IN THE SUPREME COURT OF THE UNITED STATES

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DAVID BOBBY, WARDEN, :

Petitioner :

v. : No. 08-598

MICHAEL BIES. :

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Washington, D.C.

Monday, April 27, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

BENJAMIN C. MIZER, ESQ., Solicitor General, Columbus, Ohio; on behalf of the Petitioner.

JOHN H. BLUME, ESQ., Ithaca, N.Y.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Bobby versus Bies. Mr. Mizer.

ORAL ARGUMENT OF BENJAMIN C. MIZER

ON BEHALF OF THE PETITIONER

MR. MIZER: Mr. Chief Justice, and may it please the Court:

Three separate lines of double jeopardy analysis lead independently to the conclusion that the Double Jeopardy Clause commits the Ohio postconviction court to hold a hearing to determine whether Mr. Bies is mentally retarded for purposes of Atkins.

First, there has been no acquittal in this case. Second, there is no successive jeopardy; and, third, even if collateral estoppel analysis applies under Ashe versus Swenson, the Atkins issue has not actually and necessarily been decided. Each of these factors shows that the Ohio court's decision to go forward with the Atkins hearing was reasonable, and this Court therefore should, consistent with AEDPA, give the Ohio courts their first chance to adjudicate Mr. Bies's Atkins claim.

Much of the dispute in this case centers on the parties' disagreement over the meaning of Ashe

versus Swenson and its application. But Mr. Bies cannot benefit from Ashe because Ashe -- the Ashe collateral estoppel rule only operates to benefit defendants who have in hand an earlier acquittal, and Mr. Bies has never been acquitted of the death penalty in any sense of the word.

This Court, beginning in Bullington and extending through Sattazahn, has defined an "acquittal" in a death penalty context as a finding by the sentencer that the death -- that the sentence of death is warranted in a particular case. And the -- the jury and the trial judge in this case agreed that death was warranted, and, in fact, the Ohio Supreme Court and every reviewing court has agreed that death was warranted.

JUSTICE GINSBURG: But they all agreed that he was mentally retarded, and that was a mitigator. They all agreed to that. But assuming you're right on issue preclusion, what more -- the State says, yes, we recognize "mental retardation" means you can't administer the death penalty. But what would the State show at an Atkins hearing that is not already in the record of this case? I mean why do it again?

MR. MIZER: The reason to do it again, Your Honor, is because the -- the standard set forth by the

Ohio Supreme Court in Lott when it was implementing this Court's decision in Atkins contained three definitions -- three elements of the Atkins definition, of the definition of "mental retardation." And those three elements were not carefully demonstrated by Dr. Winter. And, in fact, the -- the record here -- the Ohio post-conviction court has concluded -- doesn't suffice to make the post-Atkins Lott determination.

The -- at pages 101a to 104a of the Petition Appendix, the State postconviction court looks at all the evidence, including Dr. Winter's testimony, and says that there needs to be a hearing where experts will be called in order to determine whether Mr. Bies not only suffers from significant intellectual limitations, which includes IQ, but there is conflicting IQ evidence in the record. It also includes findings that he suffers from substantial limitations in adaptive skills, the skills needed for daily life, which Dr. Winter never specifically spoke about. She spoke only about IQ when she was talking about mental retardation.

JUSTICE KENNEDY: I don't want to take you too far outside the record, and you can come back to it, but I -- I just have this question. Suppose that in a jury case the jury -- pre-Atkins, the jury says, we find that the defendant has a 65 IQ, but that in light of the

heinous nature of the offense, this is not a mitigating factor, and that he should be sentenced to death.

In a subsequent Atkins proceeding, can the jury finding with reference to the IQ be conclusive?

MR. MIZER: No, it cannot.

JUSTICE KENNEDY: Or must that be reopened?

MR. MIZER: It can, Your Honor, for two reasons.

JUSTICE KENNEDY: It can -- can be reopened?

MR. MIZER: It can be. Yes, I'm sorry. It can't be preclusive. It can be reopened for two reasons, one relating to the definition of "mental retardation" post-Atkins and the other relating to the different issues.

First, with respect to the definition, the Ohio Supreme Court has made clear in Lott that IQ is not enough to determine mental retardation. In fact, the -- the clinicians and the American Association of Mental Retardation say that IQ is not enough, particularly in a borderline case where IQ is close to the line. And there you need to look very carefully at adaptive skills. Moreover --

JUSTICE KENNEDY: But could the -- could the defendant argue the -- that -- the accused argue that at least as to the finding of the 65 IQ, that that is a

given.

MR. MIZER: And --

JUSTICE KENNEDY: And that that issue, i.e., the level of IQ, cannot be relitigated, the number?

MR. MIZER: And the answer to that is no, Your Honor, for issue preclusive purposes, because the issue is completely different in the mitigation context from the post-Atkins context. And I think that difference is highlighted by the difference between Penry and Atkins. Pre-Atkins what the sentencer was talking about, the jury and then the Ohio Supreme Court when it affirmed, was what this Court told it to talk about in Penry.

It was talking about mental retardation as a mitigating factor, and the State of Ohio and the Ohio courts had to know the definition of "mental retardation" pre-Atkins. In fact, I think if there had been a definition and if the courts had excluded evidence from the jury that didn't rise to a certain level of severity, then we would have run into a -- a post -- a Penry and Tennard problem. And so all of the evidence was allowed in, and it was treated as mitigating.

