IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	**Case No. 24-0352**
Appellant,	)	**On appeal from the Court of Appeals, Eleventh Appellate District**
v.	)	
DANNY LEE HILL,	)	**Court of Appeals Case No. 2023-T-0039**
Appellee.	)	**DEATH PENALTY CASE**

APPELLEE DANNY LEE HILL'S MEMORANDUM IN RESPONSE TO THE STATE'S MEMORANDUM IN SUPPORT OF JURISDICTION

DENNIS WATKINS
Trumbull County Prosecuting Attorney
CHARLES MORROW
Assistant Trumbull County
Prosecuting Attorney
160 High Street. N.W. 4th Floor
Warren, Ohio 44481
(330) 675-2426

STEPHEN MAHER
30 E. Broad Street, 23rd Floor
Columbus, OH 43215
(614) 728-7055

T. ELLIOT GAISER
Solicitor General
30 E. Broad Street, 17th Floor
Columbus, OH 43215
(614) 466-8980

Counsel for Appellant State of Ohio

STEPHEN C. NEWMAN (0051928)
FEDERAL PUBLIC DEFENDER

CALLAND M. FERRARO (0093439)
Assistant Federal Public Defender

MATTHEW GAY (NY5237409)
Assistant Federal Public Defender
Capital Habeas Unit
1660 W. 2nd Street, Suite 750
Cleveland, Ohio 44113
(216) 522-4856; (216) 522-1951 (fax)
Calland_Ferraro@fd.org
Matthew_Gay@fd.org

Counsel for Appellee Danny Lee Hill

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INTRODUCTION

Danny Hill sits on Ohio's death row even though he is intellectually disabled under the standards that now govern the Constitution's categorical ban on executing those with intellectual disability. The State does not contest this. Rather, it argues that Mr. Hill should not get the opportunity to prove this issue because Mr. Hill already filed a prior post-conviction petition. His prior post-conviction proceedings, however, were adjudicated under a definition of intellectual disability that was "improper" and "wrong." *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 49, 95-96, citing *Moore v. Texas*, 581 U.S. 1, 8, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017). And the new definitional standards are of great consequence to Mr. Hill. The State's own expert—whose opinion the State has heavily emphasized to every court during the prior litigation—has now concluded that Mr. Hill *is* intellectually disabled under the proper standards. The Eighth Amendment therefore bars Mr. Hill's execution.

Consequently, Mr. Hill sought to reopen his prior post-conviction proceedings so that the trial court can adjudicate his intellectual-disability claim under the correct substantive standards. He did so under Ohio Civil Rule 60(B), which permits litigants to move for relief from final civil judgments—like judgments in civil post-conviction cases. In response, the trial court did not address the requirements of Rule 60(B). It instead dismissed the motion because, in its view, litigants cannot use Rule 60(B) to reopen post-conviction proceedings. That decision was wrong, which is why the Eleventh District Court of Appeals later vacated and remanded for the trial court to consider whether Mr. Hill meets the requirements of Rule 60(B). In doing so, the Eleventh District relied on longstanding precedent holding that Rule 60(B) applies to civil post-conviction proceedings. And it distinguished cases, cited by the State, involving motions that did *not* seek to reopen prior post-conviction proceedings but rather directly sought to vacate the criminal

conviction or sentence (and therefore were post-conviction petitions in substance if not in name).

The State now appeals the Eleventh District's decision on the narrow question of whether Rule 60(B) is a vehicle for reopening civil post-conviction proceedings. The State's motion in support of jurisdiction, however, has many problems. The first is jurisdictional—because the Eleventh District reversed and remanded to the trial court, the at-issue decision is not a final order. So this Court lacks jurisdiction to review it. And the rest of the problems counsel against this Court's review as a matter of prudence. The Eleventh District's decision was correct as a matter of law. Unsurprisingly, then, the State cannot point to any conflict among Ohio courts on this issue. Nor can it complain that the Eleventh District's decision unreasonably delays the sentence or otherwise offends principles of finality. The State itself has asked the trial court to postpone proceedings during the pendency of this interlocutory (and improper) appeal, and thus has caused delay where Mr. Hill's intellectual-disability claim otherwise could be adjudicated well before his scheduled execution date. In any event, where a retroactive rule of substantive constitutional law categorically prohibits a death sentence, the State's interests in finality must give way to fundamental precepts of justice. "There is no grandfather clause that permits States to enforce punishments the Constitution forbids." *Montgomery v. Louisiana*, 577 U.S. 190, 204, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016). Accordingly, the State fails to make a case for this Court's review.

BACKGROUND

Mr. Hill has "well over 6,000 pages" of records demonstrating that he is intellectually disabled—a record that the experts in his case agreed is "larger than those in most capital cases in which intellectual disability is at issue." *Hill v. Anderson*, N.D.Ohio No. 4:96-cv-00795, 2014 WL 2890416, at *24 (June 25, 2014). These records "tell the story of a child who was raised primarily by an intellectually disabled mother, diagnosed as intellectually disabled in kindergarten,

and identified and treated as such throughout his childhood." *Id*. at *28. Indeed, Mr. Hill's intelligence quotient ("IQ") was measured nine times between 1973 (when he was six years old) and 2000 (when he was 33 years old). *Id*. at *21. The scores range from 48 to 71, with a mean of around 61. *Id*.

These records also reveal "significant limitations in Hill's functional academics, self-care, social skills, and self-direction." *Hill v. Shoop*, __ U.S. __, 142 S.Ct. 2579, 2579, 213 L.Ed.2d 1134 (2022) (Sotomayor, Breyer, and Kagan, JJ., dissenting from denial of certiorari). "He could not sign his own name, never lived independently, was 'functionally illiterate' at school and in prison, could not read or write above a third-grade level, and could not perform a job without substantial guidance from supervisors." *Id.* "He has never been able to take care of his own hygiene independently; even in the rigidly organized environment of prison, he will not shower without reminders." *Id.*

After a childhood spent in special-education programs and group homes, Mr. Hill was only 18 years old when he and a co-defendant were charged with capital murder. *Hill*, 2014 WL 2890416, at *24. Questions abounded at trial as to whether Mr. Hill actively participated in the crime, but his participation was secured by bitemark testimony[1] that has since been scientifically invalidated. *E,g.*, *Howard v. State*, 300 So.3d 1011, 1017-19 (Miss. 2020); *State v. Denton*, Ga. Super. Ct. No. 04-R-330, 2020 WL 7232303, at *1-13 (Feb. 07, 2020).

Nevertheless, during his trial proceedings and subsequent direct appeal, the parties, witnesses, and courts all described Mr. Hill as intellectually disabled. *E.g.*, *State v. Hill*, 11th Dist.

[1] *See State v. Hill*, 11th Dist. Trumbull No. 3720, 1989 WL 142761, at *33 ("Appellant's contention suggesting that he merely observed while co-defendant Timothy Combs tortured and assaulted the victim is overwhelmingly negated by his personal odontological 'signature' on the penis of the victim.").

Trumbull No. 3720, 1989 WL 142761, at *4, 6, 32 (Nov. 27, 1989); *State v. Hill*, 64 Ohio St.3d 313, 334-335, 1992-Ohio-43, 595 N.E.2d 884 (1992). At that time, however, nothing barred states from executing persons with intellectual disability. So the trial court imposed a death sentence, and the appellate courts affirmed.

Then, in 2002, the United States Supreme Court held that the Eighth Amendment forbids executing the intellectual disabled (or mentally retarded, as it was then called). *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The Court reasoned:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 305. The Court left to the States "the task of developing appropriate ways to enforce th[is] constitutional restriction." *Id.* at 317.

Thus, shortly thereafter, Ohio adopted a three-prong "definition of mental retardation." *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011, ¶ 12 (2002). That definition required: "(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.*

Mr. Hill then sought post-conviction relief in state court on the ground that he is intellectually disabled under *Atkins* and *Lott*, and the trial court held an evidentiary hearing in 2004 and 2005. At the hearing, Mr. Hill presented an abundance of evidence detailing his numerous

diagnoses of intellectual disability throughout his life. *See, e.g.*, *Hill*, 2014 WL 2890416, at *21-51. Additionally, three experts evaluated Mr. Hill under the *Lott* standard: Dr. David Hammer (Mr. Hill's expert), Dr. Nancy Huntsman (the court's expert), and Dr. John Gregory Olley (the State's expert). All agreed that Mr. Hill had significantly subaverage intellectual functioning, and on subsequent appeals it was undisputed that any limitations from which Mr. Hill suffers manifested before age 18. *Hill v. Shoop*, 11 F.4th 373, 387 (6th Cir.2021). Thus, the only dispute was on prong two: whether Mr. Hill had significant limitations in two or more adaptive skills.

The trial court at the outset directed the experts to limit their inquiry to Mr. Hill's current adaptive functioning. Judgment Entry (5/16/2003) T.d. 220. Because the experts deemed the results of the standardized testing to be unreliable, they rendered their opinions based on interviews and records. From this information, Dr. Hammer concluded that Mr. Hill had demonstrated the necessary adaptive limitations. *Hill*, 2014 WL 2890416, at *9. But Drs. Olley and Huntsman disagreed, finding that although the record indicated significant limitations in functional academics, Mr. Hill had not shown significant deficits in *two or more* adaptive skills. *Id.* at *27, 48. Given the court's order, they largely relied on evidence relating to Mr. Hill's perceived adaptive strengths and his current functioning in the controlled prison environment. *See, e.g.*, *id.* at *47-49. Dr. Olley conceded, however, that Mr. Hill's case was a "close call." *Id.* at *49.

