No. 08-598

In the Supreme Court of the United States

DAVID BOBBY, WARDEN,
Petitioner,

v.

MICHAEL BIES,
Respondent.

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

BRIEF OF PETITIONER

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CAPITAL CASE—NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. Did the Sixth Circuit violate the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") when, in overruling an Ohio post-conviction court on double jeopardy grounds, it crafted a new definition of "acquittal" that conflicts with this Court's decisions?

2. Do the Double Jeopardy Clause's protections apply to a state post-conviction hearing on the question of a death-sentenced inmate's mental retardation under *Atkins v. Virginia*, 536 U.S. 304 (2002), that does not expose the inmate to the risk of any additional criminal punishment?

3. Did the Sixth Circuit violate AEDPA when it applied the Double Jeopardy Clause's collateral estoppel component to enjoin an Ohio post-conviction court from deciding the issue of a death-sentenced inmate's mental retardation under *Atkins* even though the Ohio Supreme Court did not actually and necessarily decide the issue on direct review?

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the Warden's rehearing petition on August 5, 2008. The Warden timely filed a petition for a writ of certiorari and invoked the Court's jurisdiction under 28 U.S.C. § 1254(1). This Court granted the Warden's petition on January 16, 2009. *Bobby v. Bies*, 77 U.S.L.W. 3412 (U.S. Jan. 16, 2009) (No. 08-598).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

The State of Ohio in this case simply seeks to put Respondent Michael Bies to his proof on the claim that his death sentence is invalid under *Atkins v. Virginia*, 536 U.S. 304 (2002), because he is mentally retarded. Relying on the collateral estoppel component of the Double Jeopardy Clause, the Sixth Circuit held that Bies's *Atkins* claim was decided once and for all in 1996, when the Ohio Supreme Court, in affirming Bies's conviction and death sentence, observed that Bies's "mild to borderline mental retardation merit[ed] some weight in mitigation." But the Ohio Supreme Court could not have decided the *Atkins* claim six years before *Atkins* was even issued. More to the point, the Double Jeopardy Clause affords Bies no refuge because he has never been "acquitted" of the death penalty, nor is he being "twice put in jeopardy" by a second prosecution or punishment. The Court therefore should reverse the Sixth Circuit's decision and afford the Ohio courts their first chance to adjudicate Bies's mental-retardation claim under the *Atkins* standard.

STATEMENT OF THE CASE

A. Bies was convicted and sentenced to death for the murder and attempted rape of a ten-year-old boy.

On the morning of May 12, 1992, police discovered the body of ten-year-old Aaron Raines in the basement of an abandoned building in Cincinnati. Pet. App. 106a. The autopsy showed that Raines suffered multiple blunt injuries to his head, neck, chest, and abdomen. Pet. App. 109a. He

had nineteen separate lacerations to his scalp, five broken ribs, and a collapsed lung, and the left side of his face was flattened because of severe skull fractures. Pet. App. 108a-109a. Raines's injuries suggested that he had been severely beaten with a piece of concrete and a metal pipe, strangled with a piece of twine, and kicked. Pet. App. 107a-108a.

A nine-week police investigation implicated Bies and an accomplice, Darryl Gumm, in the murder. Pet. App. 109a. The evidence showed that the two men lured the boy into the abandoned building with the intent to rape him. Pet. App. 107a. When Raines resisted, they beat him, deposited his body in the basement, and left the area. Pet. App. 107a-108a. Bies eventually admitted his involvement in the crime. Pet. App. 110a.

A jury convicted Bies of aggravated murder, attempted rape, and kidnapping, as well as three death-penalty specifications. Pet. App. 110a. During the penalty phase, as mitigating evidence, Bies presented the testimony of a clinical psychologist, Donna E. Winter. J.A. 9-58. The Ohio Supreme Court summarized her testimony as follows:

> Winter reviewed an evaluation made of Bies when he was three years old, in which he was characterized as being "violent and uncontrollable." Hospital records of Bies indicated that he was abused during his childhood, and that his upbringing was chaotic, neglectful and violent. Between the ages of five and thirteen, Bies had made several suicide attempts or threats. Bies was too disruptive for public school, so he

> was placed in several different special schools. Winter believes that Bies is still a very impulsive person, who at times cannot control his anger and becomes hostile. Winter evaluated Bies's I.Q. as being in the range of mildly to borderline mentally retarded. Although Winter described Bies as a "very dense individual" lacking common sense, she conceded that everyone who evaluated Bies, including herself, concluded that Bies knew right from wrong at the time of the murder.

Pet. App. 110a-111a. The jury recommended a sentence of death, which the trial court imposed. Pet. App. 111a. The Ohio court of appeals affirmed the conviction and sentence. J.A. 84.

B. The Ohio Supreme Court affirmed Bies's conviction and sentence on direct review.

On Bies's direct appeal as of right, the Ohio Supreme Court conducted an independent review of Bies's death sentence for appropriateness and proportionality under Ohio Rev. Code § 2929.05. Citing Winter's trial testimony, the court stated that "Bies's personality disorder and mild to borderline mental retardation merit[ed] some weight" under the catch-all mitigating provision of the Ohio sentencing law. Pet. App. 120a (citing Ohio Rev. Code § 2929.04(B)(7) (LexisNexis 1996)). It also gave "some weight" in mitigation to "Bies's lack of a significant criminal record" and his "violent and unstable family environment." *Id*. Nevertheless, the court concluded that the aggravating circumstances, including the heinous and brutal nature of the crime,

"outweigh[ed] the mitigating factors beyond a reasonable doubt," "merit[ing] the capital penalty." Pet. App. 121a. The court affirmed the death sentence, and this Court denied review. *Bies v. Ohio*, 517 U.S. 1238 (1996).

C. The state courts rejected Bies's petitions for post-conviction relief.

Bies filed his first petition for post-conviction relief in the state court of common pleas, arguing, among other things, that the Eighth Amendment's cruel and unusual punishment clause barred his execution because he is mentally retarded. The court rejected the claim on its merits. J.A. 153. The Ohio court of appeals affirmed, concluding that Bies had waived his Eighth Amendment claim by not raising it on direct appeal. J.A. 176. The Ohio Supreme Court dismissed the appeal without a decision. See *State v. Bies*, 719 N.E.2d 4 (Ohio 1999). Bies then filed a second state post-conviction petition, which the state courts again denied. See *State v. Bies*, No. C-020306, 2003 Ohio App. Lexis 459 (Ohio Ct. App. Jan. 31, 2003); *State v. Bies*, 788 N.E.2d 648 (Ohio 2003).

While his second petition for state post-conviction relief was pending, Bies filed a parallel action in federal district court, seeking habeas relief on the ground, among others, that he is ineligible for the death penalty because he is mentally retarded. Shortly after he filed that petition, this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). In light of *Atkins*, the federal court stayed Bies's habeas proceeding and directed him to exhaust his mental-retardation claim by filing a third petition for post-conviction relief in the Ohio courts. Pet. App. 83a.

Bies complied and moved for summary judgment in the state court of common pleas, arguing that the trial record affirmatively established the fact of his mental retardation, that the Ohio Supreme Court recognized his mental retardation on direct appeal, and that double jeopardy precluded the State from taking a contrary position. Pet. App. 95a-104a.

The court of common pleas denied summary judgment, finding that a factual dispute existed in the record as to Bies's IQ score, and that the Ohio Supreme Court had not, for *Atkins* purposes, conclusively determined the issue of mental retardation in its earlier opinion: "Because the issues were not identified and the analysis of *Lott* and *Atkins* had not yet been established by the Courts, the Court does not find that the State is precluded from arguing that Mr. Bies is not mentally retarded." Pet. App. 104a. The state court ordered a full hearing on the *Atkins* claim.

Bies filed a renewed motion for summary judgment, reiterating that a hearing on the issue of his mental retardation would violate his double-jeopardy rights. The court denied the motion, referencing its prior decision and stating that "the double jeopardy clause does not require summary judgment." Pet. App. 95a.

D. The federal courts granted habeas relief on Bies's double-jeopardy claim.

After the state post-conviction court denied his summary judgment motion, Bies returned to federal district court and restarted his habeas proceedings on his double-jeopardy theory. The magistrate judge found that Bies's *Atkins* claim remained

unexhausted because the state court was moving forward with a hearing on the claim. Pet. App. 83a. But the magistrate judge concluded that Bies had exhausted his argument under the Double Jeopardy Clause, and the judge found that the Clause's collateral estoppel component prevented the State from relitigating the issue of Bies's mental retardation in the state post-conviction proceedings. Pet. App. 84a-93a. The magistrate judge accordingly recommended that the habeas writ issue, Pet. App. 93a, and the district court agreed, Pet. App. 67a-68a.

