**Nos. 99-4317, 14-3781**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**DEATH PENALTY CASE**

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DANNY HILL,
*Petitioner-Appellant*

v.

TIMOTHY SHOOP, WARDEN,
*Respondent-Appellee*

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On Appeal from the United States District Court for the
Northern District of Ohio

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# BRIEF OF THE STATES OF TENNESSEE, ALABAMA, ARIZONA, ARKANSAS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF THE WARDEN AND AFFIRMANCE

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HERBERT H. SLATERY III
Attorney General and Reporter
of the State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

SARAH K. CAMPBELL
Associate Solicitor General
*Counsel of Record*

MARK ALEXANDER CARVER
Honors Fellow, Office of the
Solicitor General

P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
Sarah.Campbell@ag.tn.gov

Counsel for *Amici Curiae*

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## INTERESTS OF *AMICI CURIAE*

The States of Tennessee, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, and Texas respectfully submit this brief as *amici curiae* in support of the Warden. *Amici* States have a "strong interest in enforcing . . . criminal judgments," *Cooey v. Strickland*, 484 F.3d 424, 425 (6th Cir. 2007), securing justice and closure for crime victims, and exercising sovereign authority over their respective criminal justice systems. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011). Because the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is intended to respect and promote these interests, *see id.*; *Cullen v. Pinholster*, 563 U.S. 170, 185-86 (2011), *amici* States also have an interest in ensuring that federal courts correctly apply that law.

*Amici* States file this brief under Federal Rule of Appellate Procedure 29(a)(2) to urge this Court to (i) clarify that "clearly established Federal law," 28 U.S.C. § 2254(d)(1), includes only Supreme Court precedent, not state court decisions interpreting that precedent; and (ii) grant en banc review when panel decisions fail to faithfully apply AEDPA.

## ARGUMENT

### I. This Court Should Overrule Earlier Precedent Allowing Federal Habeas Courts to Grant Relief Based on a State Court's Application of State Law.

Under AEDPA, a federal court may grant habeas relief to a state prisoner if the state court's adjudication of a claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The phrase "clearly established Federal law, as determined by the Supreme Court" means "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (internal quotation marks omitted). Yet this Court has held that "where a state-court decision is 'contrary to' clearly established *state supreme court precedent* applying *Atkins* [*v. Virginia*, 536 U.S. 317 (2002)], the decision is 'contrary to *Atkins*' for purposes of habeas review." *Williams v. Mitchell*, 792 F.3d 606, 612 (6th Cir. 2015) (emphasis added) (citing *Van Tran v. Colson*, 764 F.3d 594, 617-19 (6th Cir. 2014), and *Black v. Bell*, 664 F.3d 81, 96-97 (6th Cir. 2011)).

As the Warden's brief explains, this holding in *Williams*, *Van Tran*, and *Black* disregards both the text of section 2254(d)(1) and Supreme Court precedent. It also conflicts with basic principles of federalism and hinders the development of state law implementing the constitutional restriction against executing the intellectually disabled. This Court should overrule these precedents and reaffirm that "state-court

decisions" cannot qualify as "clearly established Federal law, as determined by the Supreme Court." *Kernan v. Cuero*, 138 S. Ct. 4, 9 (2017) (per curiam) (internal quotation marks omitted).

The Supreme Court held in *Atkins* that the Eighth Amendment forbids the execution of the intellectually disabled, but it did not adopt a test for identifying intellectual disability. 536 U.S. at 317. The Court instead left that task to the States, which have discretion "to define intellectual disability substantively for the purposes of *Atkins*" and to establish procedures to identify the intellectually disabled. *Van Tran*, 764 F.3d at 604-05. So, although the prohibition against executing the intellectually disabled is a federal constitutional command, the substantive and procedural standards for determining intellectual disability are, within constitutional limits, questions of state law. *See id.* at 604-05, 612, 627.