The trial and appellate court deferred to these experts in denying relief. Specifically, the Eleventh District agreed that Mr. Hill had demonstrated "significantly subaverage intellectual functioning" but held that Mr. Hill did not meet *Lott*'s definition of intellectual disability because he had failed to "demonstrate significant limitations in two or more adaptive skills." *State v. Hill*, 177 Ohio App.3d 171, 2008-Ohio-3509, 894 N.E.2d 108, ¶ 76, 100 (11th Dist.). Judge O'Toole dissented, finding that the record evidence compelled a finding of intellectual disability under

Ohio's *Lott* standard. *Id.* at ¶ 127-132. This Court denied leave to appeal, with two justices dissenting. *State v. Hill*, 122 Ohio St.3d 1502, 2009-Ohio-4233, 912 N.E.2d 107.

Mr. Hill then sought habeas relief in federal court. In adjudicating Mr. Hill's *Atkins* claim, the district court repeatedly found the state court's decision to be "troubling." *Hill*, 2014 WL 2890416, at *25, 27, 33, 36, 40. Some of the state court's findings were "squarely contradicted by the record," some constituted "gross understatement[s]" of Mr. Hill's adaptive deficits, and some were "almost cynical in [their] selective misrepresentation of the facts." *Id.* at * 26 & n.19, 27. And the state court's reliance on much of the record evidence—including testimony from prison officials—was highly "problematic." *Id.* at *26, 42. In the district court's view, "Hill's school and juvenile court records, which number hundreds of pages, are replete with evidence of Hill's limitations in adaptive functioning." *Id.* at *28. But because it was constrained to apply the Antiterrorism and Effective Death Penalty Act (AEDPA)'s "extremely deferential standard for relief" requiring that the state court decision be unreasonable "beyond any possibility for fairminded disagreement," the district court denied relief. *Id.* at *51. It noted that the state court "ultimately was persuaded by the State's expert, Dr. Olley" and that "habeas courts must defer to state-court determinations of the credibility of expert witnesses in determining intellectual disability under *Atkins*." *Id.* at *46-47. It therefore dismissed Mr. Hill's habeas petition.

Mr. Hill then appealed to the Sixth Circuit. While that appeal was pending, the United States Supreme Court decided *Moore v. Texas*, 581 U.S. 1, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017). In *Moore*, the Court held that Texas's "definition" of intellectual disability violated the Eighth Amendment because it "create[d] an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 6. The Court explained that "[t]he medical community's current standards supply one constraint on States' leeway in this area," and Texas's definition deviated

from those clinical standards. *Id.* Namely, the Texas court "overemphasized [the defendant's] perceived adaptive *strengths*" whereas "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." *Id.* at 15-16. Moreover, it improperly "stressed [the defendant's] improved behavior in prison" whereas clinicians "caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Id.* at 16. In remanding for the state court to consider the defendant's *Atkins* claim under the correct standards, the Court also explained that "deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits." *Id.* at 15-16; *see also id.* at 8 (clinicians require deficits in "any of the three adaptive skill sets").

In Mr. Hill's case, the Sixth Circuit relied on *Moore* in reversing the district court and granting Mr. Hill habeas relief. It held that the Ohio courts departed from "the prevailing clinical standards" for adaptive deficits "by placing undue emphasis on Hill's adaptive strengths" and "by relying too heavily on the observations of prison guards concerning Hill's behavior in the highly regimented environment of his prison block." *Hill v. Anderson*, 881 F.3d 483, 486, 493 (6th Cir.2018). In analyzing the record, the court determined that "Hill was universally considered to be intellectually disabled by school teachers, administrators, and the juvenile court system, and that those same authorities documented deficits in several adaptive skills areas." *Id.* at 495. It therefore granted relief on Mr. Hill's *Atkins* claim. *Id.*

The United States Supreme Court reversed. It emphasized AEDPA's command that federal habeas relief is permitted only if the state court's decision was "contrary to Supreme Court precedent that was clearly established at the time" of the state court's decision. *Shoop v. Hill*, __ U.S. __, 139 S.Ct. 504, 505, 202 L.Ed.2d 461 (2019). The Court held that "[t]he Court of Appeals' reliance on *Moore* was plainly improper under" AEDPA because *Moore* "was not handed down until long after the state-court decisions." *Id.* It rejected the Sixth Circuit's holding that *Moore*

was "merely an application of what was clearly established by *Atkins*" because "the court did not explain how the rule it applied can be teased out of the *Atkins* Court's brief comments about the meaning of what it termed 'mental retardation.'" *Id.* at 508. The Court thus remanded for the Sixth Circuit to "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 time." *Id.* at 509.

On remand, the Sixth Circuit panel again granted habeas relief. *Hill v. Anderson*, 960 F.3d 260, 265 (6th Cir.2020). The Sixth Circuit, however, then reviewed the case en banc and, in a deeply divided 9-7 decision, reversed the panel's decision. *Hill v. Shoop*, 11 F.4th 373 (6th Cir.2021). The majority acknowledged that "there is evidence in the record that shows Hill has limitations in some adaptive skills such as self-care, functional academics and self-direction" and that aspects of the state court's decision were "concerning." *Id.* at 390, 394. But it emphasized that "two medical experts, including Dr. Olley who had significant experience working with individuals with intellectual disabilities, concluded after looking at Hill's entire record that he did not have significant limitations in *two or more* adaptive skills, and, thus, was not intellectually disabled." (Emphasis added.) *Id.* at 394-95. It was therefore "not unreasonable for the Ohio Court of Appeals to rely on the reasoned judgment of two experts over another," even though "another judge could have reasonably reached the opposite conclusion." *Id.* at 395. Accordingly, Mr. Hill had not "cleared th[e] high hurdle" imposed by AEDPA. *Id.* at 384, 394. Seven judges dissented, finding that Mr. Hill had clearly demonstrated that he is intellectually disabled under *Atkins* and had met AEDPA's requirements for relief. *Id.* at 400.

The Supreme Court denied certiorari over a three-justice dissent. The dissenting justices found "overwhelming record support for the fact that Hill has intellectual disabilities" under *Atkins*, and concluded by directing "*future courts* and, if the time comes, the Ohio Parole Board,

[to] remember that a federal court's conclusion that a state court's decision was not 'unreasonable' under AEDPA does not mean that it was correct." (Emphasis added.) *Hill v. Shoop*, __ U.S. __, 142 S.Ct. 2579, 2580, 213 L.Ed.2d 1134 (2022).

During the pendency of Mr. Hill's federal habeas proceedings, this Court in *State v. Ford* held that *Moore* invalidated Ohio's definition of intellectual disability. *See Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, at ¶ 49, 95-97. It explained that the *Lott* standard was "improper" and "wrong" because it "require[d] a finding of significant deficits in *two or more* adaptive-skill sets" whereas "the current diagnostic standards require significant deficits in *any of* the three adaptive-skill sets." (Emphasis added.) *Id.* at ¶ 95-97, citing *Moore*, 581 U.S. at 8. And, per *Moore*, it held that courts cannot define intellectual disability by reference to "apparent adaptive strengths" and "adaptive improvements [the defendant] made in prison." *Id.* at ¶ 55. This Court therefore set forth a new definition of intellectual disability in line with clinical standards, as required by *Moore*. *Id.* at 100. (As noted above, the federal-court decisions post-*Ford* were constrained by AEDPA to apply *Lott*. *See, e.g.*, *Hill*, 11 F.4th at 387 n.6, 394).

In the wake of *Moore* and *Ford*, the State's expert during Mr. Hill's *Atkins* proceedings—Dr. Olley—evaluated Mr. Hill's case and determined that Mr. Hill *is* intellectually disabled under the now-governing standards. Olley Aff., Ex. 1 to Civil Rule 60(B) Motion T.d. 426. Days after the Supreme Court denied certiorari on Mr. Hill's federal habeas petition, and now with Dr. Olley's new opinion, Mr. Hill filed in state trial court a motion for relief from judgment under Ohio Civil Rule 60(B) asking the trial court to "reopen his case and grant him an evidentiary hearing" under the proper standards. Civil Rule 60(B) Motion (7/8/2022) T.d. 426, p. 1. Alternatively, Mr. Hill requested that he be permitted to file a second post-conviction petition. *Id.* at 18-20; Hill Reply (10/25/2020) T.d. 439, p. 5-8.

The trial court denied Mr. Hill all relief. It held that Civil Rule 60(B) is not the proper vehicle for Mr. Hill's request and recast the motion as a second post-conviction petition. It then dismissed the petition for failing to meet the requirements of R.C. 2953.23(A)(1). It did not, however, consider the section of the statute relating to death-penalty ineligibility, and thus did not evaluate the evidence relating to Mr. Hill's *Atkins* claim. *See* Journal Entry (5/1/2023) T.d. 446.