And so what the Ohio Supreme Court was doing was what Penry told it to do: Considering mitigating

evidence of mental retardation. But post-Atkins the inquiries are different, because Atkins effectively constitutionalized a clinical judgment in making -- in defining a categorical bar on executing the mentally retarded.

And so post-Atkins it is necessary to be very careful about the clinical judgment, and this record does not suffice for that clinical judgment. And I think it -- think it does not behoove either party to suggest that the record --

JUSTICE SOUTER: Well, when you say "the clinical judgment," you mean the specific finding of a 65 IQ?

MR. MIZER: The -- the clinical judgment that I refer to, Your Honor, is that required by -- by Lott. It looks not only at IQ, but also at the adaptive skills limitation.

JUSTICE SOUTER: Okay. I grant you that under -- under the earlier case the 65 IQ was not dispositive, and I mean that was the -- the case in Justice Kennedy's hypothetical. But it was necessary under the early case to come to a determination of what the IQ was, even though that determination was not dispositive of the result. And because it was necessary to come to a determination, why shouldn't there be a

preclusion?

MR. MIZER: Because, Your Honor, I think there are two different meanings of "necessary." It was -- it was necessary in the sense that it had to be done, but it wasn't necessary in the issue preclusive offense because it -- it was --

JUSTICE SOUTER: It wasn't necessary to reach that particular -- in other words, the determination of 65 was not necessary to reach the conclusion that they reached.

MR. MIZER: Correct.

JUSTICE SOUTER: And you -- you are saying the very fact that it was not dispositive of the result means that it cannot be preclusive now?

MR. MIZER: That's correct, Your Honor.

JUSTICE SOUTER: Okay.

MR. MIZER: And -- and --

JUSTICE GINSBURG: May I ask how it worked pre-Atkins when mental retardation was a mitigator? We are told that the appellate courts independently reviewed. We have a finding at the trial level that, yes, there is a mitigator mental retardation, but it doesn't overcome the aggravator, so the jury comes in with a death sentence.

Then at the appellate level, is there a

continuing adversary contest about whether retardation exists and, therefore, is a mitigator, or is it just the -- the judge, the appellate judge, looking over the record that has been made at trial?

MR. MIZER: The -- the appellate courts engaged in a de novo record and new -- new evidence doesn't come into the record on direct review. But there is still argument -- the parties are still in an adversarial posture.

JUSTICE GINSBURG: So -- so that the prosecutor could still argue that was unreasonable for them to find mental retardation, so there shouldn't be that mitigator?

MR. MIZER: That's correct, Your Honor, but there wasn't at the time a -- a great deal of incentive to litigate that question because the Ohio Supreme Court had said that mental retardation only merited some weight in mitigation. And, in fact, the -- the appellate briefs on direct review are in the Joint Appendix and -- excerpts of those briefs. And Mr. Bies himself on direct review didn't vigorously argue his mental retardation evidence. In fact, he said that the, "arguably," in his words, "the most persuasive mitigating evidence" was his lack of a prior record and his lack of prior violent history.

And so none of the parties thought that mental retardation in 1992 through 1996 was very persuasive, because the courts didn't treat it and the jury didn't treat it as very persuasive, Perhaps for the reasons that this Court underscored in Atkins, where the Court said that, as it had said in Penry, that mental retardation evidence presented to a jury in mitigation could be a two-edged sword, because some jurors might perceive and the prosecutor might argue that that evidence went to future dangerousness, and therefore the -- the State of Ohio argued that the mental retardation evidence here was simply not persuasive and it was outweighed by the -- the aggravating factors that the jury had found. Atkins told the --

JUSTICE STEVENS: May I interrupt right there, Mr. Mizer? Is it fair to interpret the jury's decision to impose the death penalty as having found that he was not mentally retarded and therefore was not a mitigating factor, or that even though he was -- a mitigating factor, the aggravating factors outweighed that factor?

MR. MIZER: I think, Your Honor, that it's fairest and the record that's easiest to go by is what the Ohio Supreme Court said, because the jury didn't make any specific remarks about mental retardation as a

mitigator; the Ohio Supreme Court did.

But the -- the jury's verdict and then the Ohio Supreme Court's affirmance should best be read as a determination that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt, and that mental retardation was one of those mitigating factors. But it should not be read as a mini-verdict on the existence of or the question of whether Mr. Bies is mentally retarded. Because --

JUSTICE GINSBURG: If they didn't make a finding on mental retardation, how -- how could the appellate court determine that it was a mitigator but overwhelmed by the aggravating -- what did the judge charge the jury about mitigators and aggravators?

MR. MIZER: The judge charged the jury that -- first of all, Your Honor, the mitigating evidence introduced by Mr. Bies was not extensive. He -- he introduced an unsworn statement by himself and then Dr. Winter testified, and that was the extent of the case in mitigation. So the jury was charged with the various statutory mitigating factors in Ohio, which is found in Ohio Revised Code 2929.04.

