IN THE SUPREME COURT OF OHIO
2025

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

DANNY LEE HILL,

Defendant-Appellee.

Case No. 24-352

On Appeal from the
Trumbull County
Court of Appeals, Eleventh
Appellate District

Court of Appeals
No. 2023-T-0039

MERIT BRIEF
OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION
IN SUPPORT OF APPELLANT STATE OF OHIO

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STATEMENT OF AMICUS INTEREST

Founded in 1937, the Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission is to assist prosecuting attorneys to pursue truth and justice as well as promote public safety. OPAA advocates for public policies that strengthen prosecutors' ability to secure justice for victims and sponsors legal education programs that encourage best practices in law enforcement and community safety.

In light of these considerations, OPAA urges this Court to reverse the Eleventh District's judgment. Securing justice for victims includes recognizing that victims have the constitutional right under Marsy's Law "to proceedings free from unreasonable delay" and a right to "a prompt conclusion of the case." Article I, Section 10a(A)(8), Ohio Constitution. These self-executing rights reflect the victim's right to closure in the case and the right to finality, and such rights "shall be protected in a manner no less vigorous than the rights afforded to the accused." *Id.* & Section 10a(E).

"Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Shinn v. Ramirez*, 596 U.S. 366, 376-77 (2022) (internal quotation marks and citation omitted).

The glacial pace of death-penalty litigation is a cause of great concern for Ohio prosecutors and Ohio victims, and those concerns are at their zenith here. Defendant's original *Atkins* claim was denied by the common pleas court on February 15, 2006. The defendant did not file his Civ.R. 60(B) motion until July 8, 2022, a delay totaling 5,987 days – 16.4 years of delay. The defendant's death sentence dates back to 1986, and, as of the 7-8-22 filing, a total of 13,279 days had elapsed since the imposition of the death sentence, i.e., over 36 years – over six times longer than the period in which World War II was fought. Those are big numbers, and they are indefensible.

Such exorbitant delays make this case a prime example of why time limits and restrictions on repeated post-conviction review are needed. It turns out that there is *zero* excuse for the delays since the trial court's 2006 denial of the original *Atkins* claim, given that the defense could have raised and litigated the *very same point* about the adaptive-limitations prong in that very litigation. *See* Argument, Part C, infra. This is stunning delay, and yet the Eleventh District's decision encourages even more delay by allowing Civ.R. 60(B) litigation to proceed outside the successive-review limits of R.C. 2953.23(A).

As this Court has noted, when a capital defendant has exhausted rounds of pursuing direct appeal, reopening, and post-conviction relief, "any further action a defendant files in the state court system is likely to be interposed for purposes of delay and would constitute an abuse of the court system." *State v. Steffen*, 70 Ohio St.3d 399, 412 (1994). Lax standards in such matters would "give litigants incentives to withhold claims in order to manipulate the system and create disincentives to present fresh claims." *Id*. at 411-12.

The same skepticism should apply to a death-sentenced defendant who, after having pursued multiple prior rounds of post-judgment review in the common pleas court, is now seeking to pursue yet another round of litigation. There is no other apparent reason for the 16.4 years of delay here other than delay for delay's sake. *See*

Rhines v. Weber, 544 U.S. 269, 277-78 (2005) ("capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death"). "[L]ast-minute claims arising from long-known facts, and other 'attempt[s] at manipulation' can provide a sound basis for denying equitable relief in capital cases." *Ramirez v. Collier*, 595 U.S. 411, 434 (2022).

The defense's 7-8-22 filing of the Civ.R. 60(B) motion brings to the forefront concerns about intentional delay and strategic sandbagging by the defense. Those terms are harsh, but they *easily* fit what has happened here. From 2010 until the United States Supreme Court's denial of the petition for writ of certiorari on June 30, 2022, the defense had been litigating defendant's *Atkins* claim at length in federal habeas proceedings. During that time, the defense would have been aware of United States Supreme Court's favorable references to the 2002 AAMR, 2010 AAIDD, and/or 2013 DSM-V clinical definitions in 2014, 2017, and 2019. *See Hall v. Florida*, 572 U.S. 701 (2014); *Moore v. Texas*, 581 U.S. 1 (2017); *Moore v. Texas*, 586 U.S. 133 (2019). And of course the defense would have been aware of this Court's discussion on November 7, 2019, in *State v. Ford*, 2019-Ohio-4539. The 2014 *Hall* decision, the 2017 *Moore* decision, and the 2019 *Ford* decision, were all cited in the 7-8-22 motion, but nothing would have prevented the defense from approaching Dr. Olley in 2014, 2017, or 2019 to assess whether the changed definition as to adaptive limitations would make a difference in his opinion. The definitions being cited were from 2010 and 2013 publications. But no Civ.R. 60(B) motion was filed in 2010, 2013, 2014, 2017, or 2019. The defense was intentionally choosing *not* to file the motion while it continued with its federal habeas litigation.