This Court has on several occasions granted relief on an *Atkins* claim based on a state court's alleged misapplication of state law governing intellectual disability determinations. In *Williams*, the panel held that a decision of the Ohio Court of Appeals was contrary to and an unreasonable application of Ohio Supreme Court precedent about the relevance of past intellectual function to determining present intellectual disability. 792 F.3d at 617-18. In *Van Tran*, the panel held that a decision of the Tennessee Court of Criminal Appeals was contrary to Tennessee Supreme Court precedent about the role of expert testimony in determining

intellectual disability. 764 F.3d at 619. And in *Black*, the panel held that a decision of the Tennessee Court of Criminal Appeals was contrary to Tennessee Supreme Court precedent regarding the use of the Flynn Effect to measure intellectual disability. 664 F.3d at 95-97.

Federal courts are in no position to tell state courts that they misapplied state law, let alone that their application of state law was wrong "beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). In other contexts, respect for state courts as the final arbiters of state law forbids federal courts from second-guessing their conclusions about state law. And AEDPA extends similar deference even to state-court conclusions about *federal* law. Troublingly, this Circuit's precedent turns these principles upside down by treating state decisions on questions of state law with even less respect in the AEDPA context—where federalism concerns are at their zenith—than in other contexts.

Consider how federal courts treat state-court precedent when exercising diversity jurisdiction. Federal courts sitting in diversity are duty-bound "to ascertain from all the available data what the state law is and [to] apply it rather than to prescribe a different rule, however superior it may appear." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940). State supreme courts are the highest authority on state law, and their decisions "defin[e]" state law for federal diversity courts. *Id.* at 236. Nor may a federal court discount the decisions of lower state courts when

ascertaining the content of state law, including the meaning of state supreme court precedent. *See id.* at 236-37. As this Court recognizes, state appellate courts are more reliable expositors of state supreme court precedent than federal courts. *Lukas v. McPeak*, 730 F.3d 635, 640 (6th Cir. 2013) (rejecting the invitation "to find that multiple Tennessee appellate courts have repeatedly and grossly misunderstood applicable Tennessee Supreme Court precedent"). Even outside the AEDPA context, "a federal court should attempt to make sense, not nonsense, of state courts' holdings," which means "reasonably reconcil[ing]" the decisions of lower state courts with those of the state supreme court whenever possible. *Id.*

This high regard for state-court rulings on questions of state law also undergirds the doctrines of abstention and certification. The "basic idea" of these doctrines "is to discourage federal courts from intruding on sensitive and complicated issues of state law without giving the state courts a chance to review, and perhaps resolve, the matter first." Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 197 (2018). The premise on which these doctrines rest is unmistakable: state courts—including lower state courts—are more likely to correctly decide questions of state law than are federal courts. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 75-76 (1997) (explaining that both *Pullman* abstention and certification are "[d]esigned to avoid federal-court error in deciding state-law questions"); *R.R. Comm'n of Tex. v.*

*Pullman Co.*, 312 U.S. 496, 499 (1941) (expressing "little confidence" in the Supreme Court's "independent judgment regarding the application" of state law).

This Court's approach to adjudicating *Atkins* claims under AEDPA is in sharp tension with these principles. Panels of this Court have repeatedly told state courts that they not only misapplied state law in adjudicating an *Atkins* claim, but did so in a manner that was wrong "beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103; *see Williams*, 792 F.3d at 617-18; *Van Tran*, 764 F.3d at 619; *Black*, 664 F.3d at 95-97. This approach, which would not fly in any other area of law, is especially problematic in the AEDPA context. Allowing federal courts to grant habeas relief based on perceived misapplications of state law by state courts disrespects States precisely where the law demands they be given "the benefit of the doubt." *Burt v. Titlow*, 571 U.S. 12, 15 (2013). The en banc Court should take this opportunity to correct course.

