IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY

STATE OF OHIO, Plaintiff-Appellee, - vs - DANNY LEE HILL, Defendant-Appellant.	**CASE NO. 2023-T-0039** Civil Appeal from the Court of Common Pleas Trial Court No. 1985 CR 00317

OPINION AND JUDGMENT ENTRY

Decided: August 17, 2026
Judgment: Affirmed

Dennis Watkins, Trumbull County Prosecutor, *Charles L. Morrow*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481, and *Stephen Maher*, Special Assistant Prosecutor, Senior Assistant Attorney General, 30 East Broad Street, 23rd Floor, Columbus, OH 43215 (For Plaintiff-Appellee).

Stephen C. Newman, Federal Public Defender, and *Calland M. Ferraro* and *Matthew Gay*, Assistant Federal Public Defenders, Capital Habeas Unit, 1660 West Second Street, Suite 750, Cleveland, OH 44113 (For Defendant-Appellant).

JOHN J. EKLUND, J.

{¶1} This case is before us after remand from the Ohio Supreme Court. The issue before this Court is whether an individual sentenced to death whose previously-filed petition for postconviction relief under *Atkins v. Virginia*, 536 U.S. 304 (2002), was denied may file a second postconviction relief petition after the legal authority on which the prior denial was based has been reversed or otherwise vacated.

{¶2} Appellant, Danny Lee Hill, appeals after the trial court issued a judgment entry recasting his Civ.R. 60(B) motion as a second petition for postconviction relief and dismissing it. In *State v. Hill*, 2023-Ohio-4486 (11th Dist.), we determined that Appellant's first assignment of error had merit and reversed without addressing the second assignment of error. The State appealed to the Supreme Court of Ohio, which reversed our decision and remanded the matter. *State v. Hill*, 2026-Ohio-1427, ¶ 26.

{¶3} On remand, we take up Appellant's second assignment of error and determine that the trial court did not err when it concluded that Appellant had not satisfied the jurisdictional requirements of R.C. 2953.23(A) permitting a second petition for postconviction relief when a petitioner was either unavoidably prevented from discovery of the facts relied on to present the claim for relief or the United States Supreme Court has recognized a new federal or state right.

{¶4} Therefore, we affirm the judgment of the Trumbull County Court of Common Pleas.

I. Substantive and Procedural History

{¶5} Appellant's convictions are based on the murder of Raymond Fife on September 10, 1985. The factual record is set forth in detail in *State v. Hill*, 1989 WL 142761 (11th Dist. Nov. 27, 1989), and *State v. Hill*, 64 Ohio St.3d 313 (1992). The post-conviction procedural history of the case is further aptly surveyed in *Hill*, 2026-Ohio-1427.

{¶6} Although Appellant raised issues of his intellectual disability during the mitigation phase of his sentencing, nothing at the time barred the imposition of the death penalty for persons with intellectual disabilities. Appellant was sentenced to death. His State appeals were unsuccessful.

A. Initial Petition for Postconviction Relief pursuant to *Atkins*

{¶7} In 2002, the United States Supreme Court determined the Eighth Amendment's bar against cruel and unusual punishment prohibits the imposition of the death penalty for "mentally retarded"[1] persons. *Atkins*, 536 U.S. at 321.

{¶8} In the wake of *Atkins*, the Ohio Supreme Court set forth three criteria for establishing whether a person is intellectually disabled. *State v. Lott*, 2002-Ohio-6625. Under *Lott*, a defendant was required to demonstrate*:* "(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.* at ¶ 12. The court further held that "[w]hile IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue," and "there is a rebuttable presumption that a defendant is not [intellectually disabled] if his or her IQ is above 70." *Id.*

{¶9} In 2003, as a result of the *Atkins* and *Lott* decisions, Appellant filed a petition to vacate his death sentence through a petition for postconviction relief under R.C. 2953.21. In 2006, the trial court denied Appellant's petition for postconviction relief and Appellant appealed to this Court. *See State v. Hill*, 2008-Ohio-3509, ¶ 99-100 (11th Dist.). We affirmed. The Supreme Court of Ohio denied review in 2009. *Hill*, 2026-Ohio-1427, at ¶ 7.