On appeal, the Eleventh District held that Civil Rule 60(B) is a proper procedural mechanism for seeking relief from a judgment in a civil post-conviction proceeding. *State v. Hill*, 11th Dist. Trumbull No. 2023-T-0039, 2023-Ohio-4486. It therefore vacated the trial court's decision and remanded for the trial court to "consider [Mr. Hill's] Civ.R. 60(B) motion for relief from judgment." *Id.* at 16. It did not address the merits of Mr. Hill's Rule 60(B) motion or the alternative question of whether Mr. Hill meets the requirements for a second post-conviction petition. *Id.* The Eleventh District also denied the State's subsequent motion to certify a conflict and application for en banc consideration, carefully distinguishing each case cited by the State. *See* Judgment Entry, 11th Dist. Case No. 2023-T-0039 (1/24/2023); Judgment Entry, 11th Dist. Case No. 2023-T-0039 (2/09/2023).

The State then filed the current memorandum in support of jurisdiction with this Court ("Mem."). Because the matter is now pending with the trial court, Mr. Hill moved the trial court for a status conference so that his Rule 60(B) motion can be addressed in a timely manner. *See* Mot. For Status Conference, No. 1985-cr-00317 (3/22/2024). The State has opposed that request, urging the trial court to postpone resuming proceedings until this Court has decided the State's appeal. *See* State's Opp'n to Mot. for Status Conference, No. 1985-cr-00317 (3/25/2024). The trial court has yet to set a status conference.

ARGUMENT

I. This Court Lacks Appellate Jurisdiction Over The Eleventh District's Decision Because There Is No Final Appealable Order.

The State's motion in support of jurisdiction fails from the start. The Eleventh District's decision is not a final order, which means this Court lacks jurisdiction over the State's appeal. Yet the State's brief does not even mention (let alone attempt to explain away) the final-order rule. The Court must therefore decline review for this reason alone.

The Ohio Supreme Court's "appellate jurisdiction extends only to orders that are final and appealable." *State ex rel. Sands v. Culotta*, 165 Ohio St.3d 172, 2021-Ohio-1137, 176 N.E.3d 735 ¶ 7, citing R.C. 2505.03; *see also State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, 776 N.E.2d 101, ¶ 4 (explaining that R.C. 2505.03 "limits the appellate jurisdiction of courts, including the Supreme Court, to the review of final orders, judgments, or decrees"). "This jurisdictional issue cannot be waived and may be raised by this court sua sponte." *Culotta* at ¶ 7. "A court's order is final and appealable if the requirements of R.C. 2505.02 are met." *Id.* R.C. 2505.02 defines a "final order" as, among other things, "[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment" or "[a]n order that affects a substantial right made in a special proceeding." R.C. 2505.02(A)(1) defines a "substantial right" as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect."

"Under the statute, however, the mere existence or implication of a substantial right in a case is insufficient to create a final order." *Crown Servs. v. Miami Valley Paper Tube Co.*, 162 Ohio St.3d 564, 2020-Ohio-4409, 166 N.E.3d 1115, ¶ 16. "Instead, the 'crucial question' is whether the order '*affects* a substantial right.'" (Emphasis sic.) *Id.*, quoting *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993). "An order affects a substantial right 'only if

an immediate appeal is necessary to protect the right effectively.' " *Id.*, quoting *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, 950 N.E.2d 516, ¶ 7; *see also Bell* at 63 ("An order which affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future.").

Here, there is no "final order" for this Court to review. The State appeals the Eleventh District's decision, but that decision vacated the trial court's order and remanded for further proceedings. *See* State Not. of Appeal (3/8/2024). Accordingly, Mr. Hill's Rule 60(B) motion is currently pending with the trial court. And the trial court has not yet determined the merits of that motion, let alone the merits of Mr. Hill's underlying intellectual-disability claim. The Eleventh District's decision is therefore a quintessential non-final order. *See, e.g.*, *State v. Carter*, 8th Dist. Cuyahoga No. 106690, 2018-Ohio-4115, ¶ 16 (no final order where the "petition for postconviction relief is still pending before the trial court"); *State v. Fitzpatrick*, 1st Dist. Hamilton No. c-220333, 2022-Ohio-4381, ¶ 22 (no final order where the order "does not determine the merits of [the] postconviction petition"); *Griffin v. Griffin*, 1st Dist. Hamilton No. C-170026, 2017-Ohio-8450, ¶ 14 (explaining that a remand "for further proceedings" "is not a final order under R.C. 2505.02(B)(2)"); *Price v. Klapp*, 9th Dist. Summit No. 27343, 2014-Ohio-5644, ¶ 8 (an order is not final where it "resets the matter for further proceedings before the trial court"); *Cooper State Bank v. City of Columbus Columbus Graphics Comm'n*, 10th Dist. Franklin No. 11AP-1069, 2012-Ohio-3337, ¶ 7 (a remand "for findings of fact and conclusions of law is not a final order").

And even if it had tried, the State could not show that the Eleventh District's decision, "if not immediately appealable, would foreclose appropriate relief in the future." *Bell* at 63. Once the lower courts enter a final order—either denying or granting Mr. Hill relief—*that* decision will be a final appealable order. The State is perfectly free to appeal at that time. *See, e.g.*, *Carter* at ¶

18 ("R.C. 2953.23(B) provides that an order granting or denying a petition for postconviction relief is a final, appealable order * * * [a]nd on appeal, the reviewing court may address all interlocutory orders that merge into the final order."). Accordingly, the absence of an immediate appeal certainly does not "foreclose appropriate relief in the future." *Bell* at 63; *see also State ex rel. McGinty v. Eighth Dist. Court of Appeals*, 142 Ohio St.3d 100, 2015-Ohio-937, 28 N.E.3d 88, ¶ 19 (no final order where the party "will still be afforded a meaningful and effective remedy after a [final judgment] by way of appeal").

One final note for the sake of completeness: R.C. 2945.67 provides that "[a] prosecuting attorney * * * may appeal as of right any decision of a trial court in a criminal case * * * which decision * * * grants postconviction relief" and "may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case." That statute is inapplicable here for several independent reasons. First, "[i]t is well settled that postconviction relief is civil in nature, so R.C. 2945.67 is inapplicable" because it "applies specifically to criminal cases." *State v. Noling*, 149 Ohio St.3d 327, 2016-Ohio-8252, 75 N.E.3d 141, ¶ 56. Second, no appeal as of right would lie because, again, the Eleventh District did not "grant[] postconviction relief"—it simply remanded to the trial court for further proceedings. R.C. 2945.67. In any event, courts have made clear that R.C. 2945.67 does not abrogate the final-order rule. So even where R.C. 2945.67 permits a discretionary appeal, the State cannot take that appeal "until the trial court issues a final appealable order." *State v. Gillispie*, 2nd Dist. Montgomery No. 28766, 2020-Ohio-7032, ¶ 6; *State v. Jones*, 2nd Dist. Montgomery No. 27354, 2017-Ohio-5758, ¶ 24. Again, there is no final appealable order here.

For this reason alone, the Court must decline review. At the very least, these jurisdictional pitfalls make this case a bad candidate to decide the question presented.

II. The Question Decided By The Eleventh District Does Not Merit This Court's Review.

Rather than address the jurisdictional elephant in the room, the State's brief simply argues that this case bears the necessary hallmarks for this Court's discretionary review. It does not. Again, the posture of this case prevents (or is at least not conducive to) this Court's review. Regardless, the Eleventh District's decision is correct as a matter of law and is entirely consistent with: separation-of-powers principles; other Ohio decisions on the issue; federal non-binding precedent; and concerns for finality. As a result, the State has provided no good reasons for this Court to accept this appeal.

A. The Eleventh District's ruling that Civil Rule 60(B) is a proper vehicle for reopening prior civil post-conviction proceedings is correct as a matter of law.

As an initial matter, this case does not merit review because the Eleventh District's narrow procedural ruling—that qualifying litigants can use Civil Rule 60(B) to reopen civil post-conviction proceedings—is correct as a matter of law.

Ohio Civil Rule 60(B) authorizes a party to move the court to "relieve" a party "from a final judgment, order or proceeding." Civ.R. 60(B). A petition for post-conviction relief initiates a *civil* proceeding. *See State v. Nichols*, 11 Ohio St.3d 40, 42-43, 463 N.E.2d 375 (1984) (Although "by necessity postconviction relief proceedings admittedly have an impact on adjudicated felons," the proper "framework is civil, not criminal."); *State v. Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, ¶ 47 ("It is well settled that a postconviction petition initiates a separate civil proceeding notwithstanding the use of an existing criminal-case number."). As a result, "the Ohio Rules of Civil Procedure and local court rules 'apply in postconviction proceedings to the extent they are not inconsistent with R.C. 2953.21.' " *State v. Peterson*, 7th Dist. Mahoning No. 08-ma-102, 2009-Ohio-1504, ¶ 15; *see also* Civ.R. 1(C) (civil rules apply in special statutory proceedings

unless "they would by their nature be clearly inapplicable").

