

or established procedures. Mr. Winkel's claim did not, and thus he was entitled to respond to the facts in the *Martinez* report. They cite *Swoboda v. Dubach*, 992 F.2d 286 (10th Cir. 1993) to explain that the district court may not look to a *Martinez* report or any other pleading outside of the complaint itself, hence the district court erred in using only the report to dismiss his complaint.

The appeals court then look at Mr. Winkel's claim outside of the content in the *Martinez* report, stating the district court's decision is not reversible unless the claim can be justified without outside materials. The court ruled that Mr. Winkel does have a plausible Fourteenth Amendment due process claim. To clarify the appropriate circumstances in which a person can be involuntarily medicated, they reference *Washington v. Harper*, 494 U.S. 210 (1990) and explain that the state may treat a prison inmate with involuntary psychiatric medications if the inmate is a danger to self or others, and the treatment is in the inmate's medical interest. They cite *United States v. Bradley*, 417 F.3d 1107 (10th Cir. 2005), saying that under certain circumstances the state may involuntarily medicate pretrial detainees to restore competency to stand trial even when they are not dangerous. Furthermore, they cite *Sell v. United States*, 539 U.S. 166 (2003) to discuss the trial court having a hearing to determine whether involuntary medication for the purpose of competency restoration is necessary to further important governmental trial-related interests.

Mr. Winkel's complaint against LSSH employees with regard to forcible injection of medication relies on his assertion that he was not dangerous, and that the district court failed to hold a hearing to determine whether medicating Mr. Winkel was necessary and appropriate. Mr. Winkel alleged that he was medicated against his will to become "more receptive" and to get him to be less resistant to scheduled medications. The appeals court asserted that he had a plausible due process claim and that the district court erred in dismissing his complaint.

*Discussion*

This case underscores the importance of due process for the psychiatric patient in correctional and forensic settings and of treating their claims as legitimate. It is noteworthy that the plaintiff in the matter was both incompetent to stand trial and was operating as a *pro se* litigant. The need to review the com-

plaints of individuals like this is no less important, even when there is no legal representation. Furthermore, the issues pertaining to this review highlight that the clinical and legal issues of competence to stand trial and restoration of competence are distinct. Although the court's review required a legal analysis of the relevant rules regarding the plaintiff's complaint, it is an important reminder that clinically, in both general and forensic psychiatry, the dismissal of a patient's or evaluatee's claims as delusional, manipulative, retaliatory, etc., can often be a reflexive thought and a convenient path. It is helpful to have a reminder to look at complaints fully and from all perspectives, and to follow protocols appropriately. Regardless of whether Mr. Winkel's claim ultimately was upheld after the issue was remanded for further consideration, the crux of the issue is that his claim warranted a more complete examination and might be plausible.

## Determining Intellectual Disability for Capital Defendants

**Jeffrey Khan, MD**  
Fellow in Forensic Psychiatry

**Stephen Noffsinger, MD**  
Associate Professor of Psychiatry

Department of Psychiatry  
Case Western Reserve University School of Medicine  
Cleveland, OH

### Ohio Unreasonably Applied the Supreme Court's Three-Part Standard Established in *Atkins v. Virginia* to Find That the Defendant Was Not Intellectually Disabled and Deny Habeas Relief from Capital Sentence

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In *Hill v. Anderson*, 881 F.3d 483 (2018), the Sixth Circuit Court of Appeals considered whether Ohio correctly reviewed the defendant's writ of *habeas corpus* that sought relief from capital sentencing. Mr. Danny Hill challenged his capital sentence, claiming he is intellectually disabled as initially established in *Atkins v. Virginia*, 536 U.S. 304 (2002) and subsequently confirmed in later cases. The Sixth Circuit agreed, reversed the judgment of the district court, and ruled that Hill was entitled to *habeas cor-*

pus relief because the state had unreasonably applied the Supreme Court's three-part standard for determining intellectual disability.