On appeal, the Sixth Circuit affirmed the grant of the writ. The panel first held that the collateral estoppel component of the Double Jeopardy Clause applies to the penalty phase of a capital trial whenever "a judge or jury enters findings sufficient to establish a legal entitlement to a life sentence." Pet. App. 45a (internal quotations, citation, and alteration omitted). The panel then held that the Ohio Supreme Court actually and necessarily decided the factual issue of Bies's mental retardation on direct appeal in 1996 using the standards that it would adopt six years later in the wake of *Atkins*. Pet. App. 47a-57a. And that finding, the Sixth Circuit reasoned, entitled Bies to a life sentence under *Atkins*. Finally, the court concluded that the State was collaterally estopped from challenging the fact of Bies's retardation because the State had a full and fair opportunity to litigate the issue on direct appeal. Pet. App. 58a-59a.

The State sought panel rehearing or rehearing en banc, which the court denied over Judge Sutton's dissent. Pet. App. 1a-2a. Judge Sutton concluded that the Double Jeopardy Clause does not apply to

Bies for two reasons: (1) Bies had never received an "acquittal" (instead, the state courts had affirmed his sentence of death); and (2) the state post-conviction proceedings did not "twice put [Bies] in jeopardy." Pet. App. 22a-23a. Judge Sutton further objected to the panel's collateral estoppel analysis. He noted that the Ohio Supreme Court did not actually decide the issue of Bies's mental retardation under *Atkins* because that court examined the claim only through the lens of a mitigation analysis, and the two evaluations "flow from different constitutional requirements under the Eighth Amendment." Pet. App. 26a-27a. Finally, Judge Sutton explained that the issue of Bies's mental retardation, "[f]ar from being necessary" to the Ohio Supreme Court's decision affirming the death sentence, actually "cut against it"—making any findings by the Ohio Supreme Court "quintessentially the kinds of rulings not eligible for issue-preclusion treatment." Pet. App. 27a.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause provides that "[n]o person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., amend V. "[B]y its terms," the Clause "applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325 (1984). The same principle holds true in the capital sentencing context, where "an 'acquittal' at a trial-like sentencing phase . . . is required to give rise to double-jeopardy protections." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 107 (2003).

The Sixth Circuit held that Bies is entitled to the writ because he was "acquitted" when the Ohio Supreme Court stated on direct review that his "mild to borderline mental retardation merit[ed] some weight in mitigation." But a defendant is "acquitted" of the death penalty only when the sentencer finds that the government has failed to prove its case that capital punishment is appropriate. See *Poland v. Arizona*, 476 U.S. 147, 155 (1986). By that settled standard, Bies was never acquitted, because the sentencing jury and every reviewing Ohio court found beyond a reasonable doubt that his death sentence was warranted. Bies cannot claim he was acquitted when he *lost* at every step along the way.

The Sixth Circuit also reasoned that the Double Jeopardy Clause's collateral estoppel component precludes the State from contesting Bies's mental retardation because that issue was already decided in his favor. See *Ashe v. Swenson*, 397 U.S. 436 (1970). But the criminal collateral estoppel rule does not apply without an earlier "acquittal." The Sixth Circuit's holding to the contrary untethers the *Ashe* doctrine from its constitutional text, conflicts with this Court's case law, and upsets well-established issue-preclusion principles.

The text of the Double Jeopardy Clause presents an additional obstacle to Bies's case. The Clause protects only those persons who are "twice put in jeopardy"—that is, those persons whom the State attempts to prosecute or punish a second time. But the state post-conviction proceeding at issue here is civil, not criminal, and it was initiated by Bies, not the State.

Even if the Double Jeopardy Clause or its collateral estoppel component applies here, the Sixth Circuit erred in its issue-preclusion analysis. For one thing, any finding by the Ohio Supreme Court as to Bies's mental retardation was not necessary to the court's decision, because it made no difference to his sentence. And findings that do not affect the outcome are, by definition, not essential to the judgment. Moreover, this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), changed the way Ohio courts treat mental-retardation evidence in capital cases. That change makes clear that the Ohio Supreme Court did not actually decide the *Atkins* issue before it became an issue, nor did the State have a full and fair opportunity to litigate it.

The Sixth Circuit's decision not only contravenes well-worn rules of double jeopardy and issue preclusion; it also flouts the principles of federalism and comity that inhere in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214. *Atkins* specifically left it to the States to administer mental-retardation claims in capital cases. But the Sixth Circuit thwarted the Ohio courts' first opportunity to implement that directive in Bies's case. What is more, the Sixth Circuit overrode the state post-conviction court's reasonable determination that no *Atkins* finding had yet been made. Comity and AEDPA do not permit such an intrusive result.

ARGUMENT

A. Bies received no death penalty "acquittal" that triggered either the Double Jeopardy Clause or its collateral estoppel component.

Even though every level of the Ohio courts affirmed Bies's death sentence, the Sixth Circuit held that Bies enjoys the Double Jeopardy Clause's protection based on two novel theories: (1) Bies was "acquitted" when the Ohio Supreme Court, in affirming his death sentence, stated that he exhibited "mild to borderline mental retardation"; and (2) the criminal collateral estoppel principle announced in *Ashe v. Swenson*, 397 U.S. 436 (1970), prevents the State from contesting Bies's mental retardation. Both holdings depart from this Court's well-established precedent.

1. Bies has not been "acquitted" of the death penalty.

The Sixth Circuit's innovative redefinition of "acquittal" ignores the long-settled meaning and importance of the term. See *United States v. Ball*, 163 U.S. 662, 671 (1896). "[T]he law attaches particular significance to an acquittal," *United States v. Scott*, 437 U.S. 82, 91 (1978), because "[i]t is acquittal that prevents retrial" under the Double Jeopardy Clause, *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980); see also *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (incorporating the Double Jeopardy Clause against the States). An "acquittal" is commonly understood as "a deliverance or setting free a person from a charge of guilt." *Black's Law Dictionary* 25 (6th ed. 1990).

In the capital-sentencing context, too, "the touchstone for double-jeopardy protection . . . is whether there has been an 'acquittal.'" *Sattazahn*, 537 U.S. at 109. An "acquittal" occurs in this context if "the sentencer or reviewing court has decided that the prosecution has not proved its case that the death penalty is appropriate." *Poland v. Arizona*, 476 U.S. 147, 155 (1986) (alteration and internal quotation marks omitted). In other words, when the jury rejects the prosecution's case for a death sentence, that sentencing judgment "amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty." *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984); accord *Bullington v. Missouri*, 451 U.S. 430, 446 (1981); *United States v. Peoples*, 360 F.3d 892, 895 (8th Cir. 2004) ("[T]here must be an affirmative choice by the jury not to impose a death sentence.").

Bies has not been "acquitted" of the death penalty in any sense of the word. The State of Ohio persuaded the jury, beyond a reasonable doubt, that Bies committed first-degree murder plus three capital specifications. Pet. App. 110a. The jury then found beyond a reasonable doubt that the death penalty was warranted because the aggravating circumstances outweighed the mitigating circumstances. Pet. App. 111a. The Ohio courts affirmed the jury's findings and Bies's sentence on direct review. The Ohio Supreme Court specifically found, "beyond a reasonable doubt, that Bies committed the aggravating circumstances," Pet. App. 118a, and that "the aggravating circumstances outweigh[ed] the mitigating factors," Pet. App. 120a-121a.

Despite these unanimous outcomes in the State's favor, the Sixth Circuit found that an "acquittal" occurred based on a new definition of the term. The Sixth Circuit believed that "acquittal" "should not be read to mean that the defendant emerges victorious" from trial. Pet. App. 45a n.5. Instead, the court said, an "acquittal" occurs in a capital sentencing proceeding "when a judge or jury 'enter[s] findings sufficient to establish legal entitlement to the life sentence.'" Pet. App. 45a (quoting *Sattazahn*, 537 U.S. at 109). The appeals court then held that Bies was "acquitted" when the Ohio Supreme Court noted that he suffered "mild to borderline mental retardation," because that statement rendered him "constitutionally ineligible for the death penalty" under *Atkins*. Pet. App. 50a n.6.

