and tendentious descriptions, amounts to a disagreement with the experts' weighing of the evidence. 960 F.3d at 274–78. That reweighing is not a task that habeas courts may perform. *Van Tran*, 764 F.3d at 610; *O'Neal*, 743 F.3d at 1023.

C. Hill's arguments for relief under §2254(d)(2) rest on a slew of supposed flaws in the Ohio Court of Appeals' opinion. None is even relevant given the court's reliance on testimony from two credible experts. Their testimony *per se* establishes that reasonableness of the state courts' determination that Hill failed to prove intellectual disability. *See O'Neal*, 743 F.3d at 1023. Regardless, some of the

supposed errors are not errors *of fact* at all, and none entitles Hill to relief.

"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 Hill*, 177 Ohio App. 3d at 191; Br.5–10. He is wrong for three reasons. *First*, this comment is a characterization of the record, not a factual "determination," and is therefore irrelevant for purposes of §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. *See Byrd*, 645 F.3d at 1171–72. *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. *Hill*, 177 Ohio App.3d at 191. 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. R. 97-1, PageID#430–31, 754, 780, 783.

Hill says "the overwhelming majority of the record was not 'anecdotal' at all." Br.6. But he supports this by citing a very small portion of an exceptionally large record. Br.6–7. And some of the evidence he cites (such as reports from school records) *is* anecdotal. Thus, Hill fails to show that the state court unreason-

ably concluded that the experts had to assess Hill's adaptive deficits using "collateral, largely anecdotal evidence." *Hill*, 177 Ohio App. 3d at 191. What is more, the non-anecdotal evidence that Hill identifies—in particular, the psychological tests performed in school and for the mitigation phase of Hill's direct proceedings—is largely irrelevant: those tests, as the experts explained, were administered for different purposes and thus shed little light on the question whether Hill's adaptive functioning was two standard deviations below average. Hear. Tr., R.97 1, PageID#932–34, 1046–47.

Evidence from Hill's youth. Hill also claims that the state court looked at only "select[]" details in the record, and made "no mention" of certain tests and other information supporting Hill's claim. Br.10–18. This is irrelevant for two reasons. *First*, 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).) *Second*, there is no evidence that the Ohio Court of Appeals ignored anything in the record. To the contrary, its thorough discussion evinces a careful review of the record, 177 Ohio App. 3d at 188–94, 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." *Id.* at 191. (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* Br.11.) In addition, the court relied on testimony from experts who themselves examined the whole record and stressed the importance of doing so. *See* Hear. Tr., R.97-1 PageID#665, 779, 714, 1129, 1133, 1175, 1762. True, the court did not expressly "mention" or discuss every piece of evidence that supported Hill, including certain evaluations, letters, and other records. Br.11–13. But it did not have to. 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 covert §2254's deferential review into an easy game of gotcha for petitioners.

Hill describes as "sinister" the state court's citing evidence that one teacher described Hill as "a bright, perceptive boy with high reasoning ability." 177 Ohio App.3d at 191. Hill says that, because that teacher "worked with Hill at the Fairhaven Program for The Mentally Retarded," the Court's reliance on this statement was unreasonable. Br.13. Not so. This description suggests that Hill performed well relative to his fellow students, at least some of whom were presumably intellec-

tually disabled. That supports Dr. Olley's determination that Hill's adaptive deficits were close to, but not beyond, the two-standard-deviation threshold. Regardless, the Ohio Court of Appeals' *accurate* restatement of evidence is not itself an unreasonable factual determination. Nor does it make the only factual determination at issue—that Hill failed to carry his burden of proof as to adaptive deficits—incorrect beyond fairminded disagreement.

