No. 13-10044

In the Supreme Court of the United States

JAMES O'NEAL,

Petitioner,

v.

CHARLOTTE JENKINS, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

At a post-conviction hearing, the trial court held (and the Ohio Court of Appeals affirmed) that Petitioner James O'Neal did not demonstrate by a preponderance of the evidence that he was mentally retarded under the Ohio Supreme Court's three-part test established by *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002). The trial court received evidence that O'Neal had IQ-test scores of 71, 67, 64, and 63, and experts provided conflicting testimony regarding whether O'Neal had subaverage intellectual functioning or limitations in adaptive skills. The question presented is:

Did the state courts unreasonably determine, as a factual matter, that O'Neal was not mentally retarded pursuant to Ohio's procedures for determining mental retardation under *Lott*?

LIST OF PARTIES

The Petitioner is James O'Neal, an inmate at the Chillicothe Correctional Institution in Chillicothe, Ohio.

The Respondent is Charlotte Jenkins, the Warden of the Chillicothe Correctional Institution. Jenkins is substituted for Margaret Bagley. *See* Fed. R. Civ. P. 25(d).

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INTRODUCTION

Petitioner James O'Neal was sentenced to death for the murder of his wife, Carol O'Neal. James O'Neal broke into the house that Carol O'Neal rented, shot and killed his wife, and then fled. At a post-conviction hearing, the Ohio trial court denied O'Neal's petition to vacate his death sentence based upon his alleged mental retardation. The trial court applied Ohio's test for determining mental retardation, *see State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002), and determined that O'Neal was not mentally retarded. The Ohio Court of Appeals affirmed, holding that there was "reliable, credible evidence" to support the trial court's finding "that O'Neal had failed to prove significantly subaverage intellectual functioning" and "that O'Neal had failed to prove the conjunctive criterion of coexistent limitations in two or more adaptive skills." Pet. App. 195. On federal habeas, the federal district court adopted the magistrate judge's report and recommendation and denied the Petition, holding that the state court did not unreasonably determine that O'Neal was not mentally retarded. The Sixth Circuit Court of Appeals affirmed and held that "O'Neal ultimately fails to show that the state court's decision was inconsistent with the record . . . [and] he is not entitled to relief on his mental retardation claim. *See* 28 U.S.C. § 2254(e)(1)." Pet. App. 38-39.

O'Neal now seeks meritless factbound error correction. He argues that the Ohio Court of Appeals unreasonably construed the facts by 1) misconstruing a rebuttable presumption that individuals are not mentally retarded if they have an IQ test of 70 or above; 2) disregarding O'Neal's sub-70 IQ scores; 3) requiring a causal relationship between subaverage intellectual functioning and deficits in

adaptive skills; and 4) considering irrelevant facts. For two general reasons, none of these arguments merits anything other than a denial from this Court.

First, O'Neal does not challenge Ohio's method of determining whether an individual is mentally retarded, and that method is squarely within the parameters set forth by this Court in *Atkins v. Virginia*, 536 U.S. 304 (2002). Ohio's standard focuses on "[c]linical definitions of mental retardation, cited with approval in *Atkins* . . . . These definitions require (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." *Lott*, 779 N.E.2d at 1014. Viewed, as it must be, through the deferential lens of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the Ohio Court of Appeals determination *of the facts* as they relate solely to O'Neal's claim that he is mentally retarded were reasonable. *See* 28 U.S.C. § 2254(d)(2). Regardless, that factbound question raises no legal issue worthy of this Court's attention.

Second, this case need not be remanded in light of this Court's recent decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014). Most obviously, this case reaches the federal courts under AEDPA's deferential standards of review, and so those courts cannot even consider *Hall*, which came out *after* the relevant state decisions in this case. Regardless, Ohio's method of determining mental retardation is not among those called into question by *Hall*. *See id.* at 1997-98. The Ohio trial and appellate courts explicitly refused to treat O'Neal's IQ score as determinative of mental retardation, the practice prohibited by *Hall*. Finally, the "subaverage intellectual

functioning" prong of the test—the only prong to which IQ is relevant and which was addressed in *Hall*—is not even outcome-dispositive in this case. The Ohio Court of Appeals *additionally* held that O'Neal failed to demonstrate that he satisfied the second, adaptive-skills prong of the test. Pet. App. 195.