Nor did the defense file its motion in January 2022 after Olley had completed his 1-7-22 report. The defense was holding off on filing, and the holding off must have been intentional at this point since the defense now had the Olley report in hand, which was premised on a request from defense counsel (the date of the request was not disclosed).

The "tell" is that the defense waited to file the motion until 7-8-22, *after* the United States Supreme Court denied certiorari on June 30, 2022. This timing was plainly calculated to maximize the amount of delay by pursuing seriatim proceedings even though the defense could have potentially approached Dr. Olley or other expert(s) and filed the motion in 2010, 2013, 2014, 2017, or 2019. The defense very well could have filed the same motion at those times without causing additional delay on top of the federal habeas proceedings. But the defense waited, and waited, and waited, and was still waiting when certiorari was denied. Then, having wrung every bit of delay it could out of habeas review, the defense needed to start a new proceeding to start more delay and now filed the 7-8-22 Civ.R. 60(B) motion.

Instead of exacerbating these manipulative defense delays, the Eleventh District should have enforced the express statutory standard under R.C. 2953.23(A) that limits the ability of a defendant to relitigate a post-conviction claim that was previously denied. The statute already regulates when a defendant can seek to reopen a previously-denied claim based on "new" evidence or based on "new" law, and a mere procedural rule like Civ.R. 60(B) cannot supplant that statutorily-controlled process. The statutory limits on successive claims are jurisdictional and substantive in nature, and a mere procedural rule cannot modify jurisdiction or alter substantive law.

Adding to the problem is that Civ.R. 60(B) on its face is a non-starter in this context of massive unreasonable and manipulative defense delay.

In the interest of aiding this Court's review herein, amicus curiae OPAA offers the present amicus brief in support of the State's appeal.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history as set forth in the State's brief.

ARGUMENT

> **Amicus Proposition of Law**: A motion under Civil Rule 60(B) that seeks to relitigate the merits of a previously-denied post-conviction claim must be denied because R.C. 2953.23(A) alone defines the defendant's ability to relitigate the claim and a mere procedural rule cannot purport to modify or change such substantive and jurisdictional limits.

Ohio courts have a responsibility to ensure that the proceedings in state courts are not used as tools to sow further delay and to undercut Ohio's strong interests of finality. The Eleventh District's decision does the opposite.

A.

The basic premise of the 7-8-22 motion invoking Civ.R. 60(B)(4) and (B)(5) was that this Court issued a decision on November 7, 2019, in *State v. Ford*, 2019-Ohio-4539, overruling two aspects of its 2002 decision governing intellectual disability claims in *State v. Lott*, 2002-Ohio-6625, which had applied *Atkins v. Virginia*, 536 U.S. 304 (2002). Upon close inspection, the changes made by *Ford* were minimal, but, even so, the defense had the benefit of *Ford* since 11-7-19, and it still took the defense over 32 months to file the 7-8-22 motion. Even if *Ford* was the true genesis of the motion (it wasn't), the defense should have filed a *Ford*-based motion within a couple of months at most, rather than taking over 32 months. This delay of over 32 months amounts to unreasonable delay that would disqualify the defense from obtaining Civ.R. 60(B) relief, even if such relief might otherwise be available.

B.

The term "mental retardation" ("MR") transitioned over the years into the term "intellectual disability" ("ID"), and the latter term will mostly be used here.