The mental retardation evidence was relevant under two of those mitigating statutory factors, one, factor 3, which went to mental disease or defect, and

then the catch-all, factor 7. But the -- but I think Poland helps to illuminate what the -- not only what the jury was doing, but also what the Ohio Supreme Court was doing when it --

JUSTICE GINSBURG: First go back to the jury. How do we know that the jury found mental retardation as a mitigator?

MR. MIZER: We don't, Your Honor. All that we know is that the jury determined that the aggravating factors outweighed the mitigators beyond a reasonable doubt. What we do know and what the Sixth Circuit hung its hat on was the statement by the Ohio Supreme Court on direct review that Mr. Bies's mental retardation merits weight in mitigation.

Poland explains that that -- that statement by the Ohio Supreme Court should not be treated as a mini-verdict on the mitigating factor, but instead it should be read as an Eighth Amendment-required marking of the guidepost, the very guidepost that this Court in Penry said must be marked, the relevance of mitigating evidence of mental retardation.

But -- but Poland says it's wrong to think of that marking of that Eighth Amendment guidepost as a mini-verdict on mental retardation, and instead it should just be thought of as one of the factors that was

bounding the discretion of the sentencer. And so Poland instructs that Mr. Bies and the Sixth Circuit are wrong to think of mental retardation as actually having been found in some sense that affords preclusive effect, because instead it was just an Eighth Amendment balancing.

And instead what Atkins tells us is that the State of Ohio, just as the States were given the opportunity after Ford v. Wainwright in the insanity context, should be given the opportunity for the very first time in this case to implement Atkins to determine, given clinical expert judgment, whether or not Mr. Bies is in fact mentally retarded under the three-part --

JUSTICE BREYER: I understand the argument that the issues are not quite the same, that the Atkins issue of mental retardation is not quite the same as the issue that was litigated. Let's try and get that out of the case. I think that's where Justice Kennedy was going.

Suppose it was a gun case and the Supreme Court originally thought you could convict people who sell drugs of simple possession of a gun. There's a finding, because it's a bench trial, that he simply possessed but did not otherwise use the gun. Then the

Supreme Court holds that that isn't enough under the statute. So now the State wants to argue, because the proceeding on appeal or whatever is still going on, we want a second shot at this; we want to show he did more than simply possess. Is the State bound by what it previously lost on or can the State -- can he get a second shot?

MR. MIZER: The answer is that the State is not bound, for two reasons, the first relating to issue preclusion and the second relating to the double jeopardy doctrine in Ashe. On issue preclusion, the -- the finding with respect to the gun doesn't carry preclusive effect because this Court said in -- Sunnen and other cases that when there is a change in legal consequences, that change is enough to prevent the operation of preclusive rules.

But on the double jeopardy doctrine --

JUSTICE BREYER: I'm not -- I'm not going to go into double jeopardy. I don't think necessarily that it's double jeopardy that -- that is relevant here. But I have a -- have you run into this in a different context? They wouldn't use the word "double jeopardy." It would be some kind of due process problem. Maybe there isn't a problem. Have you run in your research to anything like what I described?

MR. MIZER: No, Your Honor, because it is important to remember that this is -- this is a double jeopardy case because of Ashe, and because this is in Federal habeas.

With respect to your question about due process or -- or other rules aside from due process, it's possible that the State could have more expansive common law or State law interpretations of the collateral estoppel rules, and maybe those would benefit the defendant. This Court in -- in the Hoag case declined to use due process to incorporate collateral estoppel rules constitutionally. So in your case the defendant would only be left with the hope that the State would have more expansive collateral estoppel rules.

But to return to Ashe, the defendant here is claiming that he is entitled to a constitutionalized version of collateral estoppel because of Ashe, but he's not entitled to that protection because Ashe applies only where a defendant has previously been acquitted, and he has not.

It also applies only in a case where the defendant is facing a successive jeopardy of some sort. Now, Mr. Bies's sentence is -- is surely at issue in this case, but it's at issue in the sense that it would

be at issue in, say, a direct appeal. It's only -- there has only been one prosecution. The State has only taken one crack at convicting him or imposing a sentence, and that one sentence is what's at issue here.

And so there is not anything successive about this case, and so the Double Jeopardy Clause, either through the put-in-jeopardy text or through the acquittal requirement, simply has nothing to offer Mr. Bies in the way of assistance.

JUSTICE ALITO: Could I ask you about -- about exhaustion? What should we do about exhaustion here? I take it you don't -- you're not waiving exhaustion?

MR. MIZER: Your Honor, we're not contending that the Ashe claim is unexhausted. We agree that that's exhausted because in the Ohio courts it is not permissible to take an interlocutory appeal when a double jeopardy claim has been denied, as it was in this case.

And so we are fine with the Sixth Circuit precedent that holds that in that case the Federal courts can act in habeas to prevent exposure to a double jeopardy. We simply maintain that there is no second jeopardy here. But the Atkins claim itself is unexhausted, and the Federal magistrate that first dealt

with this case in Federal Court held that it was unexhausted. And so now this case needs to go back down to the Ohio postconviction court, for what that court to do what it was about to do, which is to hold an Atkins hearing for the very first time in this case.

If there are no further questions, I'll reserve the balance of my time.

JUSTICE KENNEDY: Let -- let me just ask, does the State have any position now as to his IQ?