In short, O'Neal's Petition for Certiorari raises meritless arguments that seek to second-guess a reasonable factual determination of an Ohio court applying Ohio's test of mental retardation, and that test fits squarely within the bounds of *Atkins* and *Hall*. This Court should deny O'Neal's Petition.

COUNTERSTATEMENT

A. O'Neal Broke Into His Wife's Home And Shot Her To Death

Petitioner James O'Neal's wife, Carol, kicked O'Neal and his two sons out of the house that she rented. Four days later, he returned, broke into the house, and killed Carol. Pet. App. 2. He fired three shots at her, one of which was fatal, and tried to shoot Carol's son, Ricardo, but failed when his gun jammed. *Id.*

O'Neal killed Carol because he was "bent on 'teach[ing] [Carol] a lesson' for kicking his sons out" of the house after an altercation. *Id.* On December 7, 1993, the dispute began when O'Neal demanded that his wife give him her food stamps. *See State v. O'Neal*, No. C-960392, 1997 WL 770162, at *2 (Ohio Ct. App. Dec. 12, 1997). She refused, and he punched her. *Id.* She called the police, filed a domestic violence charge, and kicked O'Neal and his two sons out. *Id.* Four days later, O'Neal called his wife at work and told her "Bitch, it ain't over yet." *Id.* That evening, he broke into the house and killed her.

B. A Jury Convicted O'Neal Of Aggravated Murder And Aggravated Burglary, And Recommended The Death Penalty

"[O'Neal] was indicted for purposely causing Carol's death during the commission of an aggravated burglary, for purposely causing her death with prior calculation and design, for the attempted murder of Ricardo, and for aggravated burglary." Pet. App. 2-3. The indictment included death-penalty specifications for murder during an aggravated burglary and with prior calculation and design. *Id.* at 3. "A trial ensued, and the jury convicted James on both counts of aggravated murder, each accompanied by a death penalty specification for murder during an aggravated burglary, one count of aggravated burglary, and three firearms specifications." *Id.* The jury recommended the death penalty. *See O'Neal*, 1997 WL 770162, at *1.

On direct review, the Ohio Supreme Court affirmed O'Neal's conviction on the basis of *State v. Lilly*, 717 N.E.2d 322 (Ohio 1999), "an intervening decision in which the state supreme court conclusively established that spousal privilege 'is inapplicable in criminal cases.'" Pet. App. 3 (quoting *Lilly*, 717 N.E.2d at 325). The Ohio courts also denied motions for post-conviction relief and reconsideration.

C. The Trial Court Conducted An *Atkins* Hearing And Determined That O'Neal Was Not Mentally Retarded, And The Ohio Court Of Appeals Affirmed

Following this Court's decision in *Atkins*, O'Neal filed a second motion for post-conviction relief. Pet. App. 188. The trial court conducted an *Atkins* hearing following Ohio's procedures to determine mental retardation under *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002). *Id.* The court considered evidence from the

mitigation hearing at O'Neal's trial. There, a court-appointed clinical psychologist, Dr. David Chiappone, tested O'Neal, interviewed O'Neal and his friends and family, and examined O'Neal's school and employment records. *Id.* at 189. He testified that he "diagnosed O'Neal as functioning in the borderline range of intelligence, with polysubstance abuse and a mixed personality disorder." *Id.* Chiappone testified that O'Neal's school records also showed him in the "borderline to mildly mentally retarded range." *Id.*