This Court's approach to AEDPA review of *Atkins* claims also hinders the development of state law regarding intellectual disability. States have discretion to establish rules for defining and identifying intellectual disability for purposes of *Atkins*, *see Van Tran*, 764 F.3d at 604-05, and sometimes States change their law on these issues. For example, the Tennessee Supreme Court has moved away from its earlier "commonsense" definition of "adaptive deficits" and now places greater "reliance on expert analysis" in defining that term. *Id.* at 612 (citing *Coleman v.*

*State*, 341 S.W.3d 221, 241, 248 (Tenn. 2011); and *State v. Smith*, 893 S.W.2d 908, 918 (Tenn. 1994)). State courts also sometimes leave open questions about determining intellectual disability. *See Black*, 664 F.3d at 99 (observing that the Tennessee Supreme Court "did not resolve" a conflict about "the role of causation" in assessing adaptive deficits (quoting *Coleman*, 341 S.W.3d at 250)).

Granting habeas relief based on alleged misapplications of state law incentivizes state courts not to evolve their law of intellectual disability in new directions or to settle open questions about that law. After all, what federal courts in other contexts would view as evidence of a new *development* in state law, *see Lukas*, 730 F.3d at 638-40, might be viewed in the *Atkins* context as an unreasonable application of *existing* state law, *see Williams*, 792 F.3d at 617-19. Similarly, why would a state supreme court settle an open question about intellectual disability when doing so could provide fodder for federal courts to second-guess a lower state court's resolution of that question?

In many other contexts, this Court and the Supreme Court take care to guard against "the danger of interrupting the orderly development and authoritative exposition of state law." *Lukas*, 730 F.3d at 640 (alteration adopted) (internal quotation marks omitted); *see also, e.g.*, *Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011) ("Our decision is not intended to restrict the States' determination of their respective [water-rights] doctrines."); *Arizona v. Evans*, 514 U.S. 1, 7 (1995)

(reaffirming an approach to federal jurisdiction that "provide[s] state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference" (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983))). This Court should follow the same approach here by leaving the development of state law about intellectual disability to the real experts: state judges.

## II. This Court Should Not Acquiesce in Erroneous Applications of AEDPA.

This is not the first time a panel of this Court has erroneously granted habeas relief. The Supreme Court has summarily reversed this Court for granting habeas relief, often in capital cases, no fewer than 13 times in the past 17 years. *Shoop v. Hill*, 139 S. Ct. 504, 505 (2019) (per curiam); *Jenkins v. Hutton*, 137 S. Ct. 1769, 1771-73 (2017) (per curiam); *Woods v. Etherton*, 136 S. Ct. 1149, 1151-52 (2016) (per curiam); *White v. Wheeler*, 136 S. Ct. 456, 458 (2015) (per curiam); *Woods v. Donald*, 575 U.S. 312, 313 (2015) (per curiam); *Parker v. Matthews*, 567 U.S. 37, 38 (2012) (per curiam); *Bobby v. Dixon*, 565 U.S. 23, 24 (2011) (per curiam); *Bobby v. Mitts*, 563 U.S. 395, 400 (2011) (per curiam); *Bobby v. Van Hook*, 558 U.S. 4, 4-5 (2009) (per curiam); *Bradshaw v. Richey*, 546 U.S. 74, 75, 79-80 (2005) (per curiam); *Bell v. Cone*, 543 U.S. 447, 447-48 (2005) (per curiam); *Holland v. Jackson*, 542 U.S. 649, 651-52 (2004) (per curiam); *Mitchell v. Esparza*, 540 U.S. 12, 13 (2003) (per curiam).

Although the Supreme Court ordinarily does not grant certiorari merely to correct erroneous applications of settled law, *Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring in the judgment), it does not hesitate to correct erroneous awards of habeas relief, *Cash v. Maxwell*, 132 S. Ct. 611, 616-17 (2012) (Scalia, J., dissenting from the denial of certiorari) (collecting cases). And for good reason. Federal habeas relief "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Richter*, 562 U.S. at 103 (internal quotation marks omitted). It disturbs the finality of criminal judgments, denies society the right to punish admitted offenders, prolongs the suffering of victims, and frustrates state efforts to honor constitutional rights. *Id.*; *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998). By summarily reversing erroneous awards of habeas relief, the Supreme Court vindicates these interests and promotes respect for the rule of law by "treat[ing] like cases alike." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment). Following settled precedent, especially when the stakes are high, guards against "arbitrary discretion in the courts." *Id.* (quoting The Federalist No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton)).