MR. MIZER: No, Your Honor. The Ohio postconviction court said at pages 101 to 104a of the Petition Appendix that the IQ remains in question. Dr. Winters testified at trial that it was 68 or 69; she wasn't perfectly consistent. But other record evidence introduced later on postconviction proceedings is not consistent with that, and so that still needs to be definitively --

JUSTICE STEVENS: Wasn't there some testimony that one test was only 50?

MR. MIZER: That evidence is in the JA, and it was introduced after -- after the Ohio Supreme Court had issued the decision at issue in this case. So that evidence is in the record, but it is not part of the Ohio Supreme Court's finding. It was introduced on postconviction review. So it needs to be considered by

the experts and by the postconviction court when this goes back to --

JUSTICE KENNEDY: Will the State -- would you say the State has an independent obligation to -- to ensure itself that he has an adequate IQ?

MR. MIZER: Absolutely, Your Honor, in order to be constitutionally consistent with -- with Atkins. But that would be borne out through the -- the adversarial process in the Atkins hearing that hasn't occurred yet.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Blume.

ORAL ARGUMENT OF JOHN H. BLUME

ON BEHALF OF THE RESPONDENT

MR. BLUME: Mr. Chief Justice, may it please the Court:

Much of the discussion so far has focused on issues which did not form the basis of the panel's decision. The panel decided this case under 2254(d)(2). And what the panel determined was that the State court's decision that Dr. Winter, who was the testifying psychiatrist, did not apply the clinical definition of mental retardation in forming her opinions and rendering her conclusions was an unreasonable determination of the facts in light of the evidence presented in the State

court proceeding.

And it was on that basis the court went through the evidence and determined that, in fact, Dr. Winter had used the clinical definition of mental retardation in rendering her opinion, and that that meant that the Ohio Court of Appeals and the Ohio Supreme Court made a finding of mental retardation based on the clinical -- the clinical definition of mental retardation.

JUSTICE SOUTER: But even -- even if that's so, that's not necessarily an -- an Atkins finding, isn't that correct?

MR. BLUME: No, I think it is. It's not as if there's something --

JUSTICE SOUTER: Atkin -- Atkin -- we didn't determine what the definition of retardation was. We -- we operated in Atkins on a broad conception of retardation and we came down with a general rule. But we left it for later litigation, starting in the States, to determine exactly how that line ought to be drawn.

We didn't know where the line ought to be drawn at that point and certainly the clinical psychologists didn't know, regardless of what the -- what definition was being used.

JUSTICE GINSBURG: And the Ohio Supreme

Court acting years before Atkins.

MR. BLUME: Pardon me?

JUSTICE GINSBURG: The -- wasn't the Ohio Supreme Court decision in this case pre-Atkins?

MR. BLUME: Yes, it was. But the --

JUSTICE GINSBURG: And it was dealing with retardation as a mitigator, not retardation as conclusive that there can be no death penalty.

MR. BLUME: That's true, but the -- the important point, I think, that formed the basis of the Sixth Circuit opinion was that in Lott versus -- which is the Ohio decision post-Atkins, in Lott they said we're embracing the clinical definition of mental retardation.

JUSTICE GINSBURG: But before you get to whether -- anything like that, you are urging issue preclusion against the winner. It was a death sentence in this case. And I am not aware of issue preclusion operating against a judgment winner. Issue preclusion is for the party who fought this out and won.

Here we have a death sentence. So there -- the ultimate determination, whatever intermediate determinations might have been made on the way, like mental retardation exists and was a mitigator, the ultimate judgment is death. And I am not aware of, in

all of issue preclusion, where a judgment winner is precluded.

MR. BLUME: Well, clearly that is the more typical procedural context, and it happens normally in the criminal context of someone that's been acquitted. But the procedural posture here is unique, because what you have is a prior finding of mental retardation pre-Atkins, and clearly, at least according to the panel, using the definition of mental retardation which is now in effect in Ohio.

Then subsequent to that you had this Court's decision in Ohio -- I mean this Court's decision in Atkins, which creates a retroactive new rule which says that people with mental retardation can't be executed. The essence of a retroactive new rule is that it attaches new legal consequences to prior conduct.

So it is both the rule of Ashe, which says when an issue has been determined in a final proceeding, combined with this Court's decision in Atkins placing a category of people --

JUSTICE GINSBURG: But the question is what is the issue, and an intermediate finding, say mitigation, on the way to the ultimate conclusion, life or death, is not the same issue as if retardation is found, no death penalty. It's -- it's the ultimate

issue in the case that was before the Ohio Supreme Court is, do the aggravators outweigh the mitigators? That's the ultimate determination, and that's what would have preclusive effect, not the many intermediate findings that may have been made on the way to the ultimate determination of death.

MR. BLUME: Well, Justice Ginsburg, I think that minimizes or does not give adequate significance to what the Ohio Supreme Court describes as its role in -- on the appellate review. And they describe their role as being that they engage in an independent reweighing of the mitigation against the aggravation. A first step of that is the identification of the mitigating circumstances.

So they have taken it upon themselves to identify the mitigating circumstances, and they have to do that by a preponderance of the evidence, which is the same standard which exists now in a Lott proceeding.

In the course of reviewing Mr. Bies's sentence on appeal, intermediate appeal of the court of appeals, and then the Ohio Supreme Court, both courts found that Mr. Bies had mental retardation. It's not also -- I mean, they have described this as an essential function of their role, and they also don't do it uncritically.