In sixth grade, a school psychologist conducted an IQ test on which O'Neal received a score of 64. *Id.* Dr. Chiappone conducted an IQ test on which O'Neal scored 71. Despite these low IQ scores, Dr. Chiappone testified at the mitigation hearing that O'Neal was not mentally retarded. *Id.* at 190. He based this conclusion on O'Neal's work and social history. O'Neal served in the marines and attained the rank of lance corporal, but "was dishonorably discharged when he was absent without leave because, he asserted, the military had declined to allow him to attend his father's funeral." *Id.* at 189. O'Neal also "held a variety of menial jobs, including work in the kitchen of a country club restaurant." *Id.* He also had sought and received custody over two children, with whom he made a home with the victim and her children. *Id.* A second clinical psychologist, Dr. Robert Tureen, consulted with Dr. Chiappone and testified at the mitigation hearing. Tureen also "interviewed and tested O'Neal and reviewed the IQ test administered by Dr. Chiappone." *Id.* at 190. He concluded "that O'Neal was borderline to mildly mentally retarded." *Id.*

"Dr. Tureen evaluated O'Neal again in 2004 for his *Atkins* claim . . . and appeared as the sole witness at [the] *Atkins* hearing." *Id.* He conducted two more IQ tests, resulting in scores of 67 and 63, and interviewed O'Neal. *Id.* at 192. Dr. Tureen "acknowledged that O'Neal had owned and had driven a car, had served in the military, had married and had supported a family, had sought and had gained custody of two children, had held jobs, and had adjusted to prison life. But he found that O'Neal's limited intellectual abilities impaired his functional academics and, in 'emotionally charged' situation, compromised his social adaptability skills." *Id.* at 193. As at the mitigation hearing, Dr. Tureen concluded that O'Neal had "mild mental retardation." *Id.* at 192.

A third expert, Dr. Nelson, reviewed tests, interviews, and analyses conducted by Drs. Chiappone and Tureen and submitted a report on behalf of the prosecution. *Id.* at 193. Unlike Dr. Tureen, Dr. Nelson concluded that O'Neal did not meet the definition of mental retardation. *Id.* He acknowledged that his IQ scores fell in the range that would support a conclusion that O'Neal was mentally retarded, but "asserted [that] mental retardation could not be diagnosed in an individual with an IQ score of less than 70 if he had no significant deficits in his adaptive functioning." *Id.* Dr. Nelson concluded that O'Neal had no such deficits in adaptive skills, and that "deficits in his social skills, which arose in situations involving emotional intensity, were more a function of his psychological problems." *Id.* at 194.

Based on the evidence and testimony presented at the mitigation and *Atkins* hearings, the trial court concluded that O'Neal failed to prove any of the three prongs of Ohio's test of mental retardation by a preponderance of the evidence. Pet. App. 204-06. First, on the subaverage-intellectual-functioning prong, it held that though O'Neal's IQ test score of 71 had created a rebuttable presumption that he was not mentally retarded, his other scores rebutted that presumption. Nonetheless, considering the error range of the test scores, the court concluded that O'Neal had not shown by a preponderance of the evidence that he had significantly subaverage intellectual function. *Id.* at 204. Second, the trial court held that he failed the adaptive-skills prong. "[T]he respective opinions of two of the three experts available to the court clearly indicate that Defendant does not have significant limitations in two or more adaptive skills. . . . . Defendant's history lends further support to this court's conclusion." *Id.* at 205. Third, the court held that O'Neal had not demonstrated onset of the other two prongs before the age of 18. Specifically, though O'Neal did have an early low IQ score, there was no evidence of deficits in adaptive skills before the age of 18. *Id.* at 206.