Rule 60(B) is entirely consistent with Ohio's post-conviction statutes. While those statutes make clear that a post-conviction petition is the "exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case," that is not what a Rule 60(B) motion to reopen post-conviction proceedings does. R.C. 2953.21(K). Such a motion seeks relief from the civil post-conviction judgment, not from the "conviction or sentence in a criminal case." *Id.* As the Eleventh District explained here: "While a postconviction relief petition is the exclusive remedy to bring a collateral challenge to the validity of a conviction or sentence, once brought, the Civil rules necessarily control that collateral challenge." *Hill*, 11th Dist. Trumbull No. 2023-T-0039, 2023-Ohio-4486, at ¶ 49.

Here, Mr. Hill's motion asks the trial court to reopen his prior post-conviction proceedings so it can apply the proper legal standards to his intellectual-disability post-conviction claim—because that claim had previously been adjudicated under invalid standards. Thus, as the Eleventh District recognized, Mr. Hill's "Civ.R. 60(B) motion is a motion seeking to revisit the judgment entered in his postconviction relief petition rather than directly seeking to vacate the judgment of conviction." *Id.* at ¶ 51. That is the proper purview of Rule 60(B).

The Eleventh District's decision adheres to decades of precedent from Ohio appellate courts recognizing that Rule 60(B) is a "proper vehicle" for relief from a post-conviction judgment. *See State v. Jones*, 11th Dist. Ashtabula No. 2001-A-0072, 2002-Ohio-6914, ¶ 10 ("[T]here is sufficient precedent for the filing of Civ.R. 60(B) motions for relief from judgment in connection with the trial court's denial of a petition for post-conviction relief."); *State v. Jackson*, 11th Dist. Trumbull No. 2008-T-0024, 2010-Ohio-1270, ¶ 13 ("Ohio's postconviction proceedings are civil in nature, and a Civ.R. 60(B) motion is a proper vehicle to challenge the trial court's findings.");

State v. Bush, 11th Dist. Trumbull No. 97-T-0035, 1998 WL 173010, at *2 (Feb. 6, 1998) (explaining that "[a] Civ.R. 60(B) motion was a proper response to the June 29, 1993 [post-conviction] judgment because it emanated from a civil proceeding"); *State v. Adams*, 12th Dist. Butler No. CA2010-12-321, 2011-Ohio-1721, ¶ 14-15 (refusing to recast a Rule 60(B) motion as a post-conviction petition because "the Civ.R. 60(B) motion merely seeks to reverse the dismissal of [the] PCR petition" rather than "seek[ing] to vacate his conviction or sentence"); *State v. Sullivan*, 8th Dist. Nos. 74735, 74736, 1999 WL 1249529, at *2-4 (Dec. 23, 1999) (explaining that "[a] Civ.R. 60(B) motion was a proper response to the May 26, 1998 [post-conviction] judgment because it emanated from a civil proceeding").

The Eleventh District's decision is also in harmony with this Court's precedent. The State invokes the cases of *State v. Schlee*, *State v. Reynolds*, and *State v. Parker*, *see* Mem. at 13—but those cases involved motions nothing like Mr. Hill's. Specifically, the motions in those cases directly sought relief *from the criminal convictions*. *State v. Reynolds*, 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997); *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 3-11; *State v. Parker*, 157 Ohio St.3d 460, 2019-Ohio-3848, 137 N.E.3d 1151, ¶ 5-17. The defendants were not seeking relief from a prior post-conviction judgment—indeed, they had not yet challenged their convictions through a post-conviction petition. In other words, the defendants filed post-conviction petitions and just labeled them as Rule 60(B) motions.

Here, by contrast, Mr. Hill seeks relief from his civil post-conviction judgment and asks the court to reopen those post-conviction proceedings to decide his *Atkins* claim under the proper standards. The Eleventh District correctly recognized this distinction, finding that this case "is unlike *Schlee*" and its progeny because Mr. Hill's "Civ.R. 60(B) motion is a motion seeking to revisit the judgment entered in his postconviction relief petition rather than directly seeking to

vacate the judgment of conviction." *Hill*, 11th Dist. Trumbull No. 2023-T-0039, 2023-Ohio-4486, at ¶ 51; *see also State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, ¶ 10 ("*Reynolds* sets forth a narrow rule of law limited to the context of that case.").[2] The State therefore cannot show that the Eleventh District committed any error for this Court to correct.

B. The Eleventh District's decision is consistent with the General Assembly's statutory framework for post-conviction proceedings.

Most of the State's brief reads as a dissertation on general foundational tenets of law—separation of powers, legislative policy, and substance-versus-labels rules. Mem. at 8-9, 11-12. While these principles are undoubtedly valid, the State fails to adequately explain how they undermine the Eleventh District's decision here.

For example, Mr. Hill agrees that "the substance of the party's arguments and the type of relief requested determine the nature of the action." Mem. at 11-12. But that proves, rather than disproves, Mr. Hill's point. It is precisely the "substance" and "relief requested" that distinguishes his motion from a second post-conviction petition. A post-conviction petition, this Court has explained, is a filing that has "(1) [been] filed subsequent to the defendant's direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence." *Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, at ¶ 12. Again, Mr. Hill's motion does not "ask for vacation of the judgment and sentence" but rather to reopen his prior post-conviction proceedings. Put another way, granting Mr. Hill's

[2] The amicus brief also cites *State v. Lott*, 2002-Ohio-6625, ¶ 13, 97 Ohio St.3d 303, 305, 779 N.E.2d 1011, 1014, for the proposition that intellectual-disability claims under *Atkins* are properly classified as post-conviction claims. That, of course, is true; which is why Mr. Hill brought his *Atkins* claim under the post-conviction statute in 2002. *Lott* says nothing, however, about the procedures for *reopening* a post-conviction adjudication of an *Atkins* claim, because Mr. Lott had not previously filed such a claim.

motion would not vacate his sentence but would instead vacate the prior post-conviction judgment. It is only after the Rule 60(B) motion is granted that the trial court would then decide his initial post-conviction *Atkins* claim under the proper substantive standards.

The State also misreads the relevant statutes when it insists that "the General Assembly has spelled out the process for reopening litigation over post-conviction relief." Mem. at 9. The post-conviction statutes speak of post-conviction petitions or second post-conviction petitions. *See* R.C. 2953.21; R.C. 2953.23. (And, again, Mr. Hill's 60(B) motion is not itself a post-conviction petition as this Court has defined it). The statutes *do not* speak to the proper procedure for relief from a prior post-conviction judgment on an already-adjudicated claim. Civil Rule 60 therefore applies. *See supra* at 14-16.

This is not, as the State suggests, a "workaround" to the post-conviction statutes. Mem. at 14. If Mr. Hill's Rule 60(B) motion is granted, he must still meet the requirements for a post-conviction petition. And the successive post-conviction statute still governs in instances where the petitioner fails to file a timely initial post-conviction petition or where the petitioner asserts a new claim that was not in the first petition. R.C. 2953.23. In those instances, the petitioner is not seeking relief from a prior post-conviction judgment—because either there wasn't one at all or there wasn't one on that claim. So those motions would, by definition, qualify as a second (or untimely) post-conviction petition, and R.C. 2953.23 would govern.

The State also contends that, because post-conviction petitions and Rule 60(B) motions are both classified as "collateral attacks," they must be the same thing. Mem. at 13. But that reasoning skips a key analytical step. A filing is a post-conviction petition only if it initiates "a collateral challenge *to the validity of a conviction or sentence in a criminal case*." (Emphasis added.) R.C. 2951.53(K). That means a post-conviction petition is defined not just as any collateral attack, but

as a collateral attack on a specific type of judgment: a criminal conviction or sentence. At the risk of over-repetition, Mr. Hill's Rule 60(B) motion attacks *the civil post-conviction judgment*, not the judgment in his criminal case. It therefore is not itself a post-conviction petition.

C. There exists no intra- or inter-district conflict on this issue.

As explained above, the Eleventh District's decision adheres to a long line of court-of-appeals precedent holding that Rule 60(B) is the proper vehicle for seeking relief from a prior post-conviction judgment. *See supra* at 15-16. And, importantly, the State cites no decision that conflicts with the Eleventh District's decision, which is why the Eleventh District denied the State's motion to certify a conflict to this Court.

In its current briefing, the State cites two additional cases that it did not include in its conflict-certification motion below. Mem. at 5-7. Those cases, however, are just as (if not more) irrelevant than the cases it did cite. In *State v. Joy*, the defendant's motion directly sought to "reconsider his sentence" and "overturn the final judgment in his criminal case." *State v. Joy*, 4th Dist. Hocking Nos. 08CA10, 08AP10, 2009-Ohio-2211, ¶ 6, 9; *see also* Motion to Vacate Judgment, Case No. 99-cr-045, (Hocking Co. Court of Comm. Pleas Jan. 23, 2008). Because the defendant's motion "sought to overturn the final judgment in his criminal case," it was "a PCR petition pursuant to *Schlee*." *Adams*, 12th Dist. Butler No. CA2010-12-321, 2011-Ohio-1721, at ¶ 15. Mr. Hill's motion, on the other hand, "merely sought to reverse the dismissal of his PCR petition," making *Joy* inapposite. *Id.* (distinguishing *Joy* on this basis).