B. Subsequent judicial precedent

{¶10} After Appellant's *Atkins* postconviction petition was denied, the United States Supreme Court rendered decisions in *Hall v. Florida*, 572 U.S. 701 (2014), *Moore*

1. "Mentally retarded" was the prior term for "intellectual disability." Intellectual disability is used throughout this opinion consistent with current usage.

v. Texas, 581 U.S. 1 (2017) ("*Moore I*"), and *Moore v. Texas*, 586 U.S. 133 (2019) ("*Moore II*"). Those decisions required state court intellectual disability standards to be "informed by the medical community's diagnostic framework." *Hall* at 721. However, being so informed "does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards." *Moore I* at 13.

{¶11} After those decisions, the Supreme Court of Ohio decided *State v. Ford,* 2019-Ohio-4539, and announced the *Lott* test for intellectual disability was outdated. *Id.* at ¶ 100. Specifically, the Court in *Ford* held that the *Lott* test was "the wrong standard" because of its rebuttable presumption that an offender is not intellectually disabled where the offender's IQ score is above 70 and its requirement of finding significant limitations in two or more adaptive skills. *Id.* at ¶ 94-95, 97.

{¶12} The updated, and current, test Ohio courts must consider in determining intellectual disability is (1) intellectual-functioning deficits (indicated by an IQ score of approximately 70 or lower); (2) significant adaptive deficits in any of the three adaptive-skill sets (conceptual, social, and practical); and (3) the onset of these deficits while the defendant was a minor. *State v. Williams*, 2021-Ohio-241, ¶ 30, citing *Ford* at ¶ 100.

C. Appellant's intellectual disability under current judicial precedent

{¶13} After Appellant exhausted his state court remedies through direct appeals and his petition for post-conviction relief, he pursued federal habeas relief under *Atkins*. Those proceedings concluded with the United States Supreme Court denying a writ of certiorari for his *Atkins* claim in June 2022. *Hill v. Shoop*, 142 S.Ct. 2579 (2022).

{¶14} Dr. John Gregory Olley, the State's expert witness in Appellant's initial *Atkins* claim, had testified at Appellant's postconviction relief hearing opining that Appellant was not intellectually disabled. During the pendency of Appellant's petition for certiorari, Dr. Olley reviewed his previous reports concerning Appellant along with additional material. In light of the new standards set forth in *Ford*, Dr. Olley concluded that Appellant "has been a person with intellectual disability since early childhood."

{¶15} In July 2022, Appellant filed a "Civil Rule 60(B) Motion for Reconsideration of Determination Under *Atkins v. Virginia* with Request for Evidentiary Hearing." Appellant argued that under Civ.R. 60(B)(4) and (5), he was entitled to relief from the denial of his *Atkins* petition for postconviction relief because he had been evaluated under the now outdated *Lott* standard. Alternatively, Appellant argued he was entitled to file a second petition for postconviction relief under *Atkins*. Appellant appended two volumes of exhibits, including Dr. Olley's new report and an affidavit. He maintained they supported his argument that he was a person with intellectual disability under the new *Ford* standard. Appellant argued he was entitled to relief from the court's denial of his *Atkins* claim because subsequent events, including the updated definition of intellectual disability under Ohio law, rendered it inequitable to continue under his prior *Atkins* postconviction relief judgment.

{¶16} On May 3, 2023, the trial court issued a nunc pro tunc judgment entry recasting Appellant's Civ.R. 60(B) motion as a petition for postconviction relief pursuant to R.C. 2953.21 and 2953.23. It dismissed the petition, holding that Appellant's Civ.R. 60(B) motion was irregular and subject to being recast as a second petition for postconviction relief under *State v. Schlee*, 2008-Ohio-545. The trial court further concluded that Appellant did not satisfy the jurisdictional requirements for untimely or second and succussive petitions for postconviction relief. Appellant timely appealed.