The Ohio Court of Appeals affirmed on the intellectual-functioning and adaptive-skills prongs of Ohio's test. As to the first prong, the appellate court stated that the trial court held that O'Neal had failed to rebut the presumption that he was not retarded; the trial court, in fact, had determined that O'Neal had rebutted that presumption. *Id.* 194. This misstatement had no bearing on the appellate court's decision to affirm the trial court on the first prong. It held that the

trial court erred as a matter of law by requiring an IQ of 64 or below to offset an above-70 score and demonstrate by a preponderance of the evidence that an individual has subaverage intellectual functioning. But it affirmed on the basis that "Dr. Nelson's report provided the court with evidence upon which it might have concluded that O'Neal had failed to prove significantly subaverage intellectual functioning." *Id.* at 195. It also affirmed on the independently sufficient basis that "the record is replete with evidence to support the court's finding that O'Neal had failed to prove the conjunctive criterion of coexistent limitations in two or more adaptive skills . . . ." *Id.*

D. The District Court Denied O'Neal's Petition And The Sixth Circuit Affirmed

O'Neal sought habeas relief in federal court under 28 U.S.C. § 2254. *See* Pet. App. 44. While his Petition was pending, this Court decided *Atkins*, and the district court stayed proceedings while the Ohio trial court conducted O'Neal's *Atkins* hearing. *Id.* at 48. Following the Ohio courts' resolution of O'Neal's *Atkins* claim, habeas proceedings resumed, and O'Neal asserted 18 grounds for relief. Only one of those 18 grounds for relief is raised by O'Neal's Petition here—his claim that his execution would violate the Eighth Amendment and *Atkins*. Pet. at 11. On that issue, the district court held that "the state court determination regarding mental retardation was not based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Pet. App. 48. The district court denied the habeas petition, but granted a certificate of appealability on four

issues. *O'Neal v. Bagley*, No. 1:02-cv-00357, 2011 WL 3667359, at *1 (S.D. Ohio Aug. 22, 2011).

The Sixth Circuit affirmed the denial of O'Neal's habeas petition. Considering the petition through the lens of AEDPA deference, the court held that "O'Neal's case falls apart in the end because he fails to adequately undermine by clear and convincing evidence the state court's factual findings." Pet. App. 37. Though the Sixth Circuit noted evidence in support of O'Neal's mental-retardation claim, it concluded that given "the reams of separate record evidence" going the other way, "[r]easonable minds could just as easily arrive at a determination that O'Neal is not mentally retarded in light of the record read as a whole, which prevents us from granting relief." *Id.* (citing 28 U.S.C. § 2254(d)(2)). Specifically regarding the intellectual-functioning prong, the Sixth Circuit noted that O'Neal's IQ scores—three below 70 and one above—were "insufficient on their own to prove O'Neal has 'significantly subaverage intellectual functioning.'" *Id.* The court reached this conclusion based on Dr. Chiappone's and Dr. Nelson's conclusions that O'Neal's true intellectual functioning is higher than his IQ scores suggest. *Id.* The Sixth Circuit also noted the evidence that O'Neal did not satisfy the second adaptive-skills prong: "Dr. Nelson specifically noted that O'Neal's sub-70 IQ scores do not offset a lack of significant deficits in his adaptive functioning." *Id.* at 38.

In the face of evidence on both sides of O'Neal's claim of mental retardation, the Sixth Circuit applied AEDPA deference and concluded that "[f]or better or worse, as a habeas court, we are not in a position to pick and choose which evidence

we think is best so long as the presumption of correctness remains unrebutted." *Id.* Judge Merritt, dissenting, argued that the Ohio Court of Appeals conclusion was unreasonable because "a single IQ test of 71, such as this one, could not be a proper basis for finding normality." *Id.* at 40 (Merritt, J. dissenting). The dissent also argued that the Ohio court's reliance on evidence of intellectual functioning other than the IQ tests was not proper. The work experience and social history, relied on by two of the three *experts* and the Ohio courts was, in the dissent's view, not sufficient to make reasonable a conclusion that O'Neal is not mentally retarded. *Id.* at 43. "My view is that the state court's opinion, based mainly on its reliance on its presumption, is a finding so far out of the mainstream of scientific opinion—indeed, directly contrary to scientific opinion—as to deserve no deference." *Id.*