The broad outlines for determining whether a defendant is ID are set forth in *Atkins*, 536 U.S. at 308 n. 3, and *Lott*, and, with some modification, in *Ford*. Under *Atkins* and *Lott*, a defendant must prove ID by showing that he: (l) suffers from "significantly subaverage intellectual functioning," (2) experienced "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction," and (3) manifested "onset before the age of 18." The limitations in adaptive functioning must be "related" to the intellectual deficits. *Atkins*, 536 U.S. at 308 n. 3. *Lott* stated in ¶ 12 that "there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70."

The United States Supreme Court has recognized that courts must consider the usual plus/minus five-point margin of error for IQ scores in assessing the IQ prong. *Hall, supra*. Scores up to 75 might support an ID diagnosis, but they do not require it.

In *Ford*, this Court left the vast majority of the *Atkins-Lott* approach in place. But *Ford* recognized that there had been a change in approach to the adaptive-limitations prong. As quoted in *Atkins*, and relied upon by *Lott*, the 1992 American Association of Mental Retardation (AAMR) manual and the 1994 DSM-IV had referred to the adaptive-limitations prong in terms of whether the defendant could show significant limitations in "two or more" adaptive-skill areas, with the 1992 AAMR listing 10 skill areas, "communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work," and with the 1994 DSM-IV listing 11 skill areas, "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." *Atkins*, 536 U.S. at 309 n. 3. As can be seen, a defendant under these standards needed to show significant limitations in 2 out of 10 (or 2 out of 11) listed skill areas.

The American Association of Intellectual and Developmental Disabilities (AAIDD) succeeded the AAMR organization, and *Ford* took note that the 2010 AAIDD and 2013 DSM-V definitions were now grouping the skill areas into three "domains" – conceptual, social, and practical – and were now requiring a significant adaptive limitation in at least one of the three domains, as opposed to the 2-of-10 or 2-of-11 approach relied upon in *Lott*. *Ford*, 2019-Ohio-4539, at ¶ 46, 95. *Ford* concluded that *Lott* was "outdated" in setting forth the older 2-or-more standard. *Id*. at ¶ 97.

While the defense would portray this as a significant change in favor of capital defendants, one must actually question how significant and how favorable it is when a person must now qualify in relation to at least one broader domain having three or more skill areas within each domain. Just 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." To be sure, using "domains" containing grouped lists of skill areas is a shift in terminology, but it does not appear to be a significant pro-defendant change. While the Court in *Ford* remanded in light of this change and other issues, the relief afforded in the *Ford* direct appeal does not demonstrate the kind of extraordinary circumstances that would warrant relief from judgment under Civ.R. 60(B) standards, and it is well settled that changes in decisional law do not justify Civ.R. 60(B) relief anyway. *Doe v. Trumbull Cty. Children Services*, 28 Ohio St.3d 128, 131 (1986) & syllabus.

C.

Adding to the lack of significance of the *Ford* change is that the 2002 AAMR definition had already begun using this 1-of-3 "domains" approach. When the Eleventh District affirmed the denial of defendant's *Atkins* claim in 2008, it *expressly cited and discussed* this development arising from the 2002 AAMR:

> The American Psychiatric Association's definition of mental retardation identified the following categories of adaptive skills: communication; self-care; home living; social/interpersonal skills; use of community resources; self-direction; functional academic skills; work; leisure; health; and safety. *In 2002*, the American Association on Mental Retardation distilled these categories into *three broad groups* of adaptive skills: conceptual adaptive skills; social adaptive skills; and practical adaptive skills. The Association on Mental Retardation's definition *only requires* that a significant deficit *in one of these groups* be demonstrated.

State v. Hill, 2008-Ohio-3509, ¶ 77 n. 3 (11th Dist.) (emphasis added).

When the federal district court later denied defendant's *Atkins* habeas claim on June 25, 2014, it too referenced this change to the clinical definition, mentioning the post-*Atkins* 2002 AAMR definition and mentioning the 2010 AAIDD and 2013 DSM-V definitions. *Hill v. Anderson*, 2014 U.S. Dist. LEXIS 86411, at *48-51 n. 7. The district court in the same decision discussed at length the evolution from the 2-of-10 and 2-of-11 approach in earlier definitions to the 1-of-3 approach in the 2002 AAMR, 2010 AAIDD, and 2013 DSM-V. *Id.* at *63-67. The district court viewed the differences between the two standards as "minor" and used the 2-or-more approach. *Id.*; *see also Chase v. State*, 171 So.3d 463, 470, 471 (Miss. 2015) ("new definitions changed the terminology applicable to adaptive functioning" but make "little substantive difference in this *Atkins* context" – quoting another case in part; "new definitions have not materially altered the diagnosis of intellectual disability but have provided new terminology."); *United States v. Williams*, 1 F.Supp.3d 1124, 1146-47 (D.Haw.2014) ("ultimately of no consequence to the Court's task" and "mostly theoretical"; quoting another case).

