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1 P R O C E E D I N G S

2 (11:02 a.m.)

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

5 ORAL ARGUMENT OF BENJAMIN C. MIZER

6 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. MIZER: No, it cannot.

6 JUSTICE KENNEDY: Or must that be reopened?

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

9 JUSTICE KENNEDY: It can -- can be reopened?

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

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

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

1 given.

2 MR. MIZER: And --

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

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

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

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

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

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

11 JUSTICE SOUTER: Well, when you say "the  
12 clinical judgment," you mean the specific finding of a  
13 65 IQ?

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

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



1 preclusion?

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

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

11 MR. MIZER: Correct.

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

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

16 JUSTICE SOUTER: Okay.

17 MR. MIZER: And -- and --

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

25 Then at the appellate level, is there a

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

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

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

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

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

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

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

1 mitigator; the Ohio Supreme Court did.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 But on the double jeopardy doctrine --

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
12 Mr. Blume.

13 ORAL ARGUMENT OF JOHN H. BLUME  
14 ON BEHALF OF THE RESPONDENT

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

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

1 court proceeding.

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

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

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

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

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

25                   JUSTICE GINSBURG: And the Ohio Supreme

1 Court acting years before Atkins.

2 MR. BLUME: Pardon me?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

11 MR. BLUME: Yes, it could have.

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

14 MR. BLUME: Well --

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

23 MR. BLUME: Well, I --

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

1 preclusion analysis just doesn't apply here.

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

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

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

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

25 But now, on to the winner point. So if

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

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

8 MR. BLUME: I understand.

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

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

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

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

25 Now it goes back, and the Warden could then

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

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

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

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

20 MR. BLUME: Well --

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

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

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

3 (Laughter.)

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

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

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

1     retardation --

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

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

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

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

5                 MR. BLUME:    Pardon me?

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

15                MR. BLUME:    That's correct.

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

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

25                JUSTICE SOUTER:   But if that is the

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

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

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

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



1     which place someone outside --

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

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

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

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

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

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

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

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

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

7           MR. BLUME: But --

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

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

1 every other State can.

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

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

1 the ultimate judgment.

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. BLUME: I'm sorry, that is both at JA  
18 143 where -- JA 143 in the State's motion, response for  
19 judgment: "The record reveals defendant to be mildly  
20 mentally retarded with an IQ of 69." And that  
21 concession is repeated in the post conviction appeal at  
22 page 160 of the Joint Appendix.

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

1 constitutionally required?

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

9           Thank you.

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

12           REBUTTAL ARGUMENT OF BENJAMIN C. MIZER

13           ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<b>A</b>	<b>aggravators</b> 12:14 23:2 34:15,18,24 35:17	<b>applies</b> 3:16 16:19,22	20:17 21:1 22:13,19 27:18	<b>best</b> 12:3
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