#### Facts of the Case

Danny Hill was convicted of aggravated murder and associated charges in 1986 in Ohio at a bench trial. At sentencing, three defense experts testified that Mr. Hill had an intelligence quotient (IQ) ranging from 55 to 68; was raised in a poor environment; and was a follower. Weighing aggravating versus mitigating factors, the three-judge panel sentenced Mr. Hill to death.

Subsequently, the U.S. Supreme Court held in *Atkins, Moore v. Texas*, 137 S.Ct. 1039 (2017), and *Hill v. Florida*, 134 S.Ct. 1986 (2014), that execution of intellectually disabled persons constitutes cruel and unusual punishment prohibited by the Eighth Amendment. Despite raising intellectual disability as a mitigating factor at sentencing, Mr. Hill was not afforded the constitutional protections later established in *Atkins*.

In 2002, the Sixth Circuit Court of Appeals remanded the state trial court to assess Mr. Hill's functioning in light of *Atkins*. In *Atkins, Moore*, and *Hill*, the Supreme Court relied on two diagnostic manuals: *Intellectual Disability: Definition Classification and Systems of Supports*, published by the American Association on Intellectual and Developmental Disabilities, and *Diagnostic and Statistical Manual of Mental Disorders*, published by the American Psychiatric Association. Both require three findings before diagnosing intellectual disability: significant deficits in intellectual functioning indicated by an IQ "approximately two standard deviations or more below the mean," or roughly 70; significant adaptive skill deficits such as "the inability to learn basic skills and adjust behavior to changing circumstances" in certain specified skill sets; and the deficits arose while the individual was still a minor.

Mr. Hill underwent several evaluations for his 1986 trial, revealing diminished mental capacity, an IQ ranging from 55 to 68, and "primitive" moral development. He had demonstrated an "inability to learn basic skills and adjust [his] behavior to changing circumstances" since a very young age. Mr. Hill was noted to be a "slow-learning child" requiring concrete work without "talking about abstract ideas," per a school psychologist. At fifteen, Mr. Hill could barely read or write. Prison staff believed Mr.

Hill was illiterate and noted that he could not remember his commissary balance, overdrew his account, and could not perform even basic cleaning tasks without close supervision. Mr. Hill had neglected his hygiene since a young age, and in prison he required reminders to shower.

After the 2002 remand, three experts examined Mr. Hill. One expert concluded that Mr. Hill met all three diagnostic criteria, while two others concluded that Mr. Hill was not intellectually disabled. The state trial court denied Mr. Hill's petition for relief under *Atkins*, finding that Mr. Hill did not exhibit significant adaptive skill deficits, and that any deficits he had were not manifest before age eighteen. The Ohio Court of Appeals affirmed, while the Supreme Court of Ohio denied *certiorari*. Mr. Hill sought habeas relief and petitioned the U.S. District Court for the Northern District of Ohio, which denied the petition. Mr. Hill then appealed to the Sixth Circuit.

#### Ruling and Reasoning

Unanimously, the Sixth Circuit found that the state court had unreasonably determined that Mr. Hill was not intellectually disabled under the adaptive skill deficit and age-of-onset prongs of the *Atkins* standard, reversed the judgment of the district court, and remanded with instructions to issue the writ of *habeas corpus* regarding Mr. Hill's capital sentence.

The Sixth Circuit found that the state court departed from *Atkins* requirements when it "disregarded well-established clinical standards for assessing adaptive deficits by focusing on Hill's adaptive strengths instead of his adaptive deficits . . . , the trial court ignored clear and convincing evidence that Hill exhibited substantial deficits in both his intellectual and adaptive abilities since long before he turned 18" (*Hill*, p 489).

In *Moore*, the Texas Criminal Court of Appeals concluded that Mr. Moore did not exhibit sufficient deficits due to various adaptive skills he did have. The Supreme Court rejected this approach by admonishing courts not to overemphasize perceived strengths, but instead should follow "prevailing clinical standards," which focus on deficits. Contrary to *Atkins* and similar to Texas in *Moore*, the Ohio courts overemphasized Mr. Hill's strengths in the controlled death-row environment.

In *Hill*, the state court determined that Mr. Hill's adaptive skills were "inconsistent with a mentally retarded individual" by focusing extensively on Mr.