Even further afield is the State's citation to *State v. Jackson*. Jackson did not even try to bring a Rule 60(B) motion. He instead explicitly brought a second post-conviction petition. *See State v. Jackson*, 2020-Ohio-4015, 157 N.E.3d 240, ¶ 10 (3d Dist.) ("Jackson acknowledged that * * * it was his second petition for postconviction relief."). So the Third District did not decide

this issue, given that courts "decide only questions presented by the parties." *United States v. Sineneng-Smith*, 590 U.S. 371, 376, 140 S.Ct. 1575, 206 L.Ed.2d 866 (2020); *Sizemore v. Smith*, 6 Ohio St.3d 330, 333 n.2, 453 N.E.2d 632 (1983). Regardless, Jackson could not have brought a Rule 60(B) motion even if he had tried—his first petition did not contain an *Atkins* claim, so there was no judgment on that claim for him to reopen. *Jackson* at ¶ 29-24.

Still grasping for a conflict, the State then throws together a bunch of cases for the point that "60(B) cannot circumvent the limits on *first* petitions." (Emphasis sic.) Mem. at 6. Mr. Hill has already explained, ad nauseum, why that principle does not apply here. He is not attempting to bypass the limits on first post-conviction petitions—he is seeking to have his first post-conviction petition determined under the proper substantive standards for intellectual disability. In the cases cited by the State, the litigants were attempting to bypass the post-conviction statutes altogether by filing a Rule 60(B) motion directly seeking to vacate their convictions.

Accordingly, the State can point to no decisional conflict meriting this Court's intervention.

D. Federal law is irrelevant to the issue decided by the Eleventh District.

The State also argues that the Eleventh District's decision departs from the federal approach in *Gonzalez v. Crosby*, 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005). Though it recognizes that *Gonzalez* is not binding, the State suggests *Gonzalez* addressed "the same problem" at issue here. Mem. at 7. That is not correct.

"As a textual matter," the federal habeas statute "applies only where the court acts pursuant to a prisoner's 'application' for a writ of habeas corpus." *Gonzalez*, 545 U.S. at 530. Accordingly, the only question in *Gonzalez* was one of statutory interpretation—the Court was asked to "decide whether a Rule 60(b) motion filed by a habeas petitioner is a 'habeas corpus application' as the statute uses that term." *Id.* Under federal law, a filing is an "application" if it contains one or more

"claims." *Id.* The Court concluded that because a motion attacking the merits of a prior habeas ruling asserts a "claim," it is a "habeas corpus application" as used in the statute. *Id.* at 530-31.

The interpretive question in *Gonzalez* is not at-issue here. R.C. 2953.21 governs "[p]etition[s] for postconviction relief" and states that "the remedy set forth in this section is the exclusive remedy by which a person may bring *a collateral challenge to the validity of a conviction or sentence in a criminal case*." (Emphasis added.) R.C. 2953.21(K). Thus, the question in Ohio is not whether Mr. Hill asserts a "claim" (as it is in federal court), but whether his motion is a "collateral challenge to the validity of a conviction or sentence in a criminal case." *Id.* As already explained, his Rule 60(B) motion does not qualify as such a challenge. *See supra* at 14-18.

The federal habeas statute also differs from Ohio's post-conviction statute in another way. The federal statute expressly applies to claims "presented in a prior application." 28 U.S.C. 2244(b)(1). Thus, a Rule 60 motion premised on a claim "presented in a prior application" directly clashes with the federal habeas statute. Ohio's statute contains no similar provision—nowhere does it mention claims presented in a prior petition. R.C. 2953.23. Accordingly, federal precedent interpreting a materially different statute does not help the State here.

E. The State's appeals to principles of finality are unconvincing.

The State additionally insists that the Eleventh District's decision offends principles of finality. Mem. at 10-11. Specifically, the State invokes the Ohio Constitution, which grants crime victims the right to "proceedings free from unreasonable delay." Mem. at 10, citing Ohio Constitution, Article I, Section 10a(A)(8). Though these interests are important as a *general* matter, the State's appeal to them *here* is both disingenuous and unconvincing.

At the outset, the State offers nothing to show how the Eleventh District's decision has caused (or will cause) "unreasonably delay." Mr. Hill's scheduled execution date is July 22,

2026—well over two years from now. *See* Execution Schedule, Ohio Dep't of Rehab. & Corr., https://drc.ohio.gov/about/capital-punishment/execution-schedule. Nineteen death-row inmates have scheduled dates that precede Mr. Hill's. *Id.* Thus, even assuming that scheduled date holds, everything suggests Mr. Hill's Rule 60(B) motion and underlying intellectual-disability claim could be adjudicated well before that date.

If anything, the party who has delayed this case is the State, not Mr. Hill. The State's current interlocutory appeal flouts the final-order rule, which itself is meant to "avoid the delay that inherently accompanies time-consuming interlocutory appeals." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 434 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985); *see also State v. Torco Termite Pest Control*, 10th Dist. Franklin No. 85AP-22, 1985 WL 4736, at *1 (final-order rule "prevents piecemeal litigation, avoids delay, and thereby promotes judicial economy"). Making matters worse, the State has now opposed Mr. Hill's post-remand attempts to move forward in the trial court, citing the State's pending motion with this Court. The effect (or, indeed, the purpose) of the State's improper appeal is therefore apparent—it forestalls a proper adjudication on the merits of Mr. Hill's intellectual-disability claim until the clock runs out.

And neither the Federal Constitution nor the Ohio Constitution tolerates such an outcome. Even if the State's calls for finality here were genuine, "the State's interest in finality deserves little weight" where the State is seeking to "enforce[e] a capital sentence" that the constitution forbids. *Buck v. Davis*, 580 U.S. 100, 126, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017). Here, a substantive rule of constitutional law exempts Mr. Hill from the death penalty. "[T]he retroactive application of [that] substantive rule[] does not implicate [the] State's weighty interests in ensuring the finality of convictions and sentences" because "no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose."

Montgomery v. Louisiana, 577 U.S. 190, 205, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016); *see also State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, ¶ 122-123 (O'Connor, C.J., concurring) (explaining that "a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction" such that "the concern for fairness and uniformity in individual cases outweighs any adverse impact that retroactive application of the rule might have on decisional finality"). The Eleventh District's holding—that Rule 60(B) is an available vehicle for reopening post-conviction proceedings—is faithful to these principles, because it permits courts (in individual cases) to strike the necessary "balance[]" between "the benefits of finality" with "principles of fairness." *Id.* at ¶ 122.

In arguing otherwise, the State ignores that Rule 60(B) has its own gatekeeping features. The litigant must demonstrate that: he qualifies for one of the grounds for relief under the Rule's subsections; he has a "meritorious defense or claim to present if relief is granted"; and his "motion is made within a reasonable time." *GTE Automatic Elec., Inc. v. ARC Indus., Inc.*, 47 Ohio St. 2d 146, 150, 351 N.E.2d 113 (1976). And this Court has made clear that Rule 60(B)(5) "is only to be used in an extraordinary and unusual case when the interests of justice warrant it." *State ex rel. Hatfield v. Miller*, 172 Ohio St.3d 247, 2023-Ohio-429, 223 N.E.3d 391, ¶ 12 (brackets omitted). Indeed, the "whole purpose" of Rule 60(B) "is to make an exception to finality" when these extraordinary circumstances are met. *Buck* at 126. And if the litigant succeeds in the motion, and the proceedings are reopened, he must then show that he meets the requirements for post-conviction relief. Nothing in that procedure offends notions of finality.

Several additional points bear mentioning specific to the State's citation to Marcy's Law. *See* Mem. at 10, citing Ohio Constitution Article I, Section 10a(A)(8). The State's arguments in this regard are waived not only because the State failed to raise them below, but also because the

State's arguments are wholly undeveloped here. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, ¶ 34; *Lycourt-Donovan v. Columbia Gas of Ohio, Inc.*, 152 Ohio St.3d 73, 2017-Ohio-7566, 93 N.E.3d 902, ¶ 50. How exactly does Marcy's Law change the normal application of Rule 60 or defendants' right to adjudicate intellectual-disability claims? The State's brief provides no answer. That is likely because such a proposition makes no sense. Marcy's Law's does not "negate existing laws unless they conflict with the amendment," *State v. Yerkey*, 171 Ohio St.3d 367, 2022-Ohio-4298, 218 N.E.3d 749, ¶ 12 n.2, and Marcy's Law says nothing about abrogating the normal application of civil rules in post-conviction proceedings. And, again, there is no indirect conflict here because the Eleventh District's decision does not cause "unreasonable delay." *See supra* at 21-22. Nor does Marcy's Law say that it trumps a defendant's constitutional right to substantive, retroactive rules prohibiting a death sentence. Even if it did, the federal constitutional rights would prevail. *See Reynolds v. Sims*, 377 U.S. 533, 584, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."); *Duckworth v. Serrano*, 454 U.S. 1, 3-4, 102 S.Ct. 18, 70 L.Ed.2d 1 (1981) ("State courts are 'equally bound to guard and protect rights secured by the Constitution.' ").[3]

Accordingly, the State's arguments about finality and delay have no merit.