The Sixth Circuit's redefinition of "acquittal" to include losses by criminal defendants defies common sense and settled case law—including the chief case the court cited for support. The Sixth Circuit leaned heavily on *Sattazahn*'s reference to "findings sufficient to establish legal entitlement to the life sentence." 537 U.S. at 108, *cited in* Pet. App. 45a. But in the same breath, *Sattazahn* explained exactly what it meant by that phrase: "*i.e.*, findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt." 537 U.S. at 108. Thus, *Sattazahn* merely confirmed that the Clause protects a capital defendant from resentencing only if the sentencer has found that the death penalty should not apply to him.

The defendant in *Sattazahn* was convicted of first-degree murder, but when the jury could not agree unanimously on whether to impose a death sentence, the trial court, consistent with state law, entered a default life sentence. *Id*. at 104-05. The state appellate court reversed the conviction because of a faulty jury instruction, and on retrial the jury again convicted the defendant of first-degree murder, but elected to impose a death sentence. *Id*. at 105.

This Court held that the Double Jeopardy Clause did not prevent Pennsylvania from seeking a death sentence on retrial because the defendant had not been "acquitted" of the death penalty. For "acquittal" purposes, the Court asked whether the defendant's "first life sentence was . . . based on findings . . . that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt." *Id*. at 108; accord *id*. at 117 (O'Connor, J., concurring) (asking whether "the prosecution failed to prove its case for the death penalty"). The defendant was not acquitted at the first trial, the Court held, because neither the jury nor the judge entered "findings with respect to the alleged aggravating circumstance." *Id*. at 109.

Sattazahn's reasoning applies with even greater force here. Unlike in *Sattazahn*, where the initial sentencer made no findings either way, Bies's jury (and reviewing courts) expressly found that the State *had* met its burden in proving that the aggravating factors outweighed the mitigating circumstances beyond a reasonable doubt.

The Sixth Circuit's expansive definition of "acquittal" also runs contrary to *Poland* and *Rumsey*, the principal cases on which *Sattazahn* rested. In

Poland, the trial court imposed death sentences on both defendants after finding one aggravating factor (that their crime was especially heinous, cruel, or depraved) but not another (that they expected pecuniary value from the murder). 476 U.S. at 149. On appeal, the Arizona Supreme Court reversed, finding error not only in the guilt phase but also in the penalty phase, on both aggravating-factor determinations. *Id*. at 150. After the defendants were again convicted on retrial, the State introduced additional evidence during the penalty phase supporting the two original aggravating factors as well as a third aggravating circumstance (previous conviction of a violent felony). *Id*. The trial judge found all three aggravating circumstances and reimposed death sentences, and the Arizona Supreme Court affirmed. *Id*. at 150-51.

This Court rejected the *Poland* defendants' argument that the Double Jeopardy Clause precluded Arizona from seeking the death penalty on retrial because they had been "acquitted" of each aggravating factor presented at the first trial. *Id*. at 155. The Court refused to characterize the penalty-phase proceeding as "a set of minitrials on the existence of each aggravating circumstance," and instead explained that "the proper inquiry" for "acquittal" purposes "is whether the sentencer or reviewing court has 'decided that the prosecution has not proved its case' *that the death penalty is appropriate*." *Id*. at 155-56 (internal citation omitted). "Plainly," the Court said, "the sentencing judge did not acquit, for he imposed the death penalty." *Id*. at 154. Because the Arizona courts "did not find the evidence legally insufficient to justify imposition of the death penalty," the *Poland*

defendants had not been "acquitted" at their first trial, and the slate had been wiped clean for purposes of a new sentencing hearing on retrial. *Id.* at 157.

Rumsey is the reverse side of the same coin. The state trial court imposed a life sentence on the capital defendant after it "entered findings denying the existence of each of the seven statutory aggravating circumstances." 467 U.S. at 211. When the Arizona Supreme Court found error and remanded for a new sentencing proceeding, the trial court imposed a death sentence. *Id.* at 207-08. This Court found a double-jeopardy violation because the trial court's earlier judgment was based on an explicit finding that the State had not proven the existence of any aggravating circumstances. In other words, the trial court had affirmatively ruled on "the central issue in the proceeding—whether death was the appropriate punishment for [the defendant's] offense." *Id.* at 211. Because the trial court's ruling that death was not an appropriate punishment "amount[ed] to an acquittal on the merits," the Double Jeopardy Clause "bar[red] any retrial of the appropriateness of the death penalty." *Id.*

This case falls squarely outside the "acquittal" box drawn in *Rumsey*, *Poland*, and *Sattazahn*. Bies faced only one sentencing proceeding, where the jury unanimously agreed that his case warranted the death penalty, and the state courts uniformly affirmed that sentence of death. The Sixth Circuit had no basis for its "odd and unacceptable result"—finding an "acquittal" even though "the State ha[d] 'proved its case.'" *Poland*, 476 U.S. at 157.

2. The collateral estoppel principle announced in *Ashe* applies only when a defendant has been "acquitted" within the meaning of the Double Jeopardy Clause.

In addition to its mistaken belief that Bies was acquitted in a way that triggered a double-jeopardy bar, the Sixth Circuit based its grant of the writ on a second theory: that the collateral estoppel component of the Double Jeopardy Clause announced in *Ashe* applies in Bies's favor. Pet. App. 45a; see also Pet. App. 4a-5a (Clay, J., concurring in the denial of rehearing en banc) (describing the "two separate double jeopardy doctrines"—*Ashe*'s collateral estoppel component and *Sattazahn*'s acquittal principle—on which the panel opinion relied). As shown above, Bies has never been acquitted of the death penalty. For Bies to benefit from *Ashe*'s collateral estoppel component, then, that doctrine must apply even without an acquittal. But "the considerations of double jeopardy protection" are "implicit in the application of collateral estoppel" under *Ashe*. *Ohio v. Johnson*, 467 U.S. 493, 500 n.9 (1984). Thus, an "acquittal" is required under *Ashe* no less than in a routine double-jeopardy case.

Ashe firmly rooted its collateral estoppel reasoning in the Double Jeopardy Clause and underscored the significance of a prior acquittal. In answering the question "whether collateral estoppel . . . is a part of the Fifth Amendment's guarantee against double jeopardy," 397 U.S. at 442-43, the *Ashe* Court started with two leading cases: (1) Justice Holmes's opinion in *United States v. Oppenheimer*, 242 U.S. 85, 88 (1916), which

established that "when a man once has been acquitted on the merits," the Fifth Amendment does not allow "the Government to prosecute him a second time"; and (2) Judge Friendly's opinion in *United States v. Kramer*, 289 F.2d 909, 915 (2d Cir. 1961), which similarly held that "[a] defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this." Both *Oppenheimer* and *Kramer* premised their collateral estoppel reasoning on earlier *acquittals*. And for good reason: As Judge Friendly explained, "to permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct . . . would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment." *Kramer*, 289 F.2d at 916.

Ashe therefore rooted the criminal collateral estoppel rule in the protections that had long attached to prior acquittals, and it made clear that the rule "is embodied in the Fifth Amendment guarantee against double jeopardy": "For whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." 397 U.S. at 445-46 (internal citations omitted). The Court also explained that "the rule of collateral estoppel in criminal cases" should be applied "with realism and rationality" to determine whether "a *previous judgment of acquittal*" foreclosed relitigation of an issue in a later proceeding. *Id.* at 444 (emphasis added). All the while, the Court emphasized that it was talking about cases "where the first judgment was based on a general verdict of acquittal." *Id.*; see

also *id*. at 459 n.13 (Brennan, J., concurring) ("[O]f course, collateral estoppel would not prevent multiple prosecutions when the first trial ends in a verdict of guilty."). In fact, the *Ashe* Court's statement of the rule itself depends on the presence of an acquittal: It bars relitigation of an issue resolved in a defendant's favor by a "valid and final judgment," *id*. at 443, and "[a] 'final judgment' in favor of a criminal defendant is an acquittal." *United States v. Merlino*, 310 F.3d 137, 142 (3d Cir. 2002).

Routine collateral estoppel principles also dictated the necessity of the acquittal in *Ashe*. Under those principles, discussed more fully in Part C below, a factual determination has preclusive effect only if it was "necessary to support the judgment entered in the first action." 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4421, p. 536 (2d ed. 2002). A factual determination is necessary (or "essential") to the first judgment when a different factual resolution would have yielded a different outcome. See Restatement (Second) of Judgments § 27 cmts. h-j (1982) ("Restatement"). That requirement was satisfied in *Ashe*: The Court looked to the jury's "general verdict of acquittal" to determine whether the jury resolved in the defendant's favor "[t]he single rationally conceivable issue in dispute"—"whether the [defendant] had been one of the robbers. And the jury by its verdict found that he had not." 397 U.S. at 444-45. Because that factual determination was essential to the outcome in the first trial, it carried preclusive effect. See Restatement at § 27 cmt. j, reporter's note (citing *Ashe* as illustration of determinations essential to judgment). Collateral

estoppel applied in *Ashe*, in other words, because the jury acquitted.

