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Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0188p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DANNY HILL,

Petitioner-Appellant,

v.

TIMOTHY SHOOP, Warden,

Respondent-Appellee.

Nos. 99-4317/14-3718

On Petition for Rehearing En Banc

United States District Court for the Northern District of Ohio at Youngstown.
No. 4:96-cv-00795—Paul R. Matia and John R. Adams, District Judges.

Argued En Banc: December 2, 2020

Decided and Filed: August 20, 2021

Before: SUTTON, Chief Circuit Judge; MERRITT, MOORE, COLE, CLAY, GIBBONS, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, BUSH, LARSEN, NALBANDIAN, and READLER, Circuit Judges.*

COUNSEL

ARGUED EN BANC: Vicki Ruth Adams Werneke, FEDERAL PUBLIC DEFENDER'S OFFICE, Cleveland, Ohio, for Appellant. Benjamin M. Flowers, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON SUPPLEMENTAL BRIEF:** Vicki Ruth Adams Werneke, Lori B. Riga, FEDERAL PUBLIC DEFENDER'S OFFICE, Cleveland, Ohio, for Appellant. Benjamin M. Flowers, Stephen E. Maher, Michael J. Hendershot, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. Sarah K. Campbell, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, Kevin J. Truitt, DISABILITY RIGHTS OHIO, Columbus, Ohio, for Amici Curiae.

*Pursuant to 6 Cir. I.O.P. 35(c), Composition of the En Banc Court, Judge Merritt, senior judge of the court who sat on the original panel in this case, participated in this decision. Judge Murphy recused himself from participation in this decision.

GIBBBONS, J., delivered the opinion of the court in which SUTTON, C.J., and GRIFFIN, KETHLEDGE, THAPAR, BUSH, LARSEN, NALBANDIAN, and READLER, JJ., joined. MOORE, J. (pp. 29–63), delivered a separate dissenting opinion, in which MERRITT, COLE, CLAY, WHITE, STRANCH, and DONALD, JJ., joined. An excerpt of the panel's 2018 opinion, *see* 881 F.3d 483 (6th Cir. 2018), is appended, (app. 64–81).

OPINION

JULIA SMITH GIBBONS, Circuit Judge. In this death penalty habeas case, appellant Danny Hill seeks collateral review of his conviction for the murder of Raymond Fife, a twelve-year-old boy. The case has been to the Supreme Court once and before panels of this court twice. The core issue in the underlying state case was whether Hill was ineligible for the death penalty because he is intellectually disabled, a question that became pertinent after the Supreme Court's 2002 decision in *Atkins v. Virginia*. 536 U.S. 304 (2002). Before us, the issues are whether, under governing AEDPA review principles, the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or 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). We conclude that the state court's resolution of the issue does not meet either of the criteria that would permit a federal court to disturb a state conviction. Thus, we affirm the district court's denial of Hill's petition for a writ of habeas corpus.

I.

In 1986, a three-judge Ohio state court panel convicted Hill of the murder of Raymond Fife, a twelve-year-old boy. *State v. Hill*, 894 N.E.2d 108, 111 (Ohio Ct. App. 2008). Hill abused and injured Fife in multiple horrible ways. *Id.* Fife was found by his father and died two days later. *Id.* The same panel sentenced Hill to death. *Id.* During the mitigation stage of Hill's sentencing, the court heard testimony from three medical professionals about whether Hill was

intellectually disabled.[1] One found that Hill's intelligence level "fluctuat[ed] between mild retarded and borderline intellectual functioning," another that Hill fell "in the mild range of mental retardation," and the last that Hill's "upper level cortical functioning indicated very poor efficiency." *Id.* at 112 (quoting *State v. Hill*, 595 N.E.2d 884, 901 (Ohio 1992)). After considering this evidence, the Ohio state court found that the record evidence suggested that Hill had a "diminished mental capacity" and that testimony suggested he would be "categorized as mildly to moderately retarded." *Id.* (quoting *State v. Hill*, Nos. 3720, 3745, 1989 WL 142761, at *32 (Ohio Ct. App. Nov. 27, 1989)). The Ohio Court of Appeals and Ohio Supreme Court both affirmed the trial court's imposition of the death penalty because they found that the aggravating circumstances outweighed any mitigating factors, including Hill's diminished intellectual capacity. *Id.*

In 2002, the Supreme Court decided *Atkins v. Virginia*, which held that it was unconstitutional to execute the intellectually disabled. 536 U.S. 304 (2002). The *Atkins* Court provided some discussion of the clinical definitions of intellectual disability, but it left it to the states to "develop[] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 317 (second alteration in original) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)). In *State v. Lott*, the Ohio Supreme Court articulated a three-part test for establishing intellectual disability based on *Atkins*: "(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." 779 N.E.2d 1011, 1014 (Ohio 2002), *overruled by State v. Ford*, 140 N.E.3d 616 (Ohio 2019).