[3] The State also has a standing problem. Marcy's Law "is concerned with providing *victims* with enumerated rights; it is *not* concerned with providing the state with any legal rights or claims." *See State v. Fisk*, 171 Ohio St.3d 479, 2022-Ohio-4435, 218 N.E.3d 852, ¶ 11; *see also City of Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 29 (Marcy's Law does not "give the government rights enforceable against its own citizens"). And the State has not argued that it otherwise has been granted express authority from a victim to assert those rights. *See* R.C. 2930.19(A)(1); Ohio Constitution, Article I, Section 10a(B).

III. The State's Arguments Regarding The Requirements Of R.C. 2953.23 Are Irrelevant To The Question Presented And Are Nonetheless Without Merit.

Importantly, the State has never contested—and does not contest here—that if Rule 60(B) is an available avenue for relief, Mr. Hill meets the requirements of that rule. Nor has it contested that Mr. Hill is intellectually disabled under the now-governing standards. The State instead maintains that Mr. Hill cannot meet the procedural requirements for a successive post-conviction petition under R.C. 2953.23(A)(1). These arguments are irrelevant to this appeal and wrong.

A. The question of whether Mr. Hill meets the requirements of R.C. 2953.23 is not before this Court.

The State concedes that the question of whether Mr. Hill meets the requirements of R.C. 2953.23 is not currently before this Court. Mem. at 4, 14. Indeed, the Eleventh District has not yet addressed Mr. Hill's alternative request for a second post-conviction petition. *Id.* This Court, as "court of review, not of first view," will not decide that question in the first instance. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005); *see, e.g.*, *Ostanek v. Ostanek*, 166 Ohio St.3d 1, 2021-Ohio-2319, 181 N.E.3d 1162, ¶ 6, 38 ("[W]e remand the matter to that court to review the assignment of error that it did not address.").

Accordingly, the Court should disregard the State's arguments relating to R.C. 2953.23.

B. The State's arguments about whether Mr. Hill meets the requirements of R.C. 2953.23 are wrong.

The State's arguments that Mr. Hill cannot satisfy his alternative request for a second post-conviction petition under R.C. 2953.23 are meritless in any event.

1. Mr. Hill was "unavoidably prevented from discovery of" Dr. Olley's report at the time of Mr. Hill's first petition.

The State first suggests that Mr. Hill cannot show he was "unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief," R.C.

2953.23(A)(1)(a), because he was "aware of the facts that might support an intellectual-disability claim for decades." Mem. at 14. That is nonsense. The new fact upon which Mr. Hill relies is Dr. Olley's new report concluding that Mr. Hill is intellectually disabled under the now-governing standards. Mr. Hill was "unavoidably prevented from discovery of" Dr. Olley's new report because, at the time of Mr. Hill's *Atkins* petition in 2002, the old standards for intellectual disability governed, and Dr. Olley's new report did not yet exist. Ohio officially changed its standards in 2019, and Dr. Olley completed his new report, based on those new standards, in 2022. *Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616. Accordingly, at the time of Mr. Hill's first petition, Mr. Hill was "unaware" of Dr. Olley's new report and "could not have discovered" it by exercising reasonable diligence. *Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, at ¶ 21; *see also State v. Long*, 1st Dist. Hamilton No. C-170529, 2018-Ohio-4194, ¶ 13 (finding that petitioner properly "invoked the jurisdiction conferred under R.C. 2953.23" by alleging that the law at the time of his prior petition "had precluded his access to necessary records until 2016, when the Ohio Supreme Court" changed the law). And to the extent the State is arguing that Mr. Hill was generally aware of his intellectual-disability claim for decades, that is irrelevant. The statute speaks of newly discovered "facts," not newly discovered "claims." R.C. 2953.23(A)(1)(a).

2. Mr. Hill relies on a new substantive rule of law that applies retroactively.

The State next argues that Mr. Hill alternatively cannot "show that the U.S. Supreme Court has recognized a new, retroactive right in this area" because the "federal courts have almost universally held that *Atkins*'s progeny is not retroactive." Mem. at 14-15. But that is not right. The federal decisions the State cites applied the *federal* successive habeas statute. And, under that statute, it is not enough that the rule *be* retroactive under constitutional retroactivity principles. The statute requires that the rule be "*made retroactive* to cases on collateral review *by the Supreme*

Court." (Emphases added.) 28 U.S.C. 2244(b)(2)(A); *see In re Payne*, 722 F. App'x 534, 538 (6th Cir.2018) ("Under § 2244(b)(2), a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive" and "it is undisputed that the Supreme Court has not expressly made *Moore* and *Hall* retroactive"). The "made retroactive" requirement is missing from—and thus cannot be added to—Ohio's post-conviction statute. *Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, at ¶ 51-58. Ohio's statute simply requires a new rule that "applies retroactively to persons in the petitioner's situation." R.C. 2953.23(A)(1)(a).

And the rule announced in *Moore* undoubtedly "applies retroactively" to Mr. Hill. R.C. 2953.23(A)(1)(a). *Moore* changed the "definition of intellectual disability." *Hill*, 139 S. Ct. at 507. In doing so, it altered the "class of defendants" who are eligible for the death penalty. *Montgomery*, 577 U.S. at 206. In other words, it "affected the reach" of *Atkins*' categorical ban, "rather than the judicial procedures by which the [ban] is applied." *Welch v. United States*, 578 U.S. 120, 130, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016). So it represents "the clearest instance" of "a substantive rule." *Id.* And state courts "*must* give retroactive effect to new substantive rules of constitutional law." (Emphasis added.) *Montgomery*, 577 U.S. at 198-200.

General principles aside, more specific precedent also compels *Moore*'s retroactivity. The Supreme Court in *Moore* itself applied *Moore*'s holding retroactively: Moore's death sentence was final in 2004, and the Supreme Court was reviewing Moore's collateral attack filed many years later. *See Moore*, 581 U.S. at 6. Furthermore, this Court has made clear that *Atkins* and *Lott* apply retroactively. *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 3-8, 47-48; *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011, at ¶ 17. And because *Moore* and *Ford* altered *Lott*'s "substantive standards" for intellectual disability, *Lott* at ¶ 6, 11, it follows that they, too, apply retroactively. That is why multiple courts of appeals in Ohio have indeed

applied *Moore* and *Ford* retroactively. *State v. Williams*, 2021-Ohio-241, 167 N.E.3d 527, ¶ 2, 154 (11th Dist.); *State v. Jackson*, 2020-Ohio-4914, 160 N.E.3d 454, ¶ 66-74 (8th Dist.).[4] So too have courts in other states. *E.g.*, *In re. Mays*, No. WR-75,105-02, 2024 Tex. Crim. App. LEXIS 231 (Tex. Ct. Crim. App. Mar. 27, 2024) (applying *Moore* retroactively and granting relief).

For its part, the State never argued below that *Moore* and *Ford* are anything other than substantive. It is unclear whether the State is now trying to switch course. It cites *Edwards v. Vannoy* for the proposition that procedural rules (as opposed to substantive rules) are not retroactive but then never proceeds to argue that *Moore* is procedural. Mem. at 15. In any event, *Edwards* illustrates why *Moore* is, in fact, substantive. The rule at issue in *Edwards* required jury verdicts in criminal cases to be unanimous, so it was a prototypical rule about procedure. *Edwards v. Vannoy*, 593 U.S. 255, 258, 141 S.Ct. 1547, 209 L. Ed. 2d 651 (2021). The rule "affects 'only *the manner* of determining the defendant's culpability,' not the 'range of conduct or the class of persons that the law punishes.'" (Emphasis added.) *Id.* at 264 n.3. Here, again, *Moore* alters the "class of persons" who are categorically ineligible for the death penalty, so it is a substantive rule that must apply retroactively. *Id.*

In the end, the State's arguments going to Mr. Hill's alternative request for a second post-conviction petition are irrelevant to this appeal and nonetheless without merit.

IV. The Court Should Disregard The Improper (And Meritless) Arguments Made In The Amicus Brief.

The Ohio Prosecuting Attorneys Association ("OPAA") submits an amicus brief in support

[4] In a different *Jackson* case, the Third District came out the other way, but the court there erred by adopting federal precedent. 2020-Ohio-4015, 157 N.E.3d 240, at ¶ 45. The *Jackson* court cited only one state-court decision, *Phillips v. State*, but the *Phillips* decision explicitly *declined* to address whether *Moore* is retroactive. *Phillips v. State*, 299 So. 3d 1013, 1024 (Fla.2020).

of jurisdiction ("Am. Br."). The OPAA's arguments, however, fail on multiple levels. Most of them are irrelevant to the issue presented for review and have never been raised by an actual party to this case. So the Court should not even consider them. Regardless, the OPAA's arguments are incorrect as a matter of fact and law.

A. The amicus brief's arguments are not properly before this Court.

This Court should disregard the OPAA's arguments from the outset, for two main reasons.