This Court's later decisions applying *Ashe* confirm that the doctrine depends on an earlier acquittal. In *United States v. Dixon*, 509 U.S. 688 (1993), the Court observed that "[t]he collateral-estoppel effect attributed to the Double Jeopardy Clause may bar a later prosecution for a separate offense where the Government has *lost* an earlier prosecution involving the same facts." *Id.* at 705 (citing *Ashe*). Likewise, in *Brown v. Ohio*, 432 U.S. 161 (1977), the Court commented that the Double Jeopardy Clause's finality policy "protects the accused from attempts to relitigate the facts underlying *a prior acquittal*." *Id.* at 165 (citing *Ashe*) (emphasis added). Consistent with that understanding, the Court in both *Turner v. Arkansas*, 407 U.S. 366, 370-71 (1972) (per curiam), and *Dowling v. United States*, 493 U.S. 342, 348 (1990), assessed whether the defendants' earlier verdicts of acquittal determined an ultimate issue in their successive prosecutions.

The federal courts of appeals have similarly understood that *Ashe*'s collateral estoppel rule depends on an earlier acquittal. The Fifth Circuit, for instance, has held "that collateral estoppel ordinarily does not apply when the offense on retrial is the same offense on which the defendant was convicted in the first trial," because "[t]he underlying purpose of collateral estoppel is to 'protect a man who has been *acquitted* from having to "run the gauntlet" a second time.'" *United States v. Price*, 750 F.2d 363, 366 (5th Cir. 1985) (quoting *Ashe*). Other circuits agree. See *Merlino*, 310 F.3d at 142 (3d

Cir.); *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1242 (10th Cir. 1998); *United States v. Lanoue*, 137 F.3d 656, 662 (1st Cir. 1998); *United States v. James*, 109 F.3d 597, 600 (9th Cir. 1997); *United States v. Boney*, 977 F.2d 624, 646 (D.C. Cir. 1992); *United States v. Bailin*, 977 F.2d 270, 277-78 (7th Cir. 1992); *Tucker v. Kemp*, 762 F.2d 1480, 1487 (11th Cir. 1985); *United States v. Nash*, 447 F.2d 1382, 1384 (4th Cir. 1971). For its part, the Eighth Circuit has offered inconsistent interpretations. Compare *United States v. Mitchell*, 476 F.3d 539, 544 (8th Cir. 2007) ("The Supreme Court has incorporated the doctrine of issue preclusion, or collateral estoppel, into the Double Jeopardy Clause, applying it not only to acquittals, but also to final adjudications of fully litigated legal issues."), with *Flittie v. Solem*, 775 F.2d 933, 939 (8th Cir. 1985) (en banc) (agreeing with the panel's conclusion that "the *Ashe* rule refers only to acquittals").

The Sixth Circuit, by contrast, did violence to *Ashe*'s doctrinal analysis when it cleaved the Double Jeopardy Clause's collateral estoppel component from the Clause itself. Pet. App. 60a ("[C]ollateral estoppel is a doctrine which exists independent of the Double Jeopardy Clause . . . ."). Bies has followed suit, maintaining that "the question here is not whether Bies was 'acquitted' of an offense (or sentence) in an earlier proceeding, but whether resolution of 'an issue of ultimate fact' in an earlier proceeding involving the same parties bars relitigation of that issue." Opp. to Cert. at 17. But while a factual finding in the defendant's favor is *necessary* for *Ashe* to apply, it is not *sufficient*. *Ashe* also requires "a valid and final judgment" in the

defendant's favor—that is, a "previous judgment of acquittal." 397 U.S. at 443, 444.

3. The Sixth Circuit's contrary analysis was not clearly established federal law at the time of the state post-conviction court's decision.

Even if the Sixth Circuit's interpretations of *Sattazahn* and *Ashe* were correct (and they are not), Bies remains ineligible for relief under AEDPA. Bies presented his double-jeopardy claim to the state post-conviction court, arguing "that [c]ourt findings establish that [he] is mentally retarded." Pet. App. 103a. The state court rejected that argument because, it determined, the earlier courts had made no findings for purposes of *Atkins*. Pet. App. 104a. It then concluded "that the double jeopardy clause does not require summary judgment in this case." Pet. App. 95a.

AEDPA does not allow the Sixth Circuit to overturn the state post-conviction court's decision, because that decision was not "contrary to" or "an unreasonable application of" this Court's decisions, 28 U.S.C. § 2254(d)(1), nor was it "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id*. § 2254(d)(2). See generally *Williams v. Taylor*, 529 U.S. 362, 405-13 (2000). As shown above, the Sixth Circuit's analysis is, at best, an ambitious extension of (if not contrary to) this Court's clearly established precedents concerning the meaning of "acquittal" in the capital-sentencing context and the scope of the Double Jeopardy Clause's collateral estoppel component. AEDPA therefore provides no grounds for habeas relief.

B. The state post-conviction proceeding does not implicate the Double Jeopardy Clause because it is not a second criminal proceeding brought by the State.

Even assuming that Bies has been "acquitted" or that the Double Jeopardy Clause's collateral estoppel component has some force without an acquittal, the Clause does not apply to this case for an additional reason. The Clause's text is limited to later incidents of "jeopardy." If there is no "jeopardy," there is no bar. And under no definition does a civil *Atkins* hearing on state post-conviction review qualify as "jeopardy."

1. The civil post-conviction remedy that Bies initiated does not put him in "jeopardy."

The Double Jeopardy Clause comes into play only if a person "for the same offence" is "twice put in jeopardy of life or limb." U.S. Const., amend. V. "Jeopardy," this Court has explained, "denotes risk"—specifically, "the risk that is traditionally associated with a criminal prosecution." *Breed v. Jones*, 421 U.S. 519, 528 (1975). The Clause bars two kinds of risk: "successive punishment" and "successive prosecution." *Dixon*, 509 U.S. at 704; *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). It therefore protects against (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

In all events, the Clause covers only "multiple *criminal* punishments for the same offense." *Hudson*

v. United States, 522 U.S. 93, 99 (1997); accord *Mitchell*, 303 U.S. at 399 ("[T]he double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense."); *Black's Law Dictionary* 835 (defining "jeopardy" as "[t]he danger of conviction and punishment which the defendant in a criminal action incurs"); 6 Wayne R. LaFave et al., *Criminal Procedure* § 25.1(c), p. 579 (3d ed. 2007) ("Generally, the prohibition has no application in noncriminal cases."). The question in a particular double-jeopardy case, then, is whether the subsequent proceeding or punishment is civil or criminal in nature. *Hudson*, 522 U.S. at 99.

The State of Ohio is subjecting Bies to neither a second criminal punishment nor a second criminal prosecution. See *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972) (per curiam). First and foremost, the State is not seeking to *punish* Bies at all in the state post-conviction proceeding. Bies's punishment already has been fixed; the State is merely defending that punishment against collateral attack. See *State v. Calhoun*, 714 N.E.2d 905, 909 (Ohio 1999) ("[A] postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment."). If an *Atkins* hearing goes forward on state post-conviction review, either Bies will succeed in barring his execution or the sentence will remain in place. In neither event will the State be imposing a second punishment. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943) ("[Only] actions intended to authorize criminal punishment . . . subject the defendant to 'jeopardy' within the constitutional meaning.").

Nor is the State subjecting Bies to a "successive prosecution." *Dixon*, 509 U.S. at 696. To begin with, the *State* is not subjecting Bies to anything; it is *Bies* who initiated the proceeding in question when he petitioned for post-conviction relief in state court under Ohio's Post-Conviction Remedy Act, Ohio Rev. Code § 2953.21(A)(1)(a). That is of course Bies's right, but "[t]his is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had . . . been found not guilty." *Scott*, 437 U.S. at 96. "[N]one of [the Fifth Amendment's] provisions is implicated *except by action of the government* that it binds . . . ." *United States v. Balsys*, 524 U.S. 666, 673 (1998) (emphasis added).