Hill's interview with a reporter, demeanor interacting with law enforcement/legal system, and circumstances surrounding the offense (*Hill*, p 493). "Those supposed adaptive strengths convinced the state trial court that Hill could not be intellectually disabled because he had 'remarkable' communication and vocabulary skills and was self-directed" (*Hill*, p 493). The Sixth Circuit found that, despite these strengths, Mr. Hill had significant limitations in at least two areas of adaptive functioning, functional academics and hygiene/self-care, since childhood. Collateral records indicated limitations in social skills and self-direction. The court noted the deficits detailed in expert testimony at trial (see above), the testimony of a psychologist who noted Mr. Hill's inability to interpret social situations and create relationships, and school records demonstrating his difficulty making friends. He was repeatedly noted in school and criminal records to be easily led, impulsive with little thought toward consequences, highly suggestible, and exploitable.

Further, the Ohio courts overly relied on Mr. Hill's behavior in prison. The Sixth Circuit stated that *Atkins* drew from the consensus of the medical community, which prohibited the assessment of adaptive skills in atypical environments like prison. Instead, defendants should be evaluated against standards in a typical community-based environment, not against those of other prisoners or, more specifically, those on death row. The state court failed to mention documentation by prison officials recognizing Mr. Hill to be "slow," illiterate, and have "very limited writing ability" (*Hill*, p 499). Additional examples of Mr. Hill's deficits in prison included his need for careful supervision completing tasks, errors tracking his prison account balance, and that he performed his job as a porter only because cleaning supplies were sorted by color not requiring him to read instructions. In sum, the court of appeals found that the state of Ohio unreasonably applied the *Atkins* standard, and that correct application of this standard supports Mr. Hill's clear deficits in at least two adaptive skillsets.

Additionally, Mr. Hill entered a *Miranda* claim arguing that certain statements he made should have been suppressed at trial. The Sixth Circuit was unconvinced that Mr. Hill had knowingly and voluntarily waived his *Miranda* Rights. However, the standard of appellate review (enunciated in *Colorado v. Connelly* 479 U.S. 157 (1986) and the Antiterrorism

and Effective Death Penalty Act, Pub. L. No. 104-132 (1996)) was whether the state courts' decision involved an unreasonable application of established federal law. The Sixth Circuit thus affirmed the district courts' denial of this claim.

Mr. Hill also argued that the trial court's failure to inquire about his trial competency denied him a fair trial under the due process clause. The court of appeals found that there was no indication that Mr. Hill did not understand the nature of the proceedings against him or that he could not consult with defense counsel. Mr. Hill put forth no authority for the proposition that illiteracy or other signs of limited intellect should have prompted the trial court to hold a competency hearing *sua sponte*. As such, the Sixth Circuit also affirmed the district court's denial of this claim.

#### Discussion

*Hill v. Anderson* illustrates many effects of intellectual disability on the legal process, including waiving *Miranda* rights, adjudicative competency, and capital sentencing. The notable holding of *Hill* delineates the proper criteria for diagnosing intellectual disability in capital defendants. *Atkins* established that execution of intellectually disabled defendants constitutes cruel and unusual punishment and the definition of "intellectual disability" in this regard. The close comportment of this definition to currently accepted medical standards reflects the broader approach in *Atkins* of relying on the country's 'evolving standards of decency' to reflect changing moral standards prohibiting execution of intellectually disabled persons.

Frequently, legal definitions do not align with psychiatric diagnoses and definitions. Statutory and common laws use terms like "severe mental disease or defect" or "present mental condition," while practitioners use "mental disorder." Many blurred lines exist, such as where personality disorders and substance-use disorders impact criminal responsibility. Refreshingly, the *Hill* court relies directly on DSM criteria and the consensus of medical professionals to diagnose intellectual disability.

The 2013 transition from DSM-IV to DSM5 changed the terminology and standards for assessing intellectual disability. IQ scores are no longer diagnostic criteria, "mental retardation" is better described as "intellectual disability" and illness severity is dependent on adaptive functioning (crucial in *Hill*). Will courts continue to follow the lead of the

medical community as these standards continue to evolve? Only time will tell.