There are other cases, State v. White for example, in which they made an express finding that the individual had not proven his mental retardation.

JUSTICE SOUTER: In -- in response to Justice Ginsburg's question, I don't see why it makes any difference which court is doing what. She -- she raised two objections. Number one is that so far as the issue being determined in the prior proceeding, the characterization of his mental state as retardation was at most a subsidiary, not an ultimate fact.

Number two, the conclusion of that prior proceeding was that he lost. And she's saying in those, in either of those circumstances, the subsidiary finding is not preclusive and any finding is not preclusive in the manner in which he wishes to use it here.

I don't see what difference it makes whether we're talking about court A or court B. What is -- what is your response to those two objections?

MR. BLUME: Well, on the first point, I didn't mean that it necessarily matters which court it did. I was saying that -- trying to describe -- usually the necessary part, which is in some ways what we're talking about here, was it necessary, turns on two considerations. And the necessary -- it's designed to determine, as I understand it, one, was the issue

decided; and, two, was it decided with some care for its significance to the proceeding?

And I think, given the unique way in which Ohio does the sentence review, both of those concerns are satisfied. As for --

JUSTICE SOUTER: If -- if the Ohio court had found, the court of first instance had found, that the IQ was at some different level, it could have come out exactly the same way it came out in this case, couldn't it?

MR. BLUME: Yes, it could have.

JUSTICE SOUTER: So the finding was not necessary to the result?

MR. BLUME: Well --

JUSTICE SOUTER: I mean, we went through this with your brother, and he pointed out, yes, it was necessary to -- to consider the issue and to make some kind of a finding -- I don't know how precise it had to be -- but the finding that it made, the -- the actual number that was used or the characterization that was used to describe that number was not necessary in order, in fact, to impose the death penalty.

MR. BLUME: Well, I --

JUSTICE SOUTER: And -- and the sense of necessity which is used normally in -- in this kind of

preclusion analysis just doesn't apply here.

MR. BLUME: Well, that is not my reading of the necessary cases. I read that the function that the necessary prong serves as trying to serve two goals. Number one, was the issue, the question, the issue --

JUSTICE GINSBURG: How do you say you have -- you don't find that in the cases when you said to me, and I think frankly you were right, that issue preclusion -- and there are many, many cases on issue preclusion -- is something that a judgment winner uses, not a judgment loser, and here the Ohio -- yes, they weighed and they found retardation, but they also found overwhelmed by the aggravating circumstances. So the ultimate determination of that, of all the courts, is death?

I don't see how you get to elevate an intermediate determination -- there are many; some go for one party, some go for the other -- to become the outcome determinative factor. The outcome determinative factor is that the aggregators outweighed whatever mitigators there were.

MR. BLUME: Well, I mean -- again, that is not my understanding of the role the necessary clause plays.

But now, on to the winner point. So if

that's necessary -- I don't think there's anything in Ashe v. Swenson that says you have to win on the ultimate outcome. It's do you win on the fact. If that's right -- and let's imagine --

JUSTICE GINSBURG: But Ashe is about somebody who was acquitted. He won. There was no doubt that he won.

MR. BLUME: I understand.

JUSTICE GINSBURG: It didn't say anything about, well, suppose he didn't win.

MR. BLUME: But the Ashe rule is stated in terms of when an issue of fact has been determined in a defendant's favor it's binding in any subsequent litigation.

But if the Warden is right -- and let's imagine now Mr. Bies goes back for his mental retardation hearing, and the court says: Yes, Mr. Bies is mentally retarded; on the other hand, I think Atkins was wrongly decided.

It goes up on appeal to the Ohio Supreme Court and they say: Yes, Mr. Bies is mentally retarded, but we think Atkins was wrongly decided. The case comes to this Court, and you summarily reverse and say Atkins is still the law of the land.

Now it goes back, and the Warden could then

say: Well, now that we know you're serious about Atkins, we want to reopen the judgment and we want another shot --

JUSTICE BREYER: It's not reopen -- it's -- it's the same problem. And maybe you found some authority to the contrary, other than statements, but actual authority. The defendant loses. He appeals. He says they made a mistake. And the normal remedy is you give him a new trial. Does it matter that it's a collateral proceeding? I don't think so. They go to the Federal court: Judge, they made a mistake at my trial. You give him a new trial. Everything's up for grabs normally at the new trial. I can't think of an instance where it isn't.

Here, they are saying: Judge, they made a mistake. They should have applied the mental retardation rule of Atkins. So give him a new trial.

Now, what I'm looking for is just one example somewhere that supports you --

MR. BLUME: Well --

JUSTICE BREYER: -- that didn't proceed on the theory I've just announced or just said.

MR. BLUME: Well, I -- I mean, I can't give you a case exactly like that, but, again, I think the procedure --

JUSTICE BREYER: No, I want a case even vaguely like that.

(Laughter.)

MR. BLUME: I think what you have are the cases -- you had the cases which essentially are the legal equivalent of insufficient evidence on appeal. Now, that's not technically an acquittal, but it's treated as an acquittal. But what you have here is a finding of fact combined with a later decision on the -- establishing a retroactive new rule, moving people outside --

CHIEF JUSTICE ROBERTS: How far -- how far down do you go on applying the issue preclusion? Let's say there's a ruling by the court that a particular expert was not credible. I mean, is that binding in a subsequent proceeding?