{¶17} On December 11, 2023, we released our decision in *Hill*, 2023-Ohio-4486 (11th Dist.). We reversed the trial court's judgment with instructions for the trial court to consider Hill's motion under the standards applicable to Civ.R. 60(B) motions. *Id*. at ¶ 57.

{¶18} On March 8, 2024, the State appealed to the Supreme Court of Ohio.

{¶19} On November 26, 2024, the Supreme Court of Ohio accepted jurisdiction.

{¶20} On October 29, 2025, the Supreme Court of Ohio held oral argument.

{¶21} On February 20, 2026, Governor Mike DeWine issued a Warrant of Reprieve, postponing Appellant's execution date to July 18, 2029.

{¶22} On April 23, 2026, the Supreme Court of Ohio issued its decision. The Court held that postconviction relief proceedings under R.C. 2953.21 "are special statutory proceedings to which the Civil Rules are inapplicable" and that Appellant could not "challenge the judgment denying his petition for postconviction relief by filing a motion under Civ.R. 60(B). Instead, successive petitions for postconviction relief must conform to the requirements of R.C. 2953.21 and 2953.23." *Hill*, 2026-Ohio-1427, at ¶ 25.

{¶23} On May 5, 2026, the Supreme Court of Ohio issued its mandate and remanded the case for this Court to consider Appellant's second assignment of error, which we had declined to reach in 2023.

II. Assignment of Error and Analysis

{¶24} Appellant's second assignment of error states: "Even If Mr. Hill Is Not Entitled To Relief Under Rule 60(B), The Trial Court Erred In Concluding That Mr. Hill

Failed To Meet The Requirements For A Second Post-Conviction Petition Under R.C. 2953.23. (T.d. 446, pp. 5-13)."

{¶25} R.C. 2953.21 strictly limits the time for bringing the petition it authorizes. Appellant cannot satisfy those limits. However, R.C. 2953.23 creates exceptions to those time limits and states the circumstances in which they may be invoked. So, the question before us is relatively narrow: Did the trial court err in deciding that Appellant's motion (re-cast as a petition under R.C. 2953.23) did not establish the statutory requirements for the court's consideration of such a petition?

A. Postconviction relief

{¶26} The procedures for postconviction relief are set forth in R.C. 2953.21 et seq. These statutes provide the statutory framework for reviewing an *Atkins* claim. *Williams*, 2021-Ohio-241, at ¶ 31 (11th Dist.). Petitioners raising an *Atkins* claim for postconviction relief bear the burden of establishing their intellectual disability by a preponderance of the evidence. *Id.*

{¶27} "'[P]ostconviction relief petitions are subject to dismissal without a hearing if the petition and the supporting evidentiary documents do not contain sufficient operative facts which, if true, would establish substantive grounds for relief.'" *State v. Hull*, 2019-Ohio-23, ¶ 31 (11th Dist.), quoting *State v. Apanovitch*, 113 Ohio App.3d 591, 597 (8th Dist. 1996); *see State v. Calhoun*, 1999-Ohio-102, paragraph two of the syllabus. "'The trial court has a duty to ensure that the petitioner adduces sufficient evidence to warrant a hearing.'" *State v. Delmonico*, 2005-Ohio-2882, ¶ 13 (11th Dist.).

{¶28} The trial court must conduct a de novo review of the evidence to determine whether a petitioner is intellectually disabled. *Williams* at ¶ 32. In doing so, the trial court may appoint experts and consider expert testimony to decide the issue. *Id.* The trial court shall issue written findings and set forth its rationale in finding a petitioner intellectually disabled or not intellectually disabled. *Id.*, citing *Ford*, 2019-Ohio-4539, at ¶ 100.