First, nearly all of the OPAA's arguments were not raised below and are not argued by the State in its brief in support of jurisdiction here. Those arguments are therefore not properly before this Court. "[A]mici curiae are not parties to an action and may not, therefore, interject issues and claims not raised by parties." *State v. Noling*, 149 Ohio St.3d 327, 2016-Ohio-8252, 75 N.E.3d 141, ¶ 18; *see also Lorain Cty. Bar Assn. v. Zubaidah,* 140 Ohio St.3d 495, 2014-Ohio-4060, 20 N.E.3d 687, ¶ 49 (amicus briefs "may not raise issues beyond those already raised by the parties"). This Court has long refused to consider arguments in an amicus brief that are not raised by the parties themselves. *See, e.g.*, *Wellington v. Mahoning Cty. Bd. of Elections*, 117 Ohio St.3d 143, 2008-Ohio-554, 882 N.E.2d 420, ¶ 53; *Schaad v. Alder*, 2024-Ohio-525, __ N.E.3d __, ¶ 52 n.1; *see also, e.g.*, *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981); *Knetsch v. United States*, 364 U.S. 361, 370, 81 S.Ct. 132, 5 L.Ed.2d 128 (1960).

Second, the OPAA's arguments go to whether Mr. Hill meets the requirements of either Civil Rule 60(B) or Ohio's successive post-conviction statute. Yet the State admits that those issues are not before this Court. In the State's own words, "this appeal raises only the question whether Rule 60(B) is a workaround to the statute limiting successive post-conviction petitions." Mem. at 14. Indeed, neither the trial court nor the Eleventh District has decided whether Mr. Hill meets the requirements of Rule 60(B). Nor has the Eleventh District addressed Mr. Hill's

alternative request for a second post-conviction petition. *See id.* at 4 ("As to the merits of Hill's motion, and the further question whether the motion stated a valid claim for successive post-conviction relief, the Eleventh District demurred."). Accordingly, the OPAA's brief is filled with improper arguments that this Court should not consider.

B. The amicus brief's arguments are meritless.

For the sake of completeness, Mr. Hill will nevertheless address the OPAA's arguments. None of them are convincing.

1. Mr. Hill could not have raised his claim at the time of his prior petition.

First, the OPAA is wrong to suggest that Mr. Hill could have raised the changed standards during the litigation of his prior petition. Regardless of when the *clinical* standards changed, the *legal* standards did not change until *Moore* held that state courts must follow the clinical standards, and this Court accordingly changed Ohio's definition of intellectual disability. *Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, at ¶ 93-100. That was well after Mr. Hill's state post-conviction proceedings had concluded. *Hill*, 122 Ohio St.3d 1502, 2009-Ohio-4233, 912 N.E.2d 107. Though the courts in Mr. Hill's prior litigation *mentioned* the change in clinical standards (from two deficits to one deficit), the courts then *explicitly applied* the two-deficit *Lott* standard, as they were bound to do.[5] Accordingly, because *Lott* still controlled, Mr. Hill could not

[5] *See Hill*, 177 Ohio App.3d 171, 2008-Ohio-3509, 894 N.E.2d 108, at ¶ 77 & n.3, ¶ 94-100 (explaining that "[t]he Association on Mental Retardation's definition" adopted in 2002 "requires that a significant deficit in only one of these groups be demonstrated" but nonetheless applying *Lott*'s requirement that the petitioner "demonstrate significant limitations in two or more adaptive skills"); *Hill*, 2014 WL 2890416, at *22 (explaining that "the experts engaged in Hill's case most often referenced the 1992 AAMR standard for adaptive behavior cited in *Atkins* and *Lott*" and "therefore, Hill was required to show by a preponderance of the evidence deficits in at least two out of the ten skill areas of adaptive behavior"); *Hill*, 11 F.4th at 386 & n.6 (recognizing that "*Lott* has since been overruled, *see Ford*, 140 N.E.3d at 654–55, but it was the controlling state law at the time of the Ohio Court of Appeals decision" and therefore *Lott* controlled).

have raised a claim based on *Moore* and *Ford* at the time of his prior proceedings.

Nor could Mr. Hill have produced Dr. Olley's new report. The OPAA claims that Mr. Hill's submission of a declaration from Dr. Olley in 2010 "confirms the availability of Olley long before 2022." Am. Br. at 12. But that hides the ball. At the time of his 2010 declaration, Dr. Olley had not yet changed his opinion because the legal standards had not yet changed. His 2010 declaration simply stated that Dr. Olley was unaware that the person who filmed Mr. Hill's evaluation had a history with Mr. Hill and could have influenced the testing, that Dr. Olley overheard individuals outside of the courthouse remarking that Mr. Hill deserved the death penalty, and that certain kinds of documents are relevant to the *Atkins* inquiry. *See* Olley Decl., Case No. 4:96-cv-00795, ECF No. 117-1 (N.D.Ohio). Nothing in that declaration suggests Mr. Hill could have produced Dr. Olley's new opinion at the time of his prior petition.

2. Mr. Hill filed his motion within a reasonable time after discovering the basis for the motion.

The OPAA also accuses Mr. Hill of "intentional delay and strategic sandbagging." Am. Br. at 2. As shown above, those accusations have zero weight given the State's own attempts to delay these proceedings. And Mr. Hill has already explained why he could not have raised this issue before *Moore* and *Ford* were decided.

To the extent the OPAA faults Mr. Hill for any post-*Ford* delay, that is equally misplaced. By the time *Ford* was decided in 2019, the Sixth Circuit had previously granted Mr. Hill relief on his *Atkins* claim, and his federal *Atkins* litigation was still ongoing. (It is worth mentioning that the State was responsible for the majority of the appeals/en-banc requests in those proceedings). Of course, if Mr. Hill received relief on his *Atkins* claim in federal court, any renewed *Atkins* filing in state court would be moot. *See State v. Wine*, 3d Dist. Auglaize No. 2-15-07, 2015-Ohio-4726, ¶ 11 ("Ohio courts have held that when an appellate court reverses or vacates a conviction, a

pending petition for post-conviction relief requesting that the judgment of conviction or sentence be vacated or set aside is rendered moot."). Mr. Hill filed his Rule 60(B) motion only eight days after the United States Supreme Court denied certiorari on his federal *Atkins* petition. *Hill*, 142 S.Ct. 2579. Moreover, Dr. Olley had to analyze the extensive record in Mr. Hill's case and form an opinion under new standards—all during a global pandemic that struck right after *Ford* was decided in November 2019. So Mr. Hill could not have filed any report immediately after *Ford*.

Considering the totality of these circumstances, Mr. Hill filed his motion within a reasonable time after *Moore* and *Ford*. *See, e.g.*, *Newark Orthopedics, Inc. v. Brock*, 634 N.E.2d 278, 282 (10th Dist.1994) (finding that the motion was filed within a "reasonable time" where the litigant had "attempted to attack the May 20, 1983 judgment in federal court before filing his Civ.R. 60(B) motion"); *Welch v. Vannoy*, 637 F.Supp.3d 406, 418 (E.D.La.2022) (explaining that "[t]he change in decisional law provides the starting point for calculating timeliness" under Federal Rule 60(b), and the petitioner's motion was timely where the he "was waiting on the outcome of an appeal" before filing). In any event, the successive post-conviction statute does not impose a "reasonable-time filing requirement." *Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, at ¶ 51-59. So the OPAA's delay arguments have no basis in law and fact.

3. The change in standards matters to Mr. Hill's case.

The OPAA then suggests that *Moore* and *Ford* did not meaningfully change the relevant standards. In its view, "one must actually question how significant and how favorable" the change is when "[j]ust in terms of numbers, achieving a '2 of 10' rate under the former construct would seem to be less demanding than requiring 'l of 3'." Am. Br. at 7. The OPAA's inexpert questioning, however, is entirely unconvincing.

First and foremost, this Court has made clear that the change in standards *is* significant.

Ford explicitly held that the *Lott* standard was "improper" and "wrong" because it "require[d] a finding of significant deficits in *two or more* adaptive-skill sets" whereas "the current diagnostic standards require significant deficits in *any of* the three adaptive-skill sets." (Emphasis added.) *Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, at ¶ 95-97, citing *Moore*, 581 U.S. at 8; *see also Jackson*, 2020-Ohio-4914, 160 N.E.3d 454, at ¶ 72 (8th Dist.) (explaining that *Ford* is "less stringent" than *Lott* because it "removes the requirement that a second adaptive skill deficit must be identified"). This Court held that these changes were significant enough to merit a fresh analysis of Ford's intellectual-disability claim. *Ford* at ¶ 100; *see also, e.g.*, *Jackson* at ¶ 66-75.

And that makes sense. A litigant now must show one qualifying deficit (two standard deviations below the mean) in only one general domain, rather than two qualifying deficits (two standard deviations below the mean) in two separate and discrete skill areas. This change—arguably imposing an "overly inclusive criterion"—was intended to prevent the wrongful *exclusion* of individuals from the definition of intellectual disability. AAMR, Mental Retardation, Ch. 5 Assessment of Adaptive Behavior, at pg. 78 (10th Ed. 2002). It is no wonder, then, why this change can make a difference in an individual case, especially where (as here) the experts and courts acknowledged that it was a "close call" under the old standards. *E.g.*, *Hill*, 2014 WL 2890416, at *27, *50.