In response to *Atkins*, Hill filed a petition for state post-conviction relief in 2003. *State v. Hill*, 894 N.E.2d at 113. The trial court held an evidentiary hearing, and Hill, the prosecution, and the court each chose a medical expert to evaluate Hill's intellectual capabilities. *Id.* Hill retained Dr. David Hammer, a professor and director of psychology services at the Ohio State University; the prosecution hired Dr. Gregory Olley, a professor and director of the Center for

[1]At the time, the condition was referred to as "mental retardation." While some of the past decisions and material we cite use that outdated terminology, the preferred term in the current lexicon is "intellectual disability." *See Hall v. Florida*, 572 U.S. 701, 704 (2014).

the Study of Development and Learning at the University of North Carolina at Chapel Hill; and the court appointed Dr. Nancy Huntsman, a forensic psychologist who worked at the Court Psychiatric Clinic in Cleveland, Ohio. *Id.* The Ohio Court of Appeals, in reviewing Hill's *Atkins* claim, described the trial court proceedings as follows:

> In April 2004, Drs. Olley, Hammer, and Huntsman evaluated Hill at the Mansfield Correctional Institution for the purposes of preparing for the *Atkins* hearing. At this time, Hill was administered the Wechsler Adult Intelligence Scale ("WAIS–III") IQ test, the Test of Mental Malingering, the Street Survival Skills Questionnaire, and the Woodcock–Johnson–III. The doctors concurred that Hill was either "faking bad" and/or malingering in the performance of these tests. As a result, the full scale IQ score of 58 obtained on this occasion was deemed unreliable, and no psychometric assessment of Hill's current adaptive functioning was possible. Thus, the doctors were forced to rely on collateral sources in reaching their conclusions, such as Hill's school records containing evaluations of his intellectual functioning, evaluations performed at the time of Hill's sentencing and while Hill was on death row, institutional records from the Southern Ohio Correctional Institution and the Mansfield Correctional Institution, interviews with Hill, corrections officers, and case workers, and prior court records and testimony.
>
> The evidentiary hearing on Hill's *Atkins* petition was held on October 4 through 8 and 26 through 29, 2004, and on March 23 through 24, 2005. Doctors Olley and Huntsman testified that in their opinion, Hill is not mentally retarded. Doctor Hammer concluded that Hill qualifies for a diagnosis of mild mental retardation.

Id. at 113–14.

The trial court held that Hill was not intellectually disabled and rejected his *Atkins* claim. *Id.* at 114. The Ohio Court of Appeals affirmed, finding that Hill failed to prove he suffered from two or more significant limitations in adaptive skills that manifested before age 18. *Id.* at 126–27. The Ohio Supreme Court, with two justices dissenting, declined to hear Hill's appeal. *State v. Hill*, 912 N.E.2d 107 (Ohio 2009) (Table).

Hill then filed a petition for a writ of habeas corpus, which the district court denied. The district court concluded that Hill had not overcome the highly deferential standard of review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[2] *Hill v.*

[2]The district court was critical of the Ohio Court of Appeals opinion. Some of us agree with some of its observations. Here, however, we do not itemize the opinion's possible flaws in order to focus attention on our

Anderson, No. 4:96 CV 00795, 2014 WL 2890416, at *51 (N.D. Ohio June 25, 2014). The district court explained that while reasonable minds may disagree with the state court's determination and weighing of the evidence, the state court's "conclusion regarding Hill's adaptive behavior *at the time he filed his* Atkins *claim* was supported by sufficient credible evidence and, most importantly, the opinions of two experts." *Id.*

Hill appealed, and a panel of judges on this court reversed the district court's decision on Hill's *Atkins* claim. The panel found that "the state court judgment . . . amounted to an unreasonable application of the standard articulated by the Supreme Court in *Atkins* and as later explained by *Hall* and *Moore*."[3] *Hill v. Anderson*, 881 F.3d 483, 489 (6th Cir. 2018). In addition to his *Atkins* claim, Hill raised four other issues on appeal: an ineffective assistance of counsel claim related to his *Atkins* hearing, a *Miranda* claim, a claim of prosecutorial misconduct, and a due process claim based on the trial court's alleged failure to hold a pretrial competency hearing. *Id.* at 487. The panel pretermitted Hill's ineffective assistance of counsel claim and affirmed the district court's denial of the other three claims, which Hill has not challenged. *Id.* The Warden filed a petition for rehearing *en banc*, which was denied. He then filed a petition for a writ of certiorari, which the Supreme Court granted.

The Supreme Court vacated and remanded, finding that the panel's "reliance on *Moore* was plainly improper under § 2254(d)(1)." *Shoop v. Hill*, 139 S. Ct. 504, 505 (2019) (per curiam). The Court explained that "habeas relief may be granted 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." *Id.* at 506 (quoting 28 U.S.C. § 2254(d)(1)). Because *Moore* was decided after Hill's state-court proceedings, the Court found that the panel erred by relying on *Moore* when determining whether habeas relief was warranted under § 2254(d)(1). *Id.* at 508–09. The Court ordered that "[o]n remand, the [panel] should determine whether its conclusions can be sustained based strictly on legal rules that were clearly established in the decisions of this Court at the relevant

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modest review role: that of determining whether the Ohio Court of Appeals unreasonably concluded that Hill was not intellectually disabled.

[3]*See Hall v. Florida*, 572 U.S. 701 (2014); *Moore v. Texas*, 137 S. Ct. 1039 (2017).

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