In fact, the district court recognized that the participants in defendant's 2004-05 common pleas *Atkins* hearing had been aware of the 2002 AAMR change. The district court noted that "[t]he experts in this case agreed that the AAMR 2002 Manual provided a slightly more stringent standard of adaptive deficiencies than the AAMR 1992 Manual." *Hill*, 2014 U.S. Dist. LEXIS 86411, at *67 n. 10.

A review of the *Atkins* hearing transcript confirms this point. Defense witness David Hammer testified under redirect examination as follows:

> Q The Prosecutor asked about the differences between the structure of the '92 9th Edition and '02 10th Edition of the AAMR diagnostic manual. At one point I think the record will reflect he commented, so the difference is it only takes one as opposed, in '02, versus two deficits in the '92 under the adaptive skill? Now, is that what, is that correct that somehow there's a lower standard for adaptive deficits?
>
> A No. In fact, in essence it's probably a little higher factor. It's a requirement of one in the sense that in the previous one you had ten areas that you were involved with and it was two areas that you only had to be deficient in. So it was 20 percent basically. Whereas, I mean, if you want to go on a percentage basis, in the new definition it's 33 and a third.

> Q In each of the three, which I should – there's conceptual, perception and social?
>
> A It's social, conceptual and practical.

(Common Pleas *Atkins* Hrg., 10-6-04, Vol. 2, at 455-56) Defense witness Sara Sparrow similarly testified under direct examination:

> Q How, if at all, would it be – what if at all would be your understanding between the relationship of the AAMR's 9th and 10th Edition articulation of the diagnostic framework and the DSM prevailing edition? Are there differences that count that would yield different results?
>
> A I don't think there are differences that count.
>
> Q In your opinions expressed thus far today, would any of your impressions or expert opinions change as a function of whether you are hewing to the '92 AAMR versus the 2002 AAMR?
>
> A. Well, the '92 AAMR let's you – you don't have to demonstrate much of a disadvantage to be, to qualify on the, on the '92 because it has so many – they didn't require you to have many, many areas that were deficient. Now you've got to have one in three or four, three particularly. So it's really, they're more stringent now than it was in '92.

(Rebuttal Evidentiary Post-Trial *Atkins* Hrg., 3-23-05, at 125-26) The 2004-05 transcripts of the *Atkins* hearing reveal repeated references to the 2002 AAMR (10th Ed.), including its change to the 1-of-3 approach as to the adaptive-limitations prong. (10-4-04, Vol. 1, at 26, 33-39, 66-67, 123, 129-30, 271-72; 10-6-04, Vol. 2, at 313-14, 457-60, 509; 10-7-04, Vol. 3, 681-82, 706, 721, 726, 762-63, 802; 10-26-04, Vol. 4, at 907, 1029-31; 3-23-05, Rebuttal Evidentiary Hrg., at 83; 7-15-05, Closing Arguments, at 98, 105, 115)

The federal Sixth Circuit's initial review sustaining the *Atkins* claim likewise noted the various editions of the clinical definitions and specifically mentioned the AAMR/AAIDD's change to the 1-in-3 domain approach. *Hill v. Anderson*, 881 F.3d 483, 493 n. 8 (6th Cir.2018). When the defense was later opposing the warden's petition for writ of certiorari seeking review of the Sixth Circuit's decision, the defense repeatedly cited the 2002 AAMR publication in its 8-29-18 brief in opposition in U.S.Sup.Ct. No. 18-56. The Supreme Court nevertheless granted the warden's petition and vacated the Sixth Circuit's decision. *Shoop v. Hill*, 139 S.Ct. 504 (2019). The en banc Sixth Circuit affirmed the denial of habeas relief. *Hill v. Shoop*, 11 F.4th 373 (6th Cir. 2021).