REASONS FOR DENYING THE WRIT

I. OHIO'S TEST TO DETERMINE MENTAL RETARDATION COMPORTS WITH *ATKINS*, AND O'NEAL MERELY SEEKS FACTBOUND ERROR CORRECTION OF A REASONABLE FACTUAL APPLICATION OF THAT STANDARD TO HIS CASE

O'Neal claims that this Court must "corral" state courts that have strayed from the guidelines set by this Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), yet Ohio's method of determining mental retardation falls in the heartland of permissible methods under *Atkins*. Pet. 11. The Ohio courts properly applied the State's method for determining mental retardation and O'Neal's Petition presents only factbound and meritless arguments that the Ohio Court of Appeals unreasonably determined facts in considering O'Neal's mental-retardation claim.

Because the Petition presents no legal questions of significance for any case other than this one, it should be denied.

A. Ohio's Method Of Determining Mental Retardation Falls Within The Heartland Of Permissible Methods Under *Atkins*

In *Atkins*, this Court held that States may not execute mentally retarded offenders. 536 U.S. at 321. This Court left to the States the question how to determine whether an individual is mentally retarded. "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Id.* at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986) (citation omitted)). While leaving it to the States to develop methods for determining mental retardation, the Court in *Atkins* did examine both the States' legislative consensus against executing mentally retarded offenders and the clinical consensus regarding the definition of the term "mentally retarded." *Id.* These definitions "require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.* at 318.

Six months after this Court decided *Atkins*, the Ohio Supreme Court applied the decision, and established Ohio's procedures for determining whether an offender is mentally retarded. *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002). The Ohio Supreme Court's method adheres closely to the guidelines set forth in *Atkins*:

> Clinical definitions of mental retardation, cited with approval in *Atkins*, provide a standard for evaluating an individual's claim of mental retardation. These definitions require (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 1014 (citation omitted). Regarding the evidence that Ohio courts should consider, the Ohio Supreme Court allowed an offender seeking to demonstrate mental retardation to present a wide range of evidence: "The trial court should rely on professional evaluations of [an offender's] mental status, and consider expert testimony, appointing experts if necessary, in deciding this matter." *Id.* at 1015. The Ohio Supreme Court was also clear on the non-determinative role that IQ tests should play in considering mental retardation: "While 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. . . . We hold that there is a *rebuttable* presumption that a defendant is not mentally retarded if his or her IQ is above 70." *Id.* at 1014 (citation omitted) (emphasis added).

B. The Ohio Court Of Appeals Properly Applied Ohio's Test, And The Petition Makes Only Claims That It Unreasonably Determined The Facts In Doing So

Despite sweeping rhetoric asserting that this Court must "corral" the States, O'Neal does not argue that Ohio's method under *Lott* is improper, only that in applying that test to him, the Ohio state courts unreasonably determined the *facts*. *See* 28 U.S.C. § 2254(d)(2). He does not and could not identify any clearly established law to which the Ohio court acted contrary. *See id.* § 2254(d)(1).

The state appellate court followed the framework laid out in *Lott* and *Atkins* to analyze two of the three conjunctive prongs of the *Lott* test. It affirmed the trial court's determinations that O'Neal failed to satisfy either *Lott's* intellectual-functioning prong or its adaptive-skills prong. In the face of the Sixth Circuit's holding that the Ohio state appellate court's determination was reasonable on each prong, O'Neal presents meritless arguments related to the state appellate court's application of the *Lott* test, which are constrained by AEDPA's highly deferential standard of review. When properly analyzed, none has merit.