Moreover, the OPAA entirely ignores the *additional* changes imposed by *Moore* and *Ford* that make a difference in Mr. Hill's case. Now, intellectual disability cannot be defined by a person's "adaptive strengths" and "adaptive improvements [the person] made in prison." *Ford* at ¶ 55, quoting *Moore*, 581 U.S. at 17. In evaluating Mr. Hill's claim, both the experts and the state courts unquestionably strayed from those dictates. *See supra* at 4-9. And the federal courts, hamstrung by AEDPA, could not correct those errors. *Id.*

Pivoting away from adaptive deficits, the OPAA also tries to downplay the significance of the changes *Ford* made to the first prong of *Atkins* (subaverage intellectual functioning). Am. Br. at 10. Mr. Hill agrees that this change matters little to his case—but for a different reason. The State has long conceded that Mr. Hill meets the first prong, even under the more rigorous *Lott* standard. *See Hill*, 11 F.4th at 387 ("Both parties agree that Hill satisfied the first factor, that he had significantly subaverage intellectual functioning.").

Ultimately, how do we know that *Moore* and *Ford* make a difference in Mr. Hill's case? Because the State's own expert—whom the State has long touted as "a leading expert with unimpeachable credentials and demonstrable objectivity"—has concluded that Mr. Hill is intellectually disabled under the now-governing standards. Appellee's Suppl. Br., *Hill v. Shoop*, Case No. 99-4317, Doc. No. 368 at 5-6 (6th Cir. Oct. 5, 2020); *see* Olley Aff., Ex. 1 to Civil Rule 60(B) Motion T.d. 426. As the State itself has argued, neither the parties nor the Court can "substitute[] its own inexpert judgment for the judgment of experts." Petition for Rehearing En Banc, *Hill v. Shoop*, Case No. 14-3718, Doc No. 83 at 15-16 (6th Cir. May 28, 2020). Indeed, the whole purpose of Mr. Hill's Rule 60(B) motion is to permit the trial court to reevaluate his claim under the proper standards in conjunction with the actual experts. And the State has still offered nothing—in terms of evidence or even argument—contesting that Mr. Hill is intellectually disabled under those standards. Accordingly, the OPAA's inexpert musings about the clinical changes are unpersuasive.

4. A change in law can justify Rule 60(B) relief.

The OPAA next misstates the law when it argues that "changes in decisional law do not justify Civ.R. 60(B) relief anyway." Am. Br. at 7. The case upon which the OPAA relies, *Doe v. Trumbull Cty. Children Serv.*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986), is based on a rule that

no longer applies to situations like Mr. Hill's. *Doe* articulated the more general rule, then applied in Ohio, that "a change in the decisional law is not grounds for vacating a final judgment entered on the merits." *Id.* at 130. This general rule applied to criminal final judgments as well—"a new judicial ruling may not be applied retroactively to a conviction that has become final." *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687, ¶ 6, citing *Doe* at syllabus. But after *Montgomery v. Louisiana*, that rule cannot apply to decisional changes imposing a substantive rule of constitutional law. *See Montgomery*, 577 U.S. at 200 ("The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.").

This Court has recognized that *Montgomery* mandates an exception to the *Doe* rule "when a new substantive rule of constitutional law controls the outcome of a case." *See Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶ 97 ("Generally, a new decision does not apply to convictions that were final when the decision was announced. But [per *Montgomery*] courts must give retroactive effect to new substantive rules of constitutional law."). Accordingly, this Court in *Moore* held that the "substantive, retroactive United States Supreme Court decision in *Graham [v. Florida]*"—prohibiting life imprisonment on juvenile nonhomicide offenders—constituted the "extraordinary circumstances" necessary for a delayed motion for reconsideration. *Id.* at ¶ 88-99; *see also Buck*, 580 U.S. at 112-128 (in a death penalty case, holding that a "change in the law" and other subsequent developments constituted the "extraordinary circumstances" necessary for relief under Federal Rule 60(b)(6)). The same reasoning applies here.

Moreover, Mr. Hill is not relying *only* on a change in decisional law. He also relies on an affidavit from the State's star expert averring that Mr. Hill is intellectually disabled under the now-governing standards. And he is relying on the "well over 6,000 pages" of records in his case

demonstrating his intellectual disability. *Hill*, 2014 WL 2890416, at *24-33.

5. The amicus brief's arguments relating to R.C. 2953.23 have zero merit.

The OPAA's final arguments, relating to R.C. 2953.23, can be disposed of quickly. The OPAA says that "reliance on *Ford* gets no traction here, since a new legal decision is not a 'fact' upon which a post-conviction claim can lie." Am. Br. at 12. But Mr. Hill relies on "a new federal or state right that applies retroactively" and therefore Mr. Hill need not meet the alternative "fact" requirement. R.C. 2953.23(A)(1)(a). Regardless, Dr. Olley's new report is the new fact upon which Mr. Hill relies. *Cf. Souter v. Jones*, 395 F.3d 577, 592 (6th Cir.2005) ("[I]f Dr. Cohle has changed his expert opinion, the evidence itself has changed, and can most certainly be characterized as new.").

The OPAA also says that "*Ford* would not satisfy R.C. 2953.23(A)(1)(a), since *Ford* is not a decision from the United States Supreme Court." Am. Br. at 13. But Mr. Hill relies on the United States Supreme Court's decision in *Moore*, which itself mandated the change to Ohio's definition of intellectual disability. *Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, at ¶ 46-100; *see also Williams*, 2021-Ohio-241, 167 N.E.3d 527, at ¶ 27-28 (explaining that the *Ford* court "appl[ied]" the "updated definition of intellectual disability from the United States Supreme Court" in *Moore*).

The OPAA additionally invokes *State v. Johnson* in arguing that Mr. Hill "cannot merely point to the timing of *Ford*" to show unavoidable prevention under R.C. 2953.23(A)(1)(a). Am. Br. at 12. But the OPAA badly misreads *Johnson*. The court there held that, to prove unavoidable prevention, the petitioner could not rely solely on the date of a recanting-witness's affidavit, because that date proved only when he *did* receive the affidavit, not when he *could have* "discovered [it] by exercising reasonable diligence." *State v. Johnson*, 2024-Ohio-134,

__ N.E.3d __, ¶ 3, 16, 25-29. Thus, the petitioner provided zero evidence that he was unavoidably prevented from discovering the affidavit within the statutory deadline. *Id.* Here, by contrast, there is no dispute that *Ford* was decided after the statutory deadline. And prior to *Ford*—and the resulting change in the standards governing intellectual-disability claims—Mr. Hill "could not have discovered [Dr. Olley's affidavit] by exercising reasonable diligence." *Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, at ¶ 21; *see supra* at 25-26, 30-31.

Finally, the OPAA claims that the question of intellectual disability "would not constitute error 'at the sentencing hearing' under R.C. 2953.23(A)(1)(b)" because the issue "is a non-jury matter." Am. Br. at 14. That argument borders on frivolous. Mr. Hill is ineligible for the death penalty under *Atkins*, so when the jury sentenced him to death at the sentencing hearing, that violated the Constitution. Moreover, the upshot of the OPAA's argument is astounding. It would mean R.C. 2953.23(A)(1)(b) covers things like evidentiary-based sentencing errors but excludes some of the most egregious sentencing errors—*i.e.*, violations of categorical bars to the death penalty. And that would squarely contradict *Lott* itself, where this Court said that an *Atkins* claim "satisfies the requirements of R.C. 2953.23(A)(1)(b)." *Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011, at ¶ 17.

Accordingly, even if the OPAA's arguments were properly presented here, they would fail on their merits.

CONCLUSION

For the above reasons, this Court should (and indeed must) decline review of the Eleventh District's decision.

Respectfully Submitted,

STEPHEN C. NEWMAN (0051928)
FEDERAL PUBLIC DEFENDER

/s/ Calland M. Ferraro
CALLAND M. FERRARO (0093439)
Assistant Federal Public Defender
MATTHEW GAY (NY5237409)
Assistant Federal Public Defender
Capital Habeas Unit
1660 W. 2nd Street, Suite 750
Cleveland, Ohio 44113
(216) 522-4856; (216) 522-1951 (fax)
Calland_Ferraro@fd.org
Matthew_Gay@fd.org

Counsel for Appellee Danny Lee Hill

CERTIFICATE OF SERVICE

I hereby certify on April 3, 2024, a true and correct copy of the foregoing **MEMORANDUM IN RESPONSE TO STATE'S MEMORANDUM IN SUPPORT OF JURISDICTION** was served by email upon the following counsel.

Charles L. Morrow
Administration Building, Fourth Floor
160 High Street, N.W.
Warren, OH, 44481
psmorrow@co.trumbull.oh.us

T. Elliot Gaiser
Michael J. Hendershot
Stephen Maher
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
thomas.gaiser@ohioago.gov
michael.hendershot@ohioago.gov
stephen.maher@ohioago.gov

Steven L. Taylor 0043876
196 East State Street, Ste. 200
Columbus, Ohio 43215
Phone: 614-221-1266
Fax: 614-221-0753
taylor@ohiopa.org

/s/ Calland M. Ferraro
CALLAND M. FERRARO
Assistant Federal Public Defender