All of the foregoing confirms that the defense would have been well aware of the 1-of-3 approach to adaptive skills as set forth in the 2002 AAMR and in the 2010 AAIDD. All of this shows beyond peradventure that the defense could have been arguing for the l-of-3 approach all along and could have been pressing for the same modest change in the *Lott* "two or more" terminology all along.

This cannot be emphasized enough. The defense has had available to it the 2002 AAMR definition using the 1-of-3 approach since 2002. The experts in the common pleas *Atkins* hearing were repeatedly *questioned* about the 2002 AAMR, as noted by the federal district court, which stated that "[t]he experts in this case agreed that the AAMR 2002 Manual provided a slightly more stringent standard of adaptive deficiencies than the AAMR 1992 Manual." This explains a lot – the defense likely preferred the 2-of-10 approach because it was viewed as slightly less stringent than the 2002 AAMR 1-of-3 approach. It is also notable that the defense was pursuing a collateral-estoppel theory in the original state-court *Atkins* proceedings by contending that earlier judicial statements referring to MR should bind the prosecution. If the defense had been arguing that the 2002 AAMR change was now legally controlling, that argument would have undercut the defense argument that pre-*Atkins* judicial references as to MR should now be controlling for collateral-estoppel purposes. In any event, the 1-of-3 approach plainly has been available to the defense since 2002, having been cited over and over again in the defendant's very own case. It is inconceivable that it might provide a basis for relief from the 2006 judgment denying *Atkins* relief sixteen years after that denial.

The 1-of-3 approach argument could have been raised in the original *Atkins* proceedings up to the time of the common pleas court's 2006 denial of PCR relief, through the time of the Eleventh District's affirmance in 2008, and up through the time of this Court's declining of review in 2009. As a matter of law, the 1-of-3 approach cannot justify any relief under Civ.R. 60(B) or under R.C. 2953.23(A), and *Ford*'s acknowledgment of that approach does not excuse the failure to raise it earlier.

In this timeline running from the 2002 AAMR, to the 2010 AAIDD, to the 2013 DSM-V, and to the 2014 and 2017 decisions in *Hall* and *Moore*, the 1-of-3 approach to the adaptive-limitations prong was readily available. By all indications, the defense decision to wait until 7-8-22 to raise this issue in state court represented a tactical gambit by the defense, with the defense intentionally holding off on raising the issue in state court so that it might serve as a basis for seriatim delay in later proceedings.

D.

In another change, *Ford* overruled *Lott*'s language indicating that an IQ over 70 raises a rebuttable presumption that the defendant is not ID. But this change makes zero difference because *Ford* did not overrule the *Lott* conclusion that the defendant bears the burden of proving ID by a preponderance in original trial-court proceedings or in a timely post-conviction petition following *Atkins* and *Lott*. The rebuttable presumption made no difference to the defendant's overall preponderance burden, and it still makes no difference to it. Absent preponderating evidence of ID, the ID claim fails regardless of any presumption. And under the controlling standard for successive post-conviction claims raising *Atkins* ID claims, defendant would be required to show by clear and convincing evidence that all reasonable factfinders would sustain his ID claim.

E.

Defendant chose the wrong vehicle in which to seek another review of his ID claim. As stated in the syllabus of *State v. Reynolds*, 79 Ohio St.3d 158 (1997), "Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21." The *Lott* Court directly relied on the *Reynolds* syllabus when it stated that "[t]he procedures for postconviction relief outlined in R.C. 2953.21 et seq. provide a suitable statutory framework for reviewing Lott's *Atkins* claim." *Lott*, 2002-Ohio-6625, at ¶ 13. For first-time ID petitions based on *Atkins*, the clear-and-convincing standard for untimely/successive post-conviction petitions did not apply. *Id*. ¶ 17. But this would be defendant Hill's second *Atkins* petition, and the standards for untimely/successive filing apply. "Petitions filed more than 180 days after [the *Lott*] decision must meet the statutory standards for untimely and successive petitions for postconviction relief." *Id.* ¶ 24.