1. The Sixth Circuit properly concluded that the state appellate court had not unreasonably applied the facts in resolving the intellectual-functioning prong

O'Neal identifies two reasons why the state appellate court allegedly unreasonably determined the facts under § 2254(d)(2) when holding that O'Neal had not met the first factor for mental retardation—that he has below average intellectual functioning. Pet. 11-13. *First*, O'Neal claims that the appellate court unreasonably determined the facts by misstating that the trial court had concluded that he had not rebutted the presumption that he was not mentally retarded under Ohio law, when in fact the trial court concluded that he *had* rebutted that presumption. Pet. 11-12. But this admitted misstatement had no bearing on the appellate court's resolution of O'Neal's claim. The court ultimately held that the entire framework under which the trial court had considered O'Neal's IQ score was error. Pet. App. 195. Specifically, to the extent that the trial court required a low test of 64 to offset a score of above 70, the appellate court held that the trial court erred. *Id*. Instead, the appellate court relied on evidence *other than the conflicting*

IQ test scores to affirm the trial court's determination that O'Neal did not demonstrate subaverage intellectual functioning. Specifically, as the Sixth Circuit noted, experts opined that "O'Neal functions at a higher level than his 'low IQ' would suggest." *Id.* at 16.

Second, O'Neal claims that the appellate court erred by using evidence relevant to the adaptive-skills prong to rebut his low IQ scores as a basis for a holding that he has subaverage intellectual functioning. Pet. 12-14. This is not the case. As the Sixth Circuit explained, the Ohio Court of Appeals conclusion on the intellectual-functioning prong is reasonable because "there is significant unrebutted evidence in the record" that O'Neal does not have subaverage intellectual functioning, including the conclusion of Dr. Chiappone that O'Neal has greater intellectual functioning than his IQ scores suggest. Pet. App. 16.

Furthermore, even assuming (wrongly) that both of these alleged errors related to IQ tests had any basis, they would provide no basis for review by this Court. For one thing, O'Neal does not and cannot identify any disagreement in the circuit courts related to these issues. O'Neal's arguments related to IQ tests thus present issues having no significance other than for this single case. For another thing, these alleged errors would not even affect the outcome of this case. The state appellate court held that O'Neal failed to demonstrate mental retardation by a preponderance of the evidence on either of the first *two* prongs of the *Lott* test. *Id.* at 195. In addition to its holding on the first intellectual-functioning prong, the appellate court held, as an independent and sufficient ground to affirm, that "the

record is replete with evidence to support the court's finding that O'Neal had failed to prove the conjunctive criterion of coexistent limitations in two or more adaptive skills . . . ." *Id.* IQ test scores are not relevant to the adaptive-skills prong of the *Lott* test, and the state appellate court did not consider them under that prong. *Id.*

2. The Sixth Circuit properly concluded that the state appellate court had not unreasonably applied the facts in resolving the adaptive-skills prong

O'Neal's two arguments concerning the second adoptive-skills prong provide no further basis for review. *See* Pet. 14-16. *First*, O'Neal argues that the state appellate court unreasonably determined the facts by including a factor in Ohio's test for mental retardation not required by *Lott*. *See* Pet. 14-15. According to O'Neal, the appellate court erroneously determined the facts by requiring that deficits in adaptive skills under *Lott's* second prong be *caused* by the subaverage intellectual functioning that is the focus of the first prong. *Id.* This argument, however, merely seeks to disguise a challenge to *what* he must prove under Ohio law to demonstrate mental retardation as a challenge to the court's determination of the facts. O'Neal, in other words, seeks to raise a § 2254(d)(1) question concerning unreasonable application of law under the guise of a § 2254(d)(2) question concerning unreasonable application of facts. Yet O'Neal presents *no* reason that requiring a causal connection between deficits in adaptive skills and subaverage intellectual functioning would violate *Atkins*—much less that it would be "unreasonable" do so (as O'Neal must show under AEDPA). Nor would it make sense to allow an offender to demonstrate mental retardation by, for example,

identifying an adaptive deficit that is caused by a *physical*, rather than mental, disability totally unrelated to subaverage intellectual functioning.