Regardless of who started it, the state post-conviction proceeding is civil, not criminal, in nature. Under Ohio law, post-conviction review is a "civil proceeding, in which the prosecuting attorney represents the state as a party." *State v. Milanovich*, 325 N.E.2d 540, 542 (Ohio 1975); accord *Calhoun*, 714 N.E.2d at 909; *State v. Williams*, No. 06AP-842, 2006 Ohio App. Lexis 5406, **2-3 (Ohio Ct. App. Oct. 17, 2006). Because the proceeding is civil, the rules "applicable to civil actions" apply at least in part, see *State v. Nichols*, 463 N.E.2d 375, 378 (Ohio 1984)[1]—a factor that "indicates clearly" the proceeding's civil nature, *Mitchell*, 303 U.S. at 402. To the extent that a state post-conviction proceeding resembles a

[1] At one point in *Nichols* the Ohio Supreme Court called post-conviction proceedings "quasi-civil," but it then underscored the *Milanovich* passage that characterized the proceedings simply as "civil," and it reiterated that the statutory post-conviction "framework is civil, not criminal, although by necessity postconviction relief proceedings admittedly have an impact on adjudicated felons." 463 N.E.2d at 377.

habeas action, those actions, too, are classified as civil under both Ohio law, *Fuqua v. Williams*, 797 N.E.2d 982, 983 (Ohio 2003) (per curiam), and federal law, *Browder v. Dir., Dep't of Corrs.*, 434 U.S. 257, 269 (1978). Because "a civil proceeding following a criminal prosecution simply is not a second 'jeopardy,'" *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 793 (1994) (O'Connor, J., dissenting), the Double Jeopardy Clause does not bar Bies's post-conviction proceeding in the Ohio courts.

2. The Double Jeopardy Clause's collateral estoppel component applies only in cases of "jeopardy."

The Double Jeopardy Clause's collateral estoppel component derives from the same text—"twice put in jeopardy"—and therefore tracks the same meaning of "jeopardy" described above. In other words, *Ashe* did nothing to relax the rule that double "jeopardy" arises only when the government seeks to re-prosecute or re-punish.

The *Ashe* Court adhered to the Clause's "put in jeopardy" language by limiting the reach of the collateral estoppel rule to successive criminal prosecutions. The purpose of the collateral estoppel doctrine in the criminal context, the Court explained, was to check "the potential for unfair and abusive reprosecutions that became far more pronounced" with the proliferation of statutory offenses. *Ashe*, 397 U.S. at 445 n.10. With that end in mind, the question in *Ashe* was "simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally *hale him before a new jury* to litigate that issue again." *Id.* at 446 (emphasis added).

Ashe's assessment of the facts further underscored the Court's fidelity to the textually required presence of a second "jeopardy." The defendant was accused of robbing six participants in a poker game. He first stood trial for robbing just one of the poker players; when the jury acquitted him, the State brought him to trial for robbing a different player in the same game. *Id.* at 437-39. After noting that the State could not have retried the defendant on the very same charge following his acquittal, the Court explained that "[t]he situation is constitutionally no different here, even though the second trial related to another victim of the same robbery." *Id.* at 446. The Court held that "the constitutional guarantee forbids" what "the State . . . frankly conceded": that "it treated the first trial as no more than a dry run for the second prosecution." *Id.* at 447. It was the State's attempted reprosecution, in other words, that raised double-jeopardy concerns.

Later cases confirm that the collateral estoppel component is not a freestanding doctrine but is instead triggered only when the government initiates subsequent criminal proceedings. In *Dixon*, the Court noted that "[t]he collateral-estoppel effect attributed to the Double Jeopardy Clause may bar a later *prosecution* for a separate offense where the Government has *lost* an earlier prosecution involving the same facts." 509 U.S. at 705 (first emphasis added and internal citation omitted). Similarly, the Court in *Dowling* summarized the rule of *Ashe*: "A second *prosecution* was impermissible because, to have convicted the defendant in the second trial, the second jury had to have reached a directly contrary conclusion." 493 U.S. at 348 (emphasis added).

Thus, in *Turner*, 407 U.S. at 368-69, and *Harris v. Washington*, 404 U.S. 55, 55-57 (1971) (per curiam), the Court applied *Ashe* to bar the indictment and prosecution on new charges of defendants who had been acquitted of murders arising out of the same circumstances.

The courts of appeals likewise have understood that *Ashe*'s collateral estoppel rule applies only within the confines of the Double Jeopardy Clause's "twice put in jeopardy" language. As the Tenth Circuit observed, "state courts are constitutionally required to apply principles of collateral estoppel in criminal cases if and only if the protections of the Double Jeopardy Clause have been triggered." *Smith v. Dinwiddie*, 510 F.3d 1180, 1187 (10th Cir. 2007); see also *United States v. Bowman*, 609 F.2d 12, 17 (D.C. Cir. 1979) (same); *United States v. Venable*, 585 F.2d 71, 75 (3d Cir. 1978) (same). To that end, the courts have recognized that *Ashe*'s collateral estoppel protection "applies insofar as it is necessary to safeguard against the risk of double jeopardy, i.e., the risk of unfair and abusive reprosecutions." *Showery v. Samaniego*, 814 F.2d 200, 203 (5th Cir. 1987); accord *United States v. Dionisio*, 503 F.3d 78, 85 (2d Cir. 2007) ("[T]here must be jeopardy in order for there to be double jeopardy."); *United States v. Castro*, 629 F.2d 456, 464 (7th Cir. 1980) ("[T]he doctrine of collateral estoppel . . . applies to multiple prosecutions."); *Standlee v. Rhay*, 557 F.2d 1303, 1305 (9th Cir. 1977) ("The nature of the sanction imposed by a proceeding also is determinative of whether collateral estoppel applies.").

The Sixth Circuit was therefore wrong to unmoor the collateral estoppel doctrine from the Double Jeopardy Clause's "put in jeopardy" text.

3. Bies's post-conviction proceeding does not implicate the purposes of the Double Jeopardy Clause.

"[T]he primary purpose of the Double Jeopardy Clause" and its collateral estoppel component is "to protect the integrity of a final judgment." *Scott*, 437 U.S. at 92; accord *Crist v. Bretz*, 437 U.S. 28, 33 (1978). That purpose is not offended when Bies is put to his proof in a civil post-conviction proceeding that he initiated after his conviction became final.

The finality principle is critical under the Double Jeopardy Clause because of the nature of the stakes:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957); see also *United States v. Jorn*, 400 U.S. 470, 479 (1971) ("[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the

individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws."). The Clause therefore protects the repose interests of the defendant from the "unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant," *Scott*, 437 U.S. at 91, by taking a "second crack" at conviction, *Swisher v. Brady*, 438 U.S. 204, 216 (1978); see also *DiFrancesco*, 449 U.S. at 130; *Ashe*, 397 U.S. at 445 n.10, 447.

The state post-conviction proceeding at issue in this case implicates none of these anti-harassment, finality, and repose interests. First, the State of Ohio is not harassing Bies with repeated proceedings, because it was Bies who initiated the collateral attack on his sentence in state court. While it is assuredly Bies's right to pursue that remedy, it is just as assuredly the State's right to defend the judgment. The Clause "guards against Government oppression"; it "does not relieve a defendant from the consequences of his voluntary choice." *Scott*, 437 U.S. at 99. Second, the "concern with protecting the finality of acquittals is not implicated when, as in th[is] case[], a defendant is sentenced to death, *i.e.*, 'convicted.' There is no cause to shield such a defendant from further litigation; further litigation is the only hope he has." *Poland*, 476 U.S. at 156. Finally, the State is not offending Bies's repose interests by putting him to the "perilous choice" of risking an increased punishment on retrial if he exercises his "right to file a potentially meritorious appeal." *Sattazahn*, 537 U.S. at 126 (Ginsburg, J., dissenting). Win or lose on

state post-conviction review, Bies will never face an *increased* sentence.

To the extent the finality of Bies's sentencing judgment is in doubt, it is by Bies's doing, not the State's. The Double Jeopardy Clause does not apply to this case.

C. The Sixth Circuit incorrectly applied basic collateral estoppel principles to bar the Ohio courts from making an *Atkins* determination for the first time.

Even assuming the Double Jeopardy Clause's collateral estoppel component applies in this case, Bies has not satisfied the requirements for collateral estoppel (or issue preclusion). That doctrine prohibits relitigation of an issue that has been "*actually* and *necessarily* determined by a court of competent jurisdiction." *Montana v. United States*, 440 U.S. 147, 153 (1979) (emphasis added). Specifically, relitigation of an issue is precluded if: (1) the precise issue raised in the present case was raised and litigated in the prior proceeding; (2) determination of the issue was necessary to the outcome of the prior proceeding; (3) the prior proceeding resulted in a final judgment on the merits; and (4) the party against whom preclusion is sought had a full and fair opportunity to litigate the issue in the prior proceeding. *NAACP v. Detroit Police Officers Ass'n*, 821 F.2d 328, 330 (6th Cir. 1987).