In light of *Lott* and *Reynolds*, defendant should have been proceeding, if at all, under the suitable post-conviction framework in R.C. 2953.21 et seq., which is "the exclusive remedy by which a person may bring a collateral challenge" to his death sentence. R.C. 2953.21(K). Because a motion under Civ.R. 60(B) is a collateral attack, *see Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 2007-Ohio-5024, ¶ 21, such "motions" should proceed, if at all, as post-conviction petitions. *See, e.g.*, *State v. Teitelbaum*, 2019-Ohio-3175, ¶ 8-19 (10th Dist.); *State v. Jones*, 2018-Ohio-306, ¶ 8 (10th Dist.). A Rule 60(b) motion claiming "newly discovered evidence" or "a subsequent change in substantive law" in relation to an earlier post-conviction ruling should be treated as a successive petition because not doing so would impermissibly circumvent statutory limits on successive review. *See Gonzalez v. Crosby*, 545 U.S. 524, 531-32, 534 (2005) ("Rule 60(b) motion that seeks to revisit the federal court's denial *on the merits* of a claim for relief should be treated as a successive habeas petition").

Defendant cannot validly invoke the narrow exceptions that allow untimely/successive filing. The first exception allows untimely/successive filing if "the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely . . .." R.C. 2953.23(A)(l)(a). But defendant's reliance on *Ford* gets no traction here, since a new legal decision is not a "fact" upon which a post-conviction claim can be based. *State v. Kane*, 2017-Ohio-7838, ¶ 15 (10th Dist.) (provision contemplates discovery of new historical facts, not new legal theories; collecting cases).

Moreover, the defendant cannot merely point to the timing of *Ford* or the timing of Olley's 1-7-22 report to show unavoidable prevention. As shown by *State v. Johnson*, 2024-Ohio-134, "unavoidable prevention" requires a showing that the defense was incapable of discovering the information. The mere date of an affidavit or report is insufficient to specifically show why the information could not have been discovered earlier. *Id*. ¶ 25-29.

As already indicated, the defense could have pursued the 1-of-3 approach to adaptive functioning during the original *Atkins* proceedings and in the state-court appeals thereafter, since the 2002 AAMR manual had already adopted that standard. It is also notable that the defense was already relying on a declaration from Olley in the federal habeas proceedings as early as 2010, which confirms Olley's availability and willingness to cooperate with the defense long before 2022. *See Hill v. Anderson*, 2010 U.S. Dist. LEXIS 132468, at *13-14 (citing petitioner's submission of a declaration from Olley).

The defendant likewise cannot satisfy the second exception by showing that, "subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right." R.C. 2953.23(A)(l)(a). *Ford* would not satisfy this exception, since *Ford* is not a decision from the United States Supreme Court. *State v. Martin*, 2025-Ohio-144, ¶ 40 (11th Dist.); *State v. Jackson*, 2020-Ohio-4015, ¶ 40 (3rd Dist.); *State v. Timmons*, 2012-Ohio-2079, ¶ 9 (10th Dist.). *Ford* also acknowledges that its guidance "appl[ies] going forward." *Ford*, 2019-Ohio-4539, at ¶ 98. As a result, *Ford* would not retroactively apply to long-final ID determinations.

Hall (2014), *Moore* (2017), and *Moore* (2019) likewise do not apply retroactively to already-final ID determinations. *Atkins* itself was retroactive to previously-final cases, but these follow-on cases adjusting how ID is determined do not have a similar retroactive effect on further collateral review. "[W]e choose to follow a substantial and growing body of case law that has declined to apply *Hall* and *Moore* retroactively." *Jackson*, ¶ 45 (collecting cases); *Martin*, ¶ 38; *State v. Lotter*, 311 Neb. 878, 906, 976 N.W.2d 721 (2022) ("neither *Hall* nor *Moore I* announced a new substantive rule of constitutional law that must be applied retroactively to cases on collateral review."); *In re Payne*, 722 F.App'x 534, 538 (6th Cir.2018) ("*Hall* and *Moore* merely created new procedural requirements that do not amount to 'watershed rules of criminal procedure.'").

Even if defendant could satisfy one of these exceptions, he would be further required to show "by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence." R.C. 2953.23(A)(l)(b).