{¶29} The trial court's decision on a postconviction *Atkins* claim will be upheld absent an abuse of discretion. *Id.* at ¶ 33. However, if the trial court dismisses a postconviction petition, the appellate court reviews the dismissal de novo. *State v. Weber*, 2014-Ohio-4133, ¶ 11 (11th Dist.).

{¶30} "[A] postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment." *Calhoun*, 1999-Ohio-102, at ¶ 10. A postconviction petitioner "receives no more rights than those granted by the statute.'" *Id.* "This means that any right to postconviction relief must arise from the statutory scheme enacted by the General Assembly." *State v. Apanovitch*, 2018-Ohio-4744, ¶ 35.

{¶31} To be timely, a postconviction petition "shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication . . . ." R.C. 2953.21(A)(2)(a). This mandate is expressly subject to the exceptions listed in R.C. 2953.23. *Id*. If no exception applies, a trial court has no jurisdiction to consider an untimely petition. *See Apanovitch*, 2018-Ohio-4744, at ¶ 36.

{¶32} R.C. 2953.23 prohibits a trial court from even entertaining a second or successive petition for post-conviction relief except in very specific circumstances. R.C. 2953.23(A)(1) provides an exception for untimely or successive postconviction relief petitions.[2] *State v. Lewis*, 2014-Ohio-2224, ¶ 9. "[A] court may not entertain. . . a second

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2. R.C. 2953.23(A)(2) addresses petitions dealing with the results of DNA testing establishing actual innocence, which is not relevant to this matter.

petition or successive petitions for similar relief on behalf of a petitioner unless" a petitioner meets both parts of a two-prong test. R.C. 2953.23(A).

{¶33} The first prong:

> **Either** the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, **or**, 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.

(Bold added.) R.C. 2953.23(A)(1)(a).

{¶34} The second prong: The petitioner must 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 . . . ." R.C. 2953.23(A)(1)(b). Or, in the alternative, "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." *Id.*

{¶35} Under *Atkins*, a mentally disabled person is ineligible for the death penalty. In this context, to satisfy the second prong that "but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence," a petitioner must demonstrate facts that the petitioner is intellectually disabled.

1. Whether Appellant was unavoidably prevented from discovery of the facts upon which he relies:

{¶36} Appellant presents a 2022 affidavit from Dr. Olley, a licensed psychologist. At Appellant's hearing in 2004-2005, Dr. Olley opined that Appellant was not intellectually disabled. In his 2022 affidavit and attached report he opines that Appellant is intellectually disabled and has been his entire life. This, Appellant argues, is something he was unavoidably prevented from discovering prior to his 2004-2005 hearing.

{¶37} An opinion is not a fact. A new one is no more a fact. If opinions were facts (and relevant) there would be no need for Evid.R. 703 and Evid.R. 705 requiring experts to disclose the underlying "facts or data" on which the opinion was based. Instead, opinions would be admitted like any other asserted fact.

{¶38} We are aware of the Ohio Supreme Court's recent plurality opinion in *State v. Grad*, 2024-Ohio-5710. Its holding is not controlling here. The Court reviewed a decision denying, without a hearing, a request for leave to file an untimely motion for a new trial under Crim.R. 33. The movant was required to show that he had been "unavoidably prevented from the discovery of the evidence upon which he must rely." Crim.R. 33(B). That is not what R.C. 2953.23 requires a successive petitioner to show. It requires *facts* that a successive petitioner was unavoidably prevented from discovering.

{¶39} R.C. 2953.23 was substantially amended in 1995. Prior to that amendment, the statute provided that a trial court could entertain a second or successive postconviction petition "based upon the same facts *or on newly discovered evidence.*" (Emphasis added.) Former R.C. 2953.23, amended in Am.Sub.S.B. No. 4, 121 Ohio Laws 24.