MR. BLUME: No, Mr. Chief Justice. I think it would have to do one of two things. It would either have to absolve the criminal defendant of liability, which is sort of the common rule under Ashe, or it would have to render him ineligible for the death penalty, though the definition of acquittal used in Sattazahn is had there been a finding which -- legally sufficient to legally entitle the defendant to a life sentence. And it is Mr. Bies's position that the finding of mental

retardation --

CHIEF JUSTICE ROBERTS: Well, that's narrowing it to your particular context. I would have assumed that the theory has to be more generally applicable, and not just applicable in the particular Atkins context. If you can have issue preclusion with respect to an underlying factual question under which the loser can assert that, I don't see why it wouldn't apply more generally. That's a theory of the Double Jeopardy Clause, not of Atkins.

MR. BLUME: Well, it's a theory of collateral estoppel which is based in the Double Jeopardy Clause, which is what -- the issue on which the panel resolved this question. And I think that -- as I read the collateral estoppel cases, again and even in the context of capital sentencing and double jeopardy, the finding would have to be either at the -- at the criminal liability stage, would it absolve the defendant of liability, like in the Ashe context. The finding was one of identity. In the first trial, the jury acquitted. The only issue was identity. When this court looked at the record as a whole -- and then they said, okay, you can't subsequently litigate the prior -- the nuts crimes on the issue of identity. In the capital sentencing context, at least here, a finding of

mental retardation is a finding sufficient to entitle the defendant --

JUSTICE BREYER: Your argument, then -- we're getting somewhere maybe.

MR. BLUME: Pardon me?

JUSTICE BREYER: You're saying to me, think of Jackson and Denno, If you're in a collateral proceeding and the Federal judge said there wasn't enough evidence to convict him under the Constitution, like the Shuffling Sam case, there isn't enough evidence; it isn't that he gets a new trial. The Constitution entitles him to acquittal, and therefore there is no new trial because of the Double Jeopardy Clause, right?

MR. BLUME: That's correct.

JUSTICE BREYER: All right. So you're saying here, the evidence the first time was such that they couldn't give him the death penalty under the Constitution as later interpreted. So if that's what you discover on the collateral appeal, a similar reasoning would somehow lead you to the similar result. Is that the argument?

MR. BLUME: That's more or less the argument. And the panel --

JUSTICE SOUTER: But if that is the

argument, then what is being preclusive here is not the first judgment. I mean, in preclusion cases it's the first judgment that precludes, and we identify a judgment which is preclusive in the way we've been describing. But in the hypothetical that Justice Breyer gave you, there's nothing preclusive about the first judgment because the first judgment stands and properly can stand. And you're saying there can't be a second judgment, but you are not depending upon a rule of preclusion that turns on the first. So whatever your argument is, it's not -- it's not issue preclusion.

MR. BLUME: Well, it is the combination of the determination that Mr. Bies is a person with mental retardation using the same definition according to the panel, which is now in effect in the State of Ohio, which would apply in a Lott proceeding if he were to have it tomorrow.

JUSTICE SOUTER: Sure, but you're coming up with a brand new rule. Whatever your rule is, it's not a rule of double jeopardy and it's not -- it's not the traditional rule of issue preclusion.

MR. BLUME: Well, it is the combination of that factual determination with the subsequent rule, a retroactive new rule. I mean, it's unusual because there are very few retroactive new rules of procedure

which place someone outside --

JUSTICE SOUTER: No, but what your rule is, as I understand it in your response to Justice Breyer's question, is if there was a subsidiary fact determination in the first case, even though it was entirely consistent with the judgment against your client, that's subsidiary fact determination can be used as a defense by your client in the second case. That's your rule, as I understand it, and that is not the rule of Ashe v. Swenson and it is not the rule of issue preclusion.

MR. BLUME: It could be used if there is a later legal ruling which means the significance of that fact would either absolve the criminal defendant of liability or make him ineligible for death.

JUSTICE SOUTER: Well, you -- do you agree with me that you're asking for a brand-new rule here?

MR. BLUME: I don't think it is a brand-new rule.

JUSTICE SOUTER: We have never held this, and I don't know of any court that's ever held this.

MR. BLUME: But I think the reason you haven't isn't --

JUSTICE SOUTER: Well, why isn't it brand new?

MR. BLUME: It's because of the unique procedural posture of this case.

JUSTICE SOUTER: Well, maybe the unique procedural posture is precisely the reason that the rule is brand new. If it's unique, we've never had it before.

MR. BLUME: But --

JUSTICE GINSBURG: We have the factor that you would preclude Ohio from doing, when we expressly said that here is the rule: You can't execute the mentally retarded. However, we are going to leave it to the State to shape the procedure, and what are the elements of retardation? You would take all that away from Ohio because in a different context, the context of weighing mitigators against aggravators, the Ohio Supreme Court said there was retardation, it is mitigating; however, it was overwhelmed by the aggravators.

It's an entirely different operation than, States, here's the rule; the procedure for doing it is up to you. Ohio didn't have a procedure for doing Atkins. It couldn't until Atkins was decided. And now you're saying, oh, Ohio, because you, in the context of weighing mitigators against aggravators, found this mitigator, you cannot shape the Atkins procedure as

every other State can.