Defendant's ID claim fails under this necessary prong. First, the changes made by *Ford* in relation to *Lott* are simply insufficient to clearly and convincingly show that all reasonable factfinders would accept his ID claim by a preponderance. The experts conceded that the 1-of-3 approach of the 2002 AAMR was slightly *more* stringent than the prior definition. In addition, under the still-operative parts of the *Lott* framework, the question of ID would not constitute error "at the sentencing hearing" under R.C. 2953.23(A)(l)(b). Rather, the issue of ID is a non-jury matter to be decided in a separate hearing akin to a competency determination in which the defendant has the burden by a preponderance. *Lott*, 2002-Ohio-6625, at ¶ 18.

"[A] petitioner's failure to satisfy R.C. 2953.23(A) deprives a trial court of jurisdiction to adjudicate the merits of an untimely or successive postconviction petition." *State v. Apanovitch*, 2018-Ohio-4744, ¶ 36-38.

F.

Civil Rule 60(B) cannot be used to circumvent the substantive standards provided on the same matter by the General Assembly. When the General Assembly has provided a mechanism for relief from a judgment, that mechanism is substantive in nature, and procedural rules cannot be used to circumvent statutory restrictions that would bar such relief. *Walsh v. Walsh*, 2019-Ohio-3723, ¶ 21-23; *Morris v. Morris*, 2016-Ohio-5002, ¶ 31-32; *State ex rel. Loyd v. Lovelady*, 2006-Ohio-161, ¶ 14-15; *Crouser v. Crouser*, 39 Ohio St.3d 177, 178 (1988). In R.C. 2953.23(A), the General Assembly is substantively regulating when defendants can pursue a post-conviction claim that was or could have been litigated in an earlier petition. As a mere procedural rule, Civ.R. 60(B) cannot override or expand those substantive standards. "[A] petitioner receives no more rights than those granted by the statute." *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999).

Questions of jurisdiction also are implicated because, "[o]nce a final judgment has been issued pursuant to Crim.R. 32, the trial court's jurisdiction ends." *State v. Gilbert*, 2014-Ohio-4562, ¶ 9. Via statutes, the General Assembly has created compartmented post-judgment proceedings that allow a criminal court to exercise jurisdiction to entertain post-conviction petitions and motions for new trial. But while these statutes are sufficient to create post-judgment jurisdiction to address such petitions and motions, such authority would necessarily be dependent on those statutory grants of jurisdiction and would be controlled by those jurisdiction-extending statutory provisions. Jurisdiction is substantive, and a mere procedural rule cannot regulate matters of jurisdiction. *See Proctor v. Kardassilaris*, 2007-Ohio-4838, ¶ 17-19; *State ex rel. Sapp v. Franklin County Court of Appeals*, 2008-Ohio-2637, ¶ 30; Civ.R. 82.

Consistent with *Gilbert*, and consistent with the "may not entertain" language in R.C. 2953.23(A), this Court has recognized that the limits on untimely/successive post-conviction review are jurisdictional. *Johnson*, 2024-Ohio-134, at ¶ 1, 10; *Apanovitch*, 2018-Ohio-4744, at ¶ 36-38. A mere procedural rule like Civ.R. 60(B) cannot create some additional extension mechanism that goes above and beyond the narrow limits of that statutory grant of jurisdiction.

G.

Defendant's reliance on Civ.R. 60(B)(4) and (B)(5) is problematic for other reasons. First, under both (B)(4) and (B)(5), the motion must be brought within a reasonable time. Even if *Ford* from November 2019 would provide a basis for Civ.R. 60(B)(4) or (B)(5) relief, the defense still could not unreasonably take 32 months after *Ford* to file the motion.

The defense reliance on *Ford* fails under Civ.R 60(B)(4) anyway. The defense relied on the part of the rule allowing relief from judgment when "a prior judgment upon which it is based has been reversed or otherwise vacated . . .." The defense argued that the 2006 judgment denying the *Atkins* claim was based on *Lott*. But "it is well-settled that relief under Civ R. 60(B)(4), . . . is limited to cases in which the present judgment is based on the prior judgment in the sense of res judicata or collateral estoppel. It does not apply merely because a case relied on as precedent by the court in rendering the present judgment has since been reversed." *Chase Manhattan Bank v. Jenkins*, 2007-Ohio-3622, ¶ 14 (10th Dist.), quoting *Doe*, 28 Ohio St.3d at 130 n. 2; *Taylor v. Deutsche Bank Natl.*

Trust Co., 470 F.App'x 482, 485 (6th Cir. 2012).