Those requirements are not satisfied here. Two issues are at play in this case: (1) Bies's mental retardation for purposes of mitigation, and (2) Bies's mental retardation for purposes of *Atkins*. Those

issues are not the same, in no small part because *Atkins* fundamentally changed the applicable law. The Ohio Supreme Court therefore did not actually resolve the second question when it decided the first. Moreover, a mental-retardation finding was not necessary to the Ohio Supreme Court's judgment affirming Bies's sentence, and the State of Ohio has not yet had a full and fair opportunity to litigate the *Atkins* issue. In nonetheless applying collateral estoppel to this case, the Sixth Circuit deprived the Ohio courts of their first chance to adjudicate Bies's *Atkins* claim and thereby contravened both AEDPA and principles of comity.

1. The Ohio Supreme Court did not actually determine the fact of Bies's mental retardation under *Atkins*.

Issue preclusion applies here only if the Ohio Supreme Court actually determined that Bies is mentally retarded within the meaning of *Atkins*. It is unclear, as an initial matter, whether the state court's passing statement—that "Bies's . . . mild to borderline mental retardation merit[ed] some weight in mitigation," Pet. App. 120a—even amounts to a factual finding to which issue-preclusion analysis applies. See Pet. App. 22a (Sutton, J., dissenting) ("I will accept for the sake of argument that the Ohio courts independently determined that Bies is mentally retarded in upholding his death penalty conviction, even though that is far from clear."). But whatever doubt might exist as to what the Ohio Supreme Court *did* do, it is clear what the court did *not* do: It did not find Bies mentally retarded under *Atkins*.

a. The Ohio Supreme Court could not have decided the *Atkins* issue before there was an *Atkins* issue to decide.

When the Ohio Supreme Court reviewed Bies's conviction and sentence in 1996, neither the Eighth Amendment nor Ohio law prohibited the execution of mentally retarded persons. See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989); *State v. Rojas*, 592 N.E.2d 1376, 1383 (Ohio 1992). This Court altered course when it held in 2002 that "the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Atkins*, 536 U.S. at 321 (citation omitted). That change in the law was just that—a change in the law—and issue preclusion does not apply when intervening decisions substantially affect the legal question.

Collateral estoppel "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 599-600 (1948). The doctrine accordingly "has no bearing" on a case "[i]f the legal matters determined in the earlier case differ from those raised in the second case," such as when "a judicial declaration intervening between the two proceedings . . . change[s] the legal atmosphere." *Id.* at 600; see also *Montana*, 440 U.S. at 155 (asking "whether controlling facts or legal principles have changed significantly"). "Preclusion is most readily defeated by specific Supreme Court overruling of precedent relied upon in reaching the first decision." *Federal*

Practice and Procedure § 4425, p. 674; see also Restatement at § 28 cmt. c.

Atkins unquestionably changed the Eighth Amendment landscape. In overruling *Penry*, the decision "announced a new rule of law," *Commonwealth v. Miller*, 888 A.2d 624, 629 n.5 (Pa. 2005), that "drastically changed" the "significance of the issue of mental retardation," *State v. Dunn*, 831 So.2d 862, 886 (La. 2002). In the parlance of *Teague* analysis, *Atkins* pronounced a new, substantive rule that placed a class of defendants beyond the government's ability to punish capitally. See *Penry*, 492 U.S. at 329-30 (citing *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion)).

The Ohio Supreme Court's reaction to *Atkins* underscores the change *Atkins* wrought. Ohio law prohibits successive petitions for post-conviction review except in certain limited circumstances. Ohio Rev. Code § 2953.23(A). The Ohio Supreme Court held that one of those exceptions applied to a successive post-conviction petition raising an *Atkins* claim, "because the Supreme Court ha[d] recognized a new federal right applying retroactively to convicted defendants facing the death penalty." *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002). The *Lott* court then rejected the State's argument that res judicata barred the inmate's mental-retardation claim: "Admittedly, he could have raised mental retardation as a mitigating factor during the penalty phase of the trial, but not as a complete bar to the death penalty," and he also lacked "*Atkins*'s guidance as to what constitutes mental retardation." *Id.* The court therefore remanded the case for the trial court to assess the defendant's mental-

retardation claim in light of the new standards and procedures set forth in the court's opinion. *Id.* at 1016.

The Ohio Supreme Court in *Lott* recognized the obvious: that *Atkins* ushered in a new regime, and that earlier cases could not have decided the *Atkins* issue. After all, "[a] question cannot be held to have been adjudged before an issue on the subject could possibly have arisen." *Third Nat'l Bank of Louisville v. Stone*, 174 U.S. 432, 434 (1899). Issue preclusion does not apply in the wake of such fundamental changes in the law.

b. Under Ohio law, mental retardation for mitigation purposes differs from mental retardation for *Atkins* purposes.

Even aside from the watershed nature of *Atkins*, the Ohio Supreme Court did not "actually decide" the *Atkins* issue in 1996 because the post-*Atkins* inquiry into mental retardation in Ohio materially differs in both procedural and substantive ways from the pre-*Atkins* mitigation inquiry. Because of those differences, the Sixth Circuit was wrong to conclude that "the state supreme court applied the same clinical definition of mental retardation in its determination that [Bies] is mentally retarded" as required by *Atkins*. Pet. App. 49a; see also *id.* at 11a (Clay, J., concurring) ("Had the identical finding of fact been made in an *Atkins* hearing, that finding alone would have been sufficient to render Bies ineligible for the death penalty.").

Before *Atkins*, evidence of a capital defendant's mental retardation was admissible during the penalty phase under two separate statutory mitigating factors. First, factor (3) of the Ohio mitigation statute instructed the sentencer to consider "[w]hether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Ohio Rev. Code § 2929.04(B)(3) (LexisNexis 1996). The question under factor (3), then, was whether the offender's mental-retardation evidence showed an inability to understand and obey the law. See, e.g., *State v. Gumm*, 653 N.E.2d 253, 270 (Ohio 1995) ("[D]espite his low IQ, Gumm is able to distinguish right from wrong . . . ."); *State v. Hill*, 595 N.E.2d 884, 901 (Ohio 1992) ("[W]e find a very tenuous relationship between the acts he committed and his level of mental retardation."); *State v. Jenkins*, 473 N.E.2d 264, 301-02 (Ohio 1984) ("There was no evidence to suggest that appellant's low intelligence distorted the decision-making processes he employed in perpetrating this robbery and murder . . . .").

The Ohio statutory mitigation statute also contained a catch-all provision—factor (7)—that instructed sentencers to consider "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death." Ohio Rev. Code § 2929.04(B)(7) (LexisNexis 1996). This catch-all category permitted the sentencer to consider a wide range of mitigating factors, including "the defendant's character and record, and the circumstances of the particular offense." *State v. Holloway*, 527 N.E.2d 831, 834 (Ohio 1988) (citing

Lockett v. Ohio, 438 U.S. 586 (1978)). As Bies's own case illustrates, that range of factors included low intelligence and mental disorders. Pet. App. 120a; see also, e.g., *State v. Jones*, 744 N.E.2d 1163, 1181 (Ohio 2001) (considering evidence of intelligence and psychological disorders). Under neither factor (3) nor factor (7), however, did Ohio statutory or case law define "mental retardation," and with reason: Because the mitigation factors were capacious, the sentencer was not restricted to considering only evidence of mental retardation in the strict sense; any evidence of mental deficiencies was relevant.[2]

Atkins created a need for what did not exist before: substantive and procedural standards to guide the mental-retardation determination in Ohio. See *Lott*, 779 N.E.2d at 1014 (noting "the absence of a statutory framework to determine mental retardation"). The *Atkins* Court expressly left "'to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.'" 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)); see *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002) ("Ohio should have the opportunity to develop its own procedures for determining whether a particular claimant is retarded and ineligible for death."). The Ohio Supreme Court picked up that mantle six months later in *State v. Lott*, for the first time adopting a clinical definition of mental retardation

[2] Both factors (3) and (7) remain materially the same today and are available for capital defendants with mental deficiencies that do not rise to the level of mental retardation. Ohio Rev. Code § 2929.04(B)(3) & (7) (LexisNexis 2008).

and prescribing procedures for the determination. 779 N.E.2d at 1014-15.