MR. BLUME: Well, I don't think that's a fair determination of what the panel did in this case. What the panel said is, number one, that we look at the procedure and definition of mental retardation that Ohio has adopted. Now, it is the same as the definition of mental retardation which was used by Dr. Winter in her testimony in Mr. Bies's trial, and is the -- that is the sole basis for the determination. And they said the burdens of proof are the same. He had the burden of establishing this fact of mental retardation by a preponderance, and that's the same. So, therefore, on that basis, they decided he --

JUSTICE GINSBURG: But the incentive is vastly different, which is an important factor in issue preclusion. That is, if the prosecutor thinks that there's overwhelming evidence of the aggravators, the nature of the crime, the prosecutor is not going to care so much about, so there is mental retardation as a mitigator; but when it's a difference, when the prosecutor wants to go for the death penalty and it thinks that it's got a secure case on the atrocious matter in which the crime was committed, there isn't the same incentive to litigate as there is when it is the ultimate question, not an issue on the way to reaching

the ultimate judgment.

MR. BLUME: Well, I don't think, Justice Ginsburg, the incentives have to be identical, but certainly prior to Atkins the prosecution had the incentive to contest the mental retardation question, and in fact in this case the failure to more adequately contest it wasn't due to a lack of incentives, it was due to a lack of evidence. There were three experts that evaluated Mr. Bies, all of whom came to virtually identical conclusions. About his mental state.

CHIEF JUSTICE ROBERTS: Well, this strikes me as the sort of case where their incentives might well be different, as Justice Ginsburg suggested. If you're dealing with a borderline case, you don't -- and you think you have very compelling aggravating factors, you know, why call attention to the -- the mitigating factor of the mental condition when your case can be won on the others?

MR. BLUME: Well, I think for three reasons, Mr. Chief Justice. Number one, as this Court recognized in Atkins, in cases where there was evidence of mental retardation, the jury was much less likely to impose a death sentence; that in part was part of the basis of this Court's decision in Atkins. Second, on appeal, by not contesting the evidence -- the State of Ohio did

contest it here -- you ran the risk that the Ohio Court of Appeals or the Ohio Supreme Court would reach a different conclusion, number one, on the balance of aggravation and mitigation; or, number two, on whether the death sentence was disproportion. And the Ohio Supreme Court had done that in several other cases.

But here also, right, you had not only the direct appeal and the findings, but you have additional findings and concessions in State postconviction, where Mr. Bies goes in in State postconviction, and he raises a pre-Atkins categorical bar claim, and says I'm a person with mental retardation; since this Court's decision in Penry, things have changed; and I believe my death sentence is disproportionate under the Ohio and the United States Constitution.

In response to that, the State, number one, conceded mental retardation and said we agree the record reveals Mr. Bies is a person with mental retardation, and the postconviction court then enters a finding of fact.

JUSTICE GINSBURG: Did they admit that as a finding of fact, or did they say that mental retardation had been found as a mitigator by the Ohio Supreme Court?

MR. BLUME: No, they said the record reveals Mr. Bies to be a person with mental retardation, with an

IQ of 69. It is not that there was, we assume for the sake of argument, it was nothing like a mitigating. It was a finding of fact, now that Mr. Bies was a person --

JUSTICE GINSBURG: It was an admission; it couldn't have been a finding of fact. You said that that's what the State claimed. Where is the admission of the State in this State postconviction proceeding that Mr. Bies is mentally retarded?

MR. BLUME: It is in the Joint Appendix at 153. This is actually the State court order, the finding of fact, and it says: Findings of fact. The defendant is shown by the record to be mildly mentally retarded with an IQ of 69.

JUSTICE GINSBURG: You told me that this -- that State conceded that the defendant was mentally retarded, and I'm -- that's what I asked you.

MR. BLUME: I'm sorry, that is both at JA 143 where -- JA 143 in the State's motion, response for judgment: "The record reveals defendant to be mildly mentally retarded with an IQ of 69." And that concession is repeated in the post conviction appeal at page 160 of the Joint Appendix.

JUSTICE ALITO: What does that have to do with issue preclusion? The State can't -- that may raise an issue of judicial estoppel. Is that

constitutionally required?

MR. BLUME: I think it primarily does raise a question of judicial estoppel, which we raised, which is -- and that is not a technical basis on which to grant habeas. It is a reason that the writ should be dismissed as improvidently granted.

There have been multiple concessions after that. This was raised by Mr. Bies in his, sort of -- when he asked for estoppel, he asked for it on multiple bases. Just as the fact that the warden, the panel again decided this under 2254(d)(2) grounds. The warden did not raise an issue under 2254(d)(2) in this Court.

JUSTICE SOUTER: But I'm not sure that there's even anything -- I mean, it does raise a judicial estoppel issue, but I'm not sure there is a -- a record hereupon which a -- a judicial estoppel claim could be maintained, because in the passages that you referred us to, first the State's concession and secondly the finding which -- which followed from it, it was a reference to mild mental retardation and a specific reference to an IQ of 69.

I think it's a stretch, would be a stretch, to go from saying that a concession of mild mental retardation for purposes of mitigation analysis should be taken as a concession for dispositive mental

retardation for Atkins purposes. So I -- I have difficulty in seeing any clear inconsistency in the State's two positions.