The defense also contended under Civ.R. 60(B)(4) that "it is no longer equitable that the judgment should have prospective application . . .." But orders of "prospective application" involve orders that are executory in nature, like injunctions. "Prospective application" means the judgment (l) compels a party to perform, (2) orders a party not to perform a future act; or (3) mandates court supervision of continuing interaction between the parties. *Discover Bank v. Wells*, 2018-Ohio-4637, ¶ 30 (2nd Dist.). The denial or dismissal of a constitutional claim does not meet this standard. *Twelve John Does v. D.C.*, 841 F.2d 1133, 1139 (D.C.Cir. 1988). In addition, an Ohio criminal court is not a court of equity, and "notions of equity do not empower courts to reopen final judgments without statutory authorization." *State v. Ware*, 2014-Ohio-5201, ¶ 20; *State ex rel. Chalfin v. Glick*, 172 Ohio St. 249, 252 (1961) ("A court of equity is in no sense a court of criminal jurisdiction.").

The defense also fails to gain traction under Civ.R. 60(B)(5). Res judicata applies to Civ.R. 60(B) motions too. *Bank of Am., N.A. v. Kuchta*, 2014-Ohio-4275, ¶ 16. It makes no difference for res judicata purposes that *Ford* was decided after the 2006 judgment denying the *Atkins* claim.

"There is no merit to [the] claim that res judicata has no application where there is a change in the law due to a judicial decision of this court." *State v. Szefcyk*, 77 Ohio St.3d 93, 95 (1996); *Reynolds*, 79 Ohio St.3d at 161-62. Courts should remember "the strong interest in the finality of judgments. To hold otherwise would enable any unsuccessful litigant to attempt to reopen and relitigate a prior adverse final judgment simply because there has been a change in controlling case law. Such a result would undermine the stability of final judgments and, in effect, render their enforceability conditional upon there being 'no change in the law.'" *Doe*, 28 Ohio St.3d at 131. A "subsequent change in the controlling case law in an unrelated proceeding does not constitute grounds for obtaining relief from final judgment . . .." *Id*. at syllabus. "A party may not use a Civ.R. 60(B) motion as a substitute for a timely appeal." *Id*.

Accordingly, "there is no exception in the doctrine of res judicata for merely erroneous judgments. . . . The reason for this rule is that the doctrine of res judicata would be abrogated if every decision could be relitigated on the ground that it is erroneous, and there would be no stability of decision, or no end to litigation." *LaBarbera v. Batsch*, 10 Ohio St.2d 106, 110 (1967). "The principle that an erroneous but existing and final judgment is judicata has been adhered to in the face of subsequent changes of law by higher courts in other actions, both in Ohio and elsewhere." *Id*. at 110.

"[T]he res judicata consequences of a final judgment on the merits are not altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *State v. Braden*, 2018-Ohio-1807, ¶ 13 (10th Dist.), citing *Federated Dept. Stores v. Moitie*, 452 U.S. 394, 398 (1981). "The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Moitie*, 452 U.S. at 401. "Unless it is vacated on appeal, a voidable judgment has the force of a valid legal judgment, regardless of whether it is right or wrong. Res judicata bars relitigation of a matter that was raised or could have been raised on direct appeal when a final, appealable order was issued in accordance with the law at the time." *In re K.K.*, 2022-

Ohio-3888, ¶ 60 (internal quote marks and brackets omitted).

This principle applies in Ohio criminal cases. *See Szefcyk*, 77 Ohio St.3d at 95; *Reynolds*, 79 Ohio St.3d at 161-62.

With the defense having litigated at length the adaptive-limitations prong, and having done so during times when the defense could have raised the argument that the prong is governed by a 1-of-3 approach instead of 2-or-more approach, including in the original post-conviction proceedings, it is easy to conclude that defendant is barred from litigating that issue now, whether it be under Civ.R. 60(B)(4), Civ.R. 60(B)(5), or R.C. 2953.21.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA respectfully urges that this Court reverse the Eleventh District's judgment and thereby affirm the common pleas court's judgment denying defendant's 7-8-22 motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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