Not surprisingly, therefore, O'Neal presents no argument that any court disagrees with the legal position that a causal connection must exist between the subaverage intellectual functioning and the lack of adaptive skills. To the contrary, at least one other circuit has explicitly rejected the same argument as O'Neal makes here. In *Ladd v. Stephens*, 748 F.3d 637 (5th Cir. 2014), an offender sought to show mental retardation under Texas Law, which, like Ohio's method, requires subaverage intellectual functioning and deficits in adaptive skills. *Id.* at 645-46. The offender argued that the district court erred by relying on experts who attributed his adaptive deficits to his anti-social personality disorder, rather than mental retardation. *Id.* at 646. Like O'Neal, the petitioner in *Ladd* argued "that the district court erred in requiring [him] to demonstrate that his adaptive deficits were caused by his low intellectual functioning, and not his anti-social personality disorder." *Id.* at 647. The Fifth Circuit affirmed, holding that the district court had properly relied on experts who discounted adaptive deficits that were not caused by the petitioner's low intellectual functioning. *Id.* No court has reached the opposite conclusion.

In any event, it is not at all clear that the state appellate court in this case *did* require O'Neal to prove that his deficits in adaptive functioning were caused by subaverage intellectual functioning. Dr. Nelson did conclude that though O'Neal had deficits in social skills, they "were more a function of his psychological

problems" than his mental retardation. Pet. App. 194. But Dr. Nelson also concluded that all of O'Neal's deficits in adaptive function were on the "borderline" of mental retardation, and that O'Neal was not mentally retarded. *Id.* There was also a great deal of evidence from O'Neal's social, education, and employment history to support the idea that O'Neal had no significant deficits in adaptive function. The appellate court could have based its conclusion that "the record is replete with evidence to support the court's finding that O'Neal had failed to prove the conjunctive criterion of coexistent limitations in two or more adaptive skills" on the expert testimony and other evidence that is not reliant on any connection between subaverage intellectual function and adaptive skills. *Id.* at 195.

Second, O'Neal argues that the state appellate court unreasonably determined the facts by relying on "stereotypical" evidence that, among other things, O'Neal "held a job, could drive a car, was a parent, and served in the military." Pet. 15. O'Neal does not argue that the court unreasonably determined any fact, but that the facts it considered were not the right facts. As in the previous argument, therefore, this is a challenge to Ohio's method of determining mental retardation masquerading as a factual challenge under 28 U.S.C. § 2254(d)(2). Though O'Neal is right that in many instances mentally retarded people can hold jobs, drive, be parents, and serve in the military, it was not unreasonable for the appellate court to consider these aspects of O'Neal's ability to function in society, as Dr. Chiappone did, in considering whether O'Neal was mentally retarded. Adaptive-skills deficits may appear as limits to an offender's abilities in several

areas including "communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." *Atkins*, 536 U.S. at 308 n.3 (quoting a definition of mental retardation from the American Association on Mental Retardation). An offender's ability to hold a job, drive, be a parent, or serve in the military could be relevant to several of these adaptive skills.

Again not surprisingly, therefore, O'Neal identifies no split in the courts on the question whether these abilities can help determine whether an offender is mentally retarded. Exactly the opposite is true; courts routinely find that the abilities do assist in that determination. *See, e.g.*, *Hill v. Humphrey*, 662 F.3d 1335, 1354 (11th Cir. 2011) (considering work history, car and motorcycle purchases, military service, and social life as evidence that an offender is not mentally retarded under Georgia law,); *Mitchell v. Epps*, 641 F.3d 134, 154 (5th Cir. 2011) (considering an offender's upbringing, employment history, educational records, marriage, parenthood, and military service to conclude that "the entire record reveals much more evidence that undermines Mitchell's claim that he is mentally retarded"); *Williams v. Quarterman*, 293 F. App'x 298, 314 (5th Cir. 2008) (holding that the federal habeas court did not err by considering petitioner's ability to purchase plane tickets, travel, and apply for employment benefits in rejecting his *Atkins* claim); *Cole v. Branker*, 328 F.App'x 149, 154 (4th Cir. 2008) (North Carolina court considered offender's employment history and reasonably concluded that he had not demonstrated mental retardation).