{¶40} However, the current language of R.C. 2953.23 differs significantly, allowing a second or successive petition only where the "petitioner was unavoidably prevented from discovery of the *facts* upon which the petitioner must rely to present the claim for relief." (Emphasis added.)

{¶41} In *State v. Biggs*, 2026-Ohio-2298 (5th Dist.), the petitioner's successive petition rested on expert reports, medical literature, and trial counsel's claimed failure to rely on appropriate experts. *Id.* at ¶ 33. However, the Fifth District explained that "the expert reports are not newly discovered *facts*. They are opinions formed after trial based on a review of existing case materials." (Emphasis added.) *Id.* at ¶ 34. "R.C. 2953.23(A)(1)(a) speaks in terms of the discovery of facts, not the later discovery of a more favorable expert, a more persuasive litigation theory, or a different interpretation of evidence known at trial." *Id.*

{¶42} New or updated medical guidelines and literature also do not establish new facts in the absence of a showing "that they announced a scientific principle, repudiated a previously accepted medical standard, or reflected a posttrial shift in scientific understanding comparable to the change discussed in *Grad*." *Id.* at ¶ 36. "At most, it supplies additional support for the appellant's current experts' criticism of the State's trial testimony, but it does not demonstrate that the appellant was unavoidably prevented from discovering *the factual basis of his claim*." (Emphasis added.) *Id.*

{¶43} "The purpose behind R.C. 2953.23 is to 'permit courts to consider factual information that may come to light after a defendant's trial, not to permit defendants to advance new legal theories using the same underlying facts.'" *State v. Williamitis*, 2006-Ohio-2904, ¶ 18 (2d Dist.), quoting *State v. Hurst*, 2000 WL 93990, *4 (5th Dist. Jan. 10, 2000).

{¶44} Provided that it is admissible, an expert opinion is "evidence." *See, e.g.*, *Bice v. United States*, 72 Fed.Cl. 432, 447 (2006) (construing the Federal Rules of Evidence); *Souter v. Jones*, 395 F.3d 577, 592 (6th Cir. 2005) (when an expert changes his or her expert opinion, “the evidence itself has changed, and can most certainly be characterized as new”). But “evidence” encompasses a broader range of things than “facts,” which is what Appellant has not shown have changed.

{¶45} Dr. Olley’s new report identifies what might pass for the “facts and data” on which his opinion is based. *See* Evid. R. 703; Evid.R. 705; Olley’s Report at 3. But, it is clear that they pre-dated February 2006 when Appellant’s first petition for postconviction relief was denied. Moreover, Dr. Olley acknowledges having reviewed “[s]ome of this information” for his 2006 opinion. He also says he reviewed materials for his new opinion that he had not reviewed for his first. However, he does not distinguish which are which, and we cannot discern that from the record before us.

{¶46} Alternatively, Appellant argues that the redefinitions of “intellectual disability” that the American Association on Intellectual and Developmental Disabilities (“AAIDD”) and American Psychological Association (“APA”) adopted in 2010 and 2013, respectively, are newly discovered and that he was unavoidably prevented from discovering them. Of course he was; they did not occur until after his original petition was heard and denied.

{¶47} But these organizations’ redefining “intellectual disability” is not a fact either. It is the opinion of professional practitioners; that is to say, their collective consensus opinion. No matter how learned it may be, it is still an opinion. Moreover, the definition changes did not change the fundamental diagnostic hallmarks of intellectual disability: concurrent significant impairment of intelligence and significant impairment in adaptive behavior, the origins of which were in childhood. They merely changed the minimum number of indicia of impaired adaptive behavior a person must exhibit to be considered intellectually disabled, from two or more indicia to any single one. That is one of the reasons why the Ohio Supreme Court changed the Ohio standard for determining whether a defendant is intellectually disabled in its 2019 decision in *Ford*.

{¶48} Appellant's arguments actually demonstrate our point. The fundamental difference between opinions and facts is that opinions can, and sometimes do, change. Facts do not; they might go undiscovered for a time, but they do not change.