The Ohio Supreme Court in *Lott* first articulated a three-part substantive test for determining whether a defendant is mentally retarded under the Eighth Amendment: "(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 (citing *Atkins*, 536 U.S. at 308 n.3). The court held that an IQ score above 70 established a rebuttable presumption that the defendant was not mentally retarded, but it cautioned that IQ score alone was not sufficient to make a final determination on the issue. *Id*.; see also *State v. Were*, 890 N.E.2d 263, 293 (Ohio 2008) ("Nothing in *Lott,* however, states that a capital defendant must be found mentally retarded if his IQ scores are below 70, regardless of the testing method used to determine those scores."). An *Atkins* claimant must "raise and prove" all three substantive *Lott* factors in order to receive relief. *Were*, 890 N.E.2d at 292; accord *State v. Stallings*, No. 21969, 2004 Ohio App. Lexis 4167, at **4 (Ohio Ct. App. 2004).

The evidence of mental retardation introduced at Bies's penalty phase did not provide a basis for judgment on *Lott*'s three-part substantive definition. By the Sixth Circuit's own admission, the Ohio Supreme Court's "finding that [Bies] is mentally retarded was based *solely* on the diagnosis of Dr. Donna Winter, a licensed clinical psychologist." Pet. App. 51a (emphasis added). But Dr. Winter's report and testimony did not carefully assess each of the

three *Lott* factors. On the first factor, for instance, Winter concluded that Bies has a full-scale IQ of 68, but she stated that he "functions on a slightly higher level than test results would indicate." J.A. 211. And her characterization of Bies's mental retardation as "mild" to "borderline," J.A. 213, is in tension with the clinical definitions incorporated in *Lott*, which do not recognize a category of "borderline mental retardation."[3] Nor did Winter address record evidence to the contrary, such as multiple findings that Bies's IQ is higher than 70. See Pet. App. 102a (citing exhibits to Petition to Vacate); 6th Cir. J.A. 1425. As to the second *Lott* factor, the Sixth Circuit suggested that Winter used the *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. 1987) (DSM-III) to find that Bies has adaptive-skills limitations, Pet. App. 51a n.7, 52a, but neither Winter's testimony nor her report mentioned the DSM-III. More to the point, Winter did not expressly address any deficiencies in adaptive skills. She opined on Bies's shortcomings—including that he is "functionally illiterate" and "doesn't think logically," J.A. 212—but those passing observations do not suffice to establish significant limitations in two adaptive skill areas as *Lott* requires.

In addition to substantive standards, the Ohio Supreme Court in *Lott* prescribed procedural guidelines for trial courts to use in assessing claims

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[3] The clinical definitions instead recognize a classification called "borderline intellectual functioning," which means that the individual has below average cognitive ability, but the deficit is not as severe as mental retardation. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders Text Revision* 740 (4th ed. 2000) (DSM-IV-TR) (borderline intellectual functioning is an IQ in the 71-84 range).

of mental retardation. *Lott* instructed that the trial court should "rely on professional evaluations," "conduct its own de novo review of the evidence in determining whether a defendant is mentally retarded," and "make written findings and set forth its rationale for finding the defendant mentally retarded or not mentally retarded." 779 N.E.2d at 1015. *Lott* explained that the "trial court's ruling on mental retardation should be conducted in a manner comparable to a ruling on competency." *Id.*

The purported findings of Bies's mental retardation on direct review fell short of those procedural guidelines. Neither the trial court nor any other Ohio court conducted a de novo review to determine whether Bies is mentally retarded, and the trial court issued no written findings on the matter. The Ohio Supreme Court therefore had no written mental-retardation "findings" to review when it conducted its statutorily mandated, independent evaluation of "all of the facts" to "determine whether the aggravating circumstances . . . outweigh[ed] the mitigating factors in the case, and whether the sentence of death [was] appropriate." Ohio Rev. Code § 2929.05 (LexisNexis 1996); cf. *Were*, 890 N.E.2d at 290-294 (reviewing in detail trial court's written *Lott* findings).

In the wake of *Atkins*, the determination of mental retardation in capital cases must be undertaken with "careful application of current clinical understanding" and "every effort to assure the scientific integrity and fairness" of the evaluation. Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote*

Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases, 41 U. Rich. L. Rev. 811, 860 (2007). "[T]he subtleties and the difficulties of using scientific standards in a legal setting are most pronounced when the defendant arguably falls within the mild range of mental retardation," where "IQ scores should rarely be taken at face value and . . . adaptive behavior . . . will be of particular relevance, as well as most challenging." *Id.* By those lights, the mental-retardation evidence introduced at Bies's penalty phase was thin. It does not behoove either party to suggest that a record so slight suffices to decide a matter so serious.

The record was thin because the issue was not *Atkins*. The Ohio Supreme Court therefore did not actually decide the *Atkins* question, and issue preclusion does not apply.

2. Any finding as to Bies's mental retardation under *Atkins* was not necessary to the Ohio Supreme Court's affirmance of Bies's death sentence.

The second element of the collateral estoppel test is likewise missing in this case, because a finding regarding Bies's mental retardation was not necessary to the Ohio Supreme Court's decision on direct review.

As explained in Part A above, collateral estoppel "'attaches only to determinations that were *necessary* to support the judgment'" in the first action—in this case, the ultimate decision affirming the death penalty. *Schiro v. Farley*, 510 U.S. 222, 233 (1994) (quoting 18 Wright, Miller & Cooper,

Federal Practice and Procedure § 4421, p. 192 (1981)) (emphasis added). The question is not whether it was necessary for a court to resolve a factual question, but rather whether it was necessary for the court to resolve the factual question *the way that it did* to support the judgment. "If issues are determined but the judgment is not *dependent* upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded." Restatement at § 27 cmt. h (emphasis added); accord *Red Lake Band v. United States*, 607 F.2d 930, 934 (Ct. Cl. 1979).

The Ohio Supreme Court did not need to determine whether Bies was mentally retarded in order to uphold his death sentence. As the Sixth Circuit correctly noted, Pet. App. 56a n.8, state law required that the Ohio Supreme Court independently assess the appropriateness of the death penalty and weigh the aggravating and mitigating circumstances. Ohio Rev. Code § 2929.05(A) (LexisNexis 1996). But the Sixth Circuit then erroneously reasoned that each individual aggravating and mitigating finding along the way carries preclusive effect. Pet. App. 57a.

On the contrary, the only finding that carries preclusive effect—because it is the only one on which the judgment hinges—is the final outcome of the balancing. Whether or not the Ohio Supreme Court found that Bies was mentally retarded for purposes of mitigation did not matter, in the end, to his sentence; what mattered was that the court found that the aggravating circumstances outweighed the mitigating factors. In fact, to the extent the Ohio Supreme Court made a mental-retardation finding, it

was in Bies's favor, and yet the court affirmed the death penalty. In this sense Bies's case is akin to a contributory-negligence case in which the jury finds that the defendant was negligent but nonetheless renders judgment in her favor because it also finds that the plaintiff was contributorily negligent. Such findings—"contrary to the judgment in the sense that, standing alone, they would conduce to an opposite judgment"—have "long been accepted as paradigms of the unnecessary conclusions that are not preclusive in later litigation." *Federal Practice and Procedure* § 4421, p. 551-52.

Any finding as to Bies's mental retardation made no difference in his sentence. "Such determinations have the characteristics of dicta," and "the interest in providing an opportunity for a considered determination . . . outweighs the interest in avoiding the burden of relitigation." Restatement at § 27 cmt. h.

3. Applying collateral estoppel deprives the State of a full and fair opportunity to litigate claims of mental retardation under *Atkins*.

Issue-preclusion rules also do not estop the State of Ohio from contesting Bies's *Atkins* claim because the State lacked a "full and fair opportunity" to litigate the issue earlier. *Allen v. McCurry*, 449 U.S. 90, 95 (1980).

Hornbook law dictates that "preclusion should not operate . . . if it was unforeseeable when the first action was litigated that the issue would arise in the context of the second action, and if that lack of foreseeability may have contributed to the losing

party's failure to litigate the issue fully." Restatement at § 28 cmt. i; *Cohen v. Bucci*, 905 F.2d 1111, 1112 (7th Cir. 1980) ("Inadequate incentive to litigate is an exception to non-mutual estoppel."); *Hyman v. Regenstein*, 258 F.2d 502, 511 (5th Cir. 1958) ("[C]ollateral estoppel by judgment is applicable only when . . . it was foreseeable that [a] fact would be of importance in possible future litigation."); see also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979); *The Evergreens v. Nunan*, 141 F.2d 927, 929 (2d Cir. 1944). "Such instances are rare, but they may arise, for example, between institutional litigants as a result of a change in the law." Restatement at § 28 cmt. i.