II. THIS COURT'S RECENT DECISION IN *HALL v. FLORIDA* PROVIDES NO BASIS FOR A REMAND IN THIS CASE

After O'Neal filed this Petition, the Court decided *Hall v. Florida*, 134 S. Ct. 1986 (2014). For purposes of completeness, the Warden notes that *Hall* provides no basis for this Court to remand for reconsideration.

In *Hall*, this Court considered Florida's method for determining mental retardation. Under Florida Supreme Court precedent, "a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited." *Hall*, 134 S. Ct. at 1994 (citing *Cherry v. State*, 959 So.2d 702, 712-13 (Fla. 2007)). Florida's rule was outside of the range of state tests permitted by *Atkins* because it "disregards medical practice" by treating IQ as *conclusive* of intellectual functioning and by "refusing to recognize . . . that IQ test scores should be read not as a single fixed number but as a range." *Id.* at 1995. These conclusions provide no support for O'Neal's Petition here.

Most obviously, *Hall* was decided more than eight years *after* the Ohio state courts resolved O'Neal's mental-retardation claim. Thus, even if there were some conflict between the Ohio Court of Appeals decision and *Hall*, it would be of no use to O'Neal. *Hall* reflects federal law that was not "clearly established" within the meaning of AEDPA at the time that the Ohio Court of Appeals considered O'Neal's *Atkins* claim. *See* 28 U.S.C. § 2254(d)(1). It thus could not be taken into account by the Sixth Circuit under AEDPA's constrained standard of review. *See Williams v.*

Taylor, 529 U.S. 362, 412 (2000) (clearly established law "refers to the holdings . . . of this Court's decisions as of the time of the relevant state-court decision").

In addition, in this case, O'Neal did not even present any legal claim that the state courts' decisions were contrary to clearly established law under § 2254(d)(1). Rather, he only presented the claim that the state courts had unreasonably determined the facts under § 2254(d)(2). The Sixth Circuit made this point perfectly clear below. *See* Pet. App. 13 n.1. So O'Neal presented no claim that the state courts—as a legal matter—applied a test that did not comport with *Atkins*. Any argument to that effect now based on *Hall*, therefore, would be waived.

Finally, even if the Sixth Circuit could consider *Hall*, nothing in Ohio state practice for determining mental retardation conflicts with that recent decision. Indeed, this Court in *Hall* identified a number of States that might have had laws or decisions that are problematic under that decision's logic. But Ohio's test was notably *not* among them. *See Hall*, 134 S. Ct. at 1996-98. Properly so—Ohio's method commits neither of the alleged errors identified in *Hall*. To the contrary, under Ohio's method, an IQ score is *not* conclusive. *See Lott*, 779 N.E.2d at 1014 (IQ tests "alone are not sufficient to make a final determination"). An IQ test above 70 creates only "a rebuttable presumption that a defendant is not mentally retarded"; that presumption may be rebutted by other IQ scores or by other evidence of subaverage intellectual functioning.

In sum, *Hall* provides no basis for anything other than a straight denial in this case. The issue it resolved was not implicated by the proceedings below and, in

any event, *Hall* could not be taken into account under AEDPA's constrained standards.

CONCLUSION

For the above reasons, the Petition should be denied.

Respectfully submitted,

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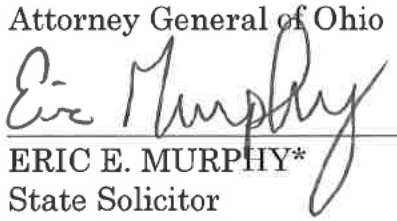

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July 9, 2014

No. 13-10044

In the Supreme Court of the United States

JAMES O'NEAL,

Petitioner,

v.

CHARLOTTE JENKINS, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CERTIFICATE OF SERVICE

I, Eric E. Murphy, counsel of record for Respondent, Charlotte Jenkins, Warden, hereby declare that the BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI was served on:

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The foregoing document was served by overnight delivery on this 9th day of July, 2014.

Eric Murphy

Eric E. Murphy
State Solicitor