{¶49} Finally, the change in how Ohio determines intellectual disability was not actually altered until *Ford* was released. Despite the AAIDD and the APA precipitating organizational redefinitions of intellectual disability, the law defining intellectual disability in Ohio did not change until *Ford* established that change some six to nine years later. This further establishes that organizational change in the definition of intellectual disability did not change any of the facts in Appellant's case. Instead, the only reason there has been any change in Appellant's case is due to *Ford* changing the *legal* basis for his claim, not the factual basis. *See Williamitis*, 2006-Ohio-2904, at ¶ 18 (2d Dist.).

{¶50} Therefore, we conclude that Appellant was not unavoidably prevented from discovery of the facts upon which his petition relies.

2. **Whether the United States Supreme Court has recognized a new federal or state right:**

{¶51} The second relevant exception to the statutory restriction on second and successive petitions for post-conviction relief requires that the United States Supreme Court "recognize 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)(1)(a). Appellant has not met this criterion either.

{¶52} The Supreme Court of Ohio's decision in *Ford* obviously was not a decision of the United States Supreme Court. Thus, it has no direct bearing on the R.C. 2953.23 analysis. This court has held, and we reiterate, that *Ford* did not create a new federal or state right. *State v. Martin*, 2025-Ohio-144, ¶ 40-41 (11th Dist.) (holding that *"Ford* does not provide an exception to the jurisdictional requirements of R.C. 2953.21" and that "R.C. 2953.23(A) does not provide an exception for an untimely or successive petition based on a new decision from the Supreme Court of Ohio"); *see State v. Jackson*, 2020-Ohio-4015, ¶ 40 (3d Dist.). While *Ford* was expressly based on new precedent from the United States Supreme Court in *Hall* and *Moore I* and *II*, we also held in *Martin* that *Hall* and *Moore I* and *II* did not recognize a new federal or state right. *Id.*

{¶53} The *Hall* and *Moore* decisions themselves support that conclusion. They did not alter the fundamental procedural holding of *Atkins.* The parameters of intellectual disability are for the states to decide. They held only that in doing so a state must apply standards that are "informed by the medical community's diagnostic framework." *Hall*, 572 U.S at 721. Further, being thus informed "does not demand adherence to everything in the latest medical guide." *Ford*, 2019-Ohio-4539, at ¶ 90.

{¶54} In all three cases, the high court grounded its decision on the fundamental constitutional right declared in *Atkins,* not some new one. *Hall* specifically addressed *whether* Florida was appropriately *implementing* the principles set forth in *Atkins*, it did not declare a new constitutional right. *Hall* at 709. *Moore I* and *II* acknowledged that states have flexibility in "*enforcing Atkins*," but similarly did not establish any new constitutional right. (Emphasis added.) *Moore I*, 581 U.S. at 20; *Moore II*, 586 U.S. at 137.

{¶55} R.C. 2953.23 is clear. A trial court is without authority to consider a second or successive petition for post-conviction relief unless there are facts on which the petitioner must rely and which the petitioner was unavoidably prevented from discovering, or the United States Supreme Court has created a new federal or state right that applies retroactively. Neither circumstance adheres in this case based on the record before us.

{¶56} Accordingly, Appellant's second assignment of error is without merit.

{¶57} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas is affirmed.

MATT LYNCH, P.J.,

ROBERT J. PATTON, J.,

concur.

JUDGMENT ENTRY

For the reasons stated in the opinion of this court, Appellant's assignments of error are without merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

Costs to be taxed against Appellant.

JUDGE JOHN J. EKLUND

PRESIDING JUDGE MATT LYNCH,
concurs

JUDGE ROBERT J. PATTON,
concurs

THIS DOCUMENT CONSTITUTES A FINAL JUDGMENT ENTRY

A certified copy of this opinion and judgment entry shall constitute the mandate pursuant to Rule 27 of the Ohio Rules of Appellate Procedure.