JUSTICE GINSBURG: The very next sentence is as a matter of law -- the law as it was then -- such a person may be punished by execution. So, again, it's -- the stakes are quite different.

MR. BLUME: Well, not in regard to this particular claim. The claim that we're talking about where this concession was made and where this finding was made wasn't -- this wasn't the brief on mitigation, this was a postconviction challenge to his death sentence as a matter of law, saying --

JUSTICE GINSBURG: But that must have been, the page you called my attention to must have been pre-Atkins.

MR. BLUME: It was pre-Atkins, but the claim was a pre-Atkins Atkins claim. The claim was not - was I am categorically ineligible for the death penalty, and I am ineligible because since the Court's decision in Atkins, things have changed.

JUSTICE GINSBURG: No, no, we're back -- what you called my attention to was pre-Atkins. It was the application made to the State court before Atkins which put two sentences together. One was the record

reveals defendant to be mildly mentally regarded with an IQ of about 69. As a matter of law, such a person may be punished by execution. This is all pre-Atkins.

So one statement has to be read in the light of what was its significance, and it wasn't the conclusive factor at the time of that motion.

MR. BLUME: Well, that was the claim. His claim was it violates the Eighth Amendment to excuse people with mental retardation. This was not -- this was after the direct appeal. He now filed for post conviction and he goes in and says, look, I've been sort of tracking things since Atkins; States have -- adopt new laws.

JUSTICE GINSBURG: Since Atkins, we're talking about --

MR. BLUME: I'm sorry, since Penry. Since Penry there have been new developments, and I believe that a new consensus exists, the one that this Court subsequently embraced, and it violates the Eighth Amendment and the Ohio Constitution to execute persons with mental retardation. And it was in response to that claim that the State conceded the fact of mental retardation, and it was in response to that claim that the State court found again Mr. Bies to be a person with mental retardation.

That wasn't in some question of the balance of aggravating circumstances. That was a straight claim that you cannot execute me because I have mental retardation.

And so I was really responding more to Justice Souter's questions of judicial estoppel and was it the same issue in this, and I think it clearly was at that time in this particular context.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel. Mr. Mizer, you have ten minutes remaining.

REBUTTAL ARGUMENT OF BENJAMIN C. MIZER
ON BEHALF OF THE PETITIONER

MR. MIZER: First, with respect to the judicial estoppel arguments and the State's purported concessions, as Justice Ginsburg noted, the statement to which Mr. Bies points was pre-Atkins, and Mr. Bies's argument ignores that Atkins changed things in two ways: one consequential, by enacting, by placing a categorical bar on the States; and the second, definitional. So for the reasons stated of our -- in our yellow brief at pages 16 to 18, the judicial estoppel argument fails for all kinds of reasons.

But more to the point, judicial estoppel shouldn't apply here also because the State, whatever it

was saying at the time, was not talking about the three-part post-Atkins definition of mental retardation in Ohio.

Mr. Bies also argues that 2254(d)(2) is enough to give support to -- to the Sixth Circuit's grant of relief -- of relief here, but there are two problems with that argument. The first problem is that the Sixth Circuit disregarded the reasonable determination by the State's postconviction court that the Atkins standard had never been applied. The second problem is that we shouldn't even get to 2254(d)(2) because there are legal problems with the Sixth Circuit's reasoning that should have prevented it from granting the writ under 2254(d)(1). Mr. Bies argues that there is not a legal problem because there was an acquittal in this case, because the Ohio Supreme Court's statement on direct review that Mr. Bies -- that Mr. Bies's mild to borderline mental retardation merits weight and mitigation was enough to entitle him to a life sentence. But that's not an acquittal, and it's a severe distortion of what this Court said in Sattazahn about an acquittal.

JUSTICE STEVENS: Mr. Mizer, can I just get one clarifying question? The concession at page 160 of the record, "The record reveals the defendant to be

mildly retarded with an IQ of about 69," and then they argue as a matter of law that he cannot be -- he may be punished. Is it your position that the further proceeding in the Ohio trial court, that the State intends to argue that a person who is mentally retarded with an IQ of about 69 may be executed?

MR. MIZER: No, Your Honor, the -- this statement will be beside the point, and the question now post-Atkins --

JUSTICE STEVENS: So you'll offer evidence to show that statement is inaccurate?

MR. MIZER: The -- the question is, the question posed in Atkins doesn't hinge so narrowly on IQ. IQ is one of the three elements, and so the experts on -- on postconviction review will now determine what his IQ is.

JUSTICE STEVENS: I understand that. The -- could well be different. But is it Ohio's intent to disagree with that statement insofar as it recites facts? That the record reveals the defendant to be mildly mentally retarded with an IQ of about 69? I understand you will argue that that's not sufficient to -- to come within Atkins. But do you intend to say -- to challenge the accuracy of that factual statement?

MR. MIZER: Yes, Your Honor, as the State

postconviction court stated in this case, that -- the record evidence pertaining to IQ is not clear; and so IQ, among all of the other elements of the mental retardation, will be up for determination.

If there are no further questions, we would ask that you reverse the Sixth Circuit.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:54 a.m., the case in the above-entitled matter was submitted.)