Atkins worked a dramatic change in the law that was not foreseeable when the Ohio Supreme Court reviewed Bies's death sentence in 1996. Before *Atkins*, evidence of a capital defendant's mental retardation in Ohio received "some weight" in mitigation, but not much. *State v. Fears*, 715 N.E.2d 136, 155 (Ohio 1999); accord *Hill*, 595 N.E.2d at 901; *State v. Waddy*, 588 N.E.2d 819, 840 (Ohio 1992); *Holloway*, 527 N.E.2d at 839. The State therefore had little incentive to litigate the issue of a defendant's mental retardation, and instead ordinarily focused on its burden to establish aggravating circumstances. See *State v. Hill*, 894 N.E.2d 108, 118 (Ohio Ct. App. 2008).

Moreover, a "decision cannot be given collateral estoppel (or res judicata) effect if the party sought to be bound could not have appealed it." *White v. Elrod*, 816 F.2d 1172, 1174 (7th Cir. 1987); accord *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1458 (2d Cir. 1995). Here, the State won; Bies's conviction

and sentence were affirmed on direct review. It is not clear how the State could have appealed that victory—or specifically the Ohio Supreme Court's comment regarding Bies's mental retardation—to this Court. And even if the State *could* have appealed, it had no *incentive* to do so. See *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 254 (3d Cir. 2006) ("Without an 'incentive to appeal, the losing litigant will be less likely to consider collateral consequences of the erroneous ground, and this may disadvantage him unfairly later, unless he is particularly prescient.'" (quoting *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168 (5th Cir. 1981))). Requiring parties to file "cautionary appeals" to avoid potential preclusive effects in such circumstances would increase litigation and undermine the "principles of judicial economy which motivated the doctrine of collateral estoppel in the first place." *Id.* at 254 (internal quotations and citation omitted).

4. Comity principles and AEDPA weigh heavily against federal court interference before an *Atkins* hearing has been held.

The above discussion illustrates that the Sixth Circuit's issue-preclusion analysis was incorrect. But even if doubt exists on the collateral estoppel question, the Sixth Circuit should have deferred to the state court's decision on the matter.

The Ohio post-conviction court considered but rejected Bies's argument that the issue of his mental retardation was already determined. Pet. App. 95a, 101a-104a. The state court found that neither the intermediate appellate court nor the Ohio Supreme

Court on direct review evaluated the mental-retardation issue "under the legal standard of *Atkins* and *Lott*, which had yet to be decided." Pet. App. 103a. The court further found that the mental-retardation evidence already in the record did not suffice for an *Atkins* determination, because the experts' "statements regarding mental retardation [were] made in a conclusory manner without any analysis," Pet. App. 102a n.1, and thus the court was "unable to determine whether the experts applied the test as laid out by the courts to determine this issue," Pet. App. 102a. The court accordingly rejected Bies's collateral estoppel argument and ordered an *Atkins* hearing. Pet. App. 104a.

The state post-conviction court's decision warrants deference under AEDPA because Bies cannot show that the determination was "contrary to" or "an unreasonable application of" this Court's precedents. 28 U.S.C. § 2254(d)(1). The state court's analysis comports with hornbook issue-preclusion rules and does not "appl[y] a rule that contradicts the governing law set forth in [this Court's] cases." *Williams*, 529 U.S. at 405. And the court's application of those settled rules to the facts of Bies's case was not "objectively unreasonable." *Id*. at 409.

The Sixth Circuit denied AEDPA deference on the ground that the Ohio post-conviction court's conclusion was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2), *cited in* Pet. App. 62a-65a. Specifically, the Sixth Circuit found that the state court's conclusion is contradicted by "overwhelming evidence that Dr. Winter did in fact apply the clinical

standard" in finding that Bies is mentally retarded. Pet. App. 65a. Even if the Sixth Circuit's characterization of the record were correct (and it is not), at best it demonstrates that the Ohio Supreme Court "actually" decided the mental-retardation issue. It does not establish that the finding was *necessary* to the judgment, nor does it undermine the Ohio post-conviction court's observation that "*Atkins* and *Lott* . . . had yet to be decided," Pet. App. 103a, which shows that the State lacked a full and fair opportunity to contest the issue.

The reasonableness of the state post-conviction court's ruling is confirmed by decisions from other state courts, in Ohio and elsewhere, distinguishing pre-*Atkins* mitigation findings from post-*Atkins* mental-retardation determinations. Every Ohio appellate court to consider the issue has concluded that "[t]he mitigation hearing, by definition, [does] not address the three-part test for mental retardation set forth in *Atkins* and adopted by Ohio in *Lott*." *State v. Lorraine*, No. 2003-T-0159, 2005 Ohio App. Lexis 2394, at **14 (Ohio Ct. App. May 20, 2005); accord *State v. Bays*, 824 N.E.2d 167, 171 (Ohio Ct. App. 2005); *State v. Hughbanks*, 823 N.E.2d 544, 548 (Ohio Ct. App. 2004); *State v. Carter*, 813 N.E.2d 78, 83 (Ohio Ct. App. 2004). Other state supreme courts have reached the same conclusion in similar cases. See, e.g., *Miller*, 888 A.2d at 632-33 (Pa.) (remanding for an *Atkins* hearing because "the prior testimony and evidence proffered at the penalty phase hearing . . . were not presented to establish [defendant's] mental retardation under *Atkins*"); *Dunn*, 831 So.2d at 886-87 (La.) (rejecting State's argument that jury's imposition of a death sentence pre-*Atkins* reflects a finding that defendant is not

mentally retarded for *Atkins* purposes); *State v. Smith*, No. 1060427, 2007 Ala. Lexis 91, at *37 (Ala. May 25, 2007) (remanding for *Atkins* hearing because defendant "could not have raised his *Atkins* claim . . . because *Atkins* had not yet been decided").

A second layer of deference to the state courts is also at work in this case. "Comity . . . dictates that when a [state] prisoner" raises a claim in federal habeas, "the state courts should have the first opportunity to review this claim and provide any necessary relief." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). The state post-conviction court was in the process of doing precisely that—reviewing the merits of Bies's *Atkins* claim for the first time—when the federal courts effectively enjoined the state court proceeding.

Such federal court intrusion in a state court proceeding might be warranted where a clear double jeopardy violation otherwise would occur, see, e.g., *Harpster v. Ohio*, 128 F.3d 322, 325-26 (6th Cir. 1997), but here the interference was founded on a determination that is itself properly left to the state courts. This Court expressly delegated the implementation of *Atkins* to the States. 536 U.S. at 317. Given that charge, the Ohio courts are best positioned to evaluate the effect *Atkins* had on Ohio law. They know better than the Sixth Circuit how Ohio courts treated mitigating evidence of mental retardation before *Atkins*, what opportunity and incentives the State had to contest that evidence pre-*Atkins*, what effect mitigation findings by the Ohio Supreme Court have on the ultimate sentencing judgment, and what mental-retardation determinations look like after *Atkins* and *Lott*. All of

these factors are critical to the issue-preclusion analysis, and the Ohio courts, not the Sixth Circuit, are best situated to make the collateral estoppel determination.

The Sixth Circuit essentially enjoined a state court hearing on the ground that the state court was wrong about its own law. That intrusion "unduly interfere[s] with the legitimate activities of the State[]" and fails to afford the "proper respect for state functions" that comity and federalism require. *Younger v. Harris*, 401 U.S. 37, 44 (1971). Had the Sixth Circuit instead been faithful to those principles, it would have given the Ohio courts the opportunity to consider Bies's *Atkins* claim for the first time. See Pet. App. 32a (Sutton, J., dissenting) ("[P]rinciples of comity and federalism mandate that we give the Ohio courts the first opportunity to apply [*Atkins*] to Bies' case.").

The trial record shows that Bies might succeed in proving at an *Atkins* hearing that he is mentally retarded. That record, however, is only a start; it was developed years before *Atkins* was decided, without any understanding of the detailed standards that now govern mental-retardation determinations. At this stage, the Warden is simply asking that Bies discharge his burden of proof on this claim for the first time.

CONCLUSION

The Court should reverse the Sixth Circuit's grant of the habeas writ.

Respectfully submitted,

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