Timing. Hill takes issue with what he thinks was the state courts' exclusive focus on his adaptive functioning at the time of the 2005 *Atkins* hearing. Br.3, 4, 22. According to Hill, the trial court "told the experts to ignore" historical evidence of Hill's disability. *Id.* at 22. Again, this is an argument that belongs under the §2254(d)(1) heading, since it faults the court's supposed *legal* determination to look at evidence from a particular time. And since *Atkins* established no rule about the timeframe relevant to an intellectual-disability diagnosis, *Hill*, 139 S. Ct. at 507; *Ochoa v. Workman*, 669 F.3d 1130, 1137 (10th Cir. 2012), the §2254(d)(1) argument fails. In any event, 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. Hear. Tr., R.97-1, PageID#779–83, 1051–54. Dr. Olley's supplemental expert report even concludes that "records from [Hill's] childhood fail[ed] to substantiate a childhood diagnosis of" intellectual disability. Supp. App'x, R.99, PageID#3088.

And both the state trial *and* appellate courts expressly found, based in large part on the experts' testimony, that Hill did not "demonstrate significant limitations in two or more adaptive skills" before age eighteen. *Hill*, 177 Ohio App. 3d at 194; *accord* Supp. App'x, R.99, PageID#3581–82. Since that determination is supported by record evidence, it is not "unreasonable" for purposes of §2254(d)(2).

Hill's behavior in 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.'" Br.14 (quoting *Hill*, 177 Ohio App. 3d at 192). That finding cannot be unreasonable, because it was supported by Dr. Olley's expert testimony. 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." Br.14 (quoting 1992 AAMR Manual at 40). It was not unreasonable—not wrong beyond "fairminded disagreement"—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, even if his "rambling" answers were not what one would expect from a person of average or high intelligence. Br.14.

Prison records. Hill next faults the state court for concluding that Hill functioned well in prison. Br.15–16. That conclusion was supported by testimony from prison guards and prison records. *See* Hear. Tr., R.97-1, PageID#1252–53, 1377–78. While other evidence of Hill's conduct in prison pointed the other way, Br.17–18, it was not "unreasonable" for the state court to credit the testimony and cite it as one piece of anecdotal information supporting the conclusion that Hill did not carry his burden to prove intellectual disability. What is more, the State's experts conceded this evidence was of limited value, *see* Hear. Tr., R.97-1, PageID#869, 1130, 1136, and the state courts' decisions did not give the evidence significant value.

Appearance. Finally, Hill 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. *Hill*, 177 Ohio App. 3d at 193; Br.18. 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 layman") observation that the Ohio Court of Appeals qualified further (calling it "anecdotal," 177 Ohio App. 3d at 191), does not show that the Court of Appeals erred beyond fairminded debate in concluding that Hill failed to carry his burden of proof.

* * *

Hill's brief takes one view of the record. The Ohio courts, relying on two experts, took another view. Because that alternative view is supported by record evidence, it cannot be disrupted on habeas review. §2254(d)(2).

III. Hill's claim regarding assistance of *Atkins* counsel fails.

Hill says in a footnote that he is entitled to relief based on the ineffective assistance of his *Atkins* counsel. He apparently wishes to preserve this for further rounds of litigation. Br.3 n2. The Court should reject this claim now. The "ineffectiveness" of counsel in "State collateral post-conviction proceedings shall not be a ground for relief," 28 U.S.C. § 2254(i), and the claim thus fails as a matter of law, *Post v. Bradshaw*, 422 F.3d 419, 423 (6th Cir. 2005).

CONCLUSION

The Court should affirm the District Court's judgment.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/Benjamin M. Flowers
BENJAMIN M. FLOWERS*
Ohio Solicitor General
*Counsel of Record
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
STEPHEN E. MAHER
Assistant Attorney General
Criminal Justice Section, Capital Crimes Unit
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
bflowers@ohioattorneygeneral.gov

Counsel for Warden Timothy Shoop

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this brief complies with the page limit for this supplemental brief as it is shorter than 25 pages. See *En Banc* Briefing Order, No. 361 (July 15, 2020).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

s/Benjamin M. Flowers
Benjamin M. Flowers
Ohio Solicitor General

CERTIFICATE OF SERVICE

I certify that on October 5, 2020, a true copy of the foregoing, Warden-Appellee's Supplemental *En Banc* Brief, was served on all parties or their counsel of record through the CM/ECF system.

s/Benjamin M. Flowers
Benjamin M. Flowers
Ohio Solicitor General