The en banc Court should follow the Supreme Court's lead in correcting erroneous awards of habeas relief. Of course, mere error correction is not the usual purpose of en banc review. *See Issa v. Bradshaw*, 910 F.3d 872, 877 (6th Cir. 2018)

(Sutton, J., concurring in denial of rehearing en banc). But neither is it the usual purpose of seeking certiorari in the Supreme Court. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted [to correct] the misapplication of a properly stated rule of law."). And the same principles that warrant the "strong medicine" of summary reversal by the Supreme Court for erroneous awards of habeas relief likewise call for en banc correction of these errors by this Court. *See Pavan v. Smith*, 137 S. Ct. 2075, 2080 (2017) (Gorsuch, J., dissenting). Error correction in the habeas context protects society's uniquely strong interests in the finality of lawful criminal judgments.

*Amici* States respectfully suggest that this Court may wish to consider taking two concrete steps to correct and prevent erroneous applications of AEDPA in this Circuit.

First, the en banc Court could express a commitment to reviewing panel decisions that misapply AEDPA. States could be encouraged to first seek en banc review of such decisions before seeking summary reversal from the Supreme Court.

Second, the en banc Court could consider summarily reversing panel decisions that obviously misapply AEDPA. This Court has already recognized the wisdom of vacating clearly erroneous panel decisions even when plenary en banc review may be unnecessary. *See Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020) (vacating a panel decision that recognized a fundamental right to education despite

mootness concerns raised by a recent settlement). It has also previously vacated an erroneous award of habeas relief and remanded for the panel to revise its opinion—only to have the panel erroneously grant relief yet again. *See Van Hook*, 558 U.S. at 6. To avoid this scenario, if a petition for rehearing en banc establishes that the panel unquestionably misapplied AEDPA, the en banc Court could summarily vacate the panel decision and issue an en banc opinion, perhaps per curiam, without additional briefing or oral argument. This practice would balance this Court's interest in ensuring that AEDPA is followed with the need to conserve judicial resources. And in the long term, it would likely lead to fewer erroneous applications of AEDPA in the first place.

## CONCLUSION

The Court should affirm the judgment of the district court, hold that misapplication of state-court precedent cannot justify relief under AEDPA, and adopt measures to correct and prevent erroneous awards of habeas relief.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter
of the State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General

MARK ALEXANDER CARVER
Honors Fellow, Office of the
Solicitor General

P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
Sarah.Campbell@ag.tn.gov

*Counsel for Amici Curiae*

October 13, 2020

**ADDITIONAL COUNSEL**

STEVE MARSHALL
Attorney General of Alabama

MARK BRNOVICH
Attorney General of Arizona

LESLIE RUTLEDGE
Attorney General of Arkansas

CURTIS T. HILL, JR.
Attorney General of Indiana

DEREK SCHMIDT
Attorney General of Kansas

DANIEL CAMERON
Attorney General of Kentucky

JEFF LANDRY
Attorney General of Missouri

LYNN FITCH
Attorney General of Mississippi

ERIC SCHMITT
Attorney General of Missouri

DOUG PETERSON
Attorney General of Nebraska

KEN PAXTON
Attorney General of Texas

## CERTIFICATE OF COMPLIANCE

This filing complies with Federal Rule of Appellate Procedure 29(a)(5) because it is less than 12 pages (half the length of the 25-page limit for the parties' supplemental briefs), excluding the parts of the brief enumerated by Rule 32(f).

This filing also complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it was prepared in Times New Roman 14-point font using Microsoft Word.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General

October 13, 2020

## CERTIFICATE OF SERVICE

I, Sarah K. Campbell, counsel for the State of Tennessee and a member of the Bar of this Court, certify that, on October 13, 2020, a copy of the foregoing amicus brief was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General