## Ohio Execution Protocol: A Risk of Serious Pain and Needless Suffering, but Not to a Constitutionally Unacceptable Level of Certainty

**Drew Calhoun, MD**  
Fellow in Forensic Psychiatry

Department of Psychiatry  
University Hospitals, Cleveland Medical Center  
Cleveland, OH

**Adrienne Saxton, MD**  
Assistant Professor of Psychiatry

Department of Psychiatry  
Case Western Reserve University School of Medicine  
Cleveland, OH

**Sixth Circuit Holds That Appellants Did Not Establish “Likelihood of Success on the Merits” of Their Claim That Ohio’s Midazolam-Based, Three-Drug Execution Protocol Presents a Constitutionally Unacceptable Risk of Pain and Suffering**

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In *In re Ohio Execution Protocol Litigation (Campbell v. Kasich)* 881 F.3d 447 (6th Cir. 2018), the U.S. Court of Appeals for the Sixth Circuit considered whether Ohio’s execution protocol presented a constitutionally unacceptable risk of pain and suffering, both physical and psychological, as alleged by two Ohio death-row inmates. Holding that the inmates did not show likelihood of success on the merits of their claims, the Sixth Circuit affirmed the decision of the U.S. District Court for the Southern District of Ohio, denying the requested injunctions.

### Facts of the Case

The litigation that produced this appeal began in 2004, when death-row inmates challenged Ohio’s then-existing three-drug protocol under 42 U.S.C. § 1983 (1996). In 2011, after many more method-of-execution claims, all execution protocol cases in the Southern District of Ohio were consolidated un-

der Case No. 2:11-cv-1016, aptly named *In re Ohio Execution Protocol Litigation*.

In 2016, Ohio adopted an execution protocol consisting of an initial 500-milligram dose of midazolam, followed by a paralytic agent and potassium chloride. In *In re Ohio Execution Protocol (Fears v. Morgan)*, 860 F.3d 881 (6th Cir. 2017), death-row inmates (including Mr. Raymond Tibbetts) subsequently filed suit, claiming that midazolam would not prevent them from the pain caused by the latter drugs, and that Ohio’s protocol thus violated the Eighth Amendment. The district court granted preliminary injunctions; however, the Sixth Circuit disagreed that plaintiffs had met their burden and reversed the district court’s decision. The Sixth Circuit held that the district court had erred by addressing “only whether Ohio’s procedure presents a ‘substantial risk of serious harm’” without also showing that the execution method “is sure or very likely to cause serious pain” (*Fears*, p 886). While agreeing that the second and third drugs “would cause severe pain to a person who is fully conscious,” the Sixth Circuit found that plaintiffs had not shown that an inmate receiving “a 500-milligram dose of midazolam is ‘sure or very likely’ to be conscious enough to experience serious pain” (*Fears*, p 886).

In 2017, after the *Fears* remand, Mr. Campbell and Mr. Tibbetts sought to enjoin their pending executions, similarly alleging that Ohio’s protocol presented a constitutionally unacceptable risk of serious pain and suffering, but now claiming a “substantial risk of serious harm” in the form of “severe, needless physical pain and suffering” and “severe mental or psychological pain, suffering, and torturous agony” (*In re Ohio Execution Protocol (“Campbell”)*, No. 2:11-CV-1016, 2017 WL 5020138 at \*8).

The district court thus considered whether Mr. Tibbetts and Mr. Campbell had “added sufficient evidence” to show, with a “sure or very likely” level of certainty, that Ohio’s execution protocol caused serious pain. After considering the proffered evidence, the district court determined that the plaintiffs had not met their burden and denied their motions for preliminary injunctions and execution stays.

Mr. Campbell and Mr. Tibbetts appealed to the Sixth Circuit, claiming that the district court had “refused to consider the significant evidence of mental and psychological suffering” (*Campbell*, p 450) and that the court was mistaken in finding they had not sufficiently proved their claims.