No. 08-598

IN THE
Supreme Court of the United States

DAVID BOBBY, WARDEN
Petitioner,
v.
MICHAEL BIES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

RESPONDENT'S STATEMENT OF THE CASE

Because Petitioner has failed to provide this Court with the evidence of Bies' mental retardation, or to acknowledge its multiple concessions that Bies has mental retardation, or to inform this Court of additional state court findings that Bies has mental retardation, Respondent will begin with a recitation of the relevant facts.

I. The Evidence of Bies' Mental Retardation.

Michael Bies was born literally black, due to a lack of oxygen. Before age three, developmental delays, intellectual deficiency, speech difficulties, and hearing loss were apparent. (Clifton Aff. ¶ 10; Dr. Donna Winter, "Mitigation Report," at 2-3, 7 (10/10/92)). A pediatrician referred three year old Bies to the Dysfunctional Child Center of the Mental Reese Hospital and Medical Center, where tests uncovered left hemisphere brain dysfunction. (Clifton Aff. ¶ 10). The doctors advised Bies' mother that he should be institutionalized, but she refused to do so. *Id.*

Because of Bies' developmental and intellectual difficulties, he attended "therapeutic schools," comprised only of profoundly mentally and emotionally disturbed children. (Mucci Aff. ¶ 2; Hookansan Aff. ¶ 3; Dr. Winter, "Mitigation Report," at 5; Dr. Eileen Myers, Illinois Bureau of Disability Adjudication Services, at 1 (2/6/85)). Bies' mental

disabilities prevented him from adequately functioning even in this environment, and he was consequently referred to the Chicago Reed Hospital. Mental health experts there again recommended that Bies be institutionalized. (Hookansan Aff. ¶ 11).

Long before Bies' trial, a number of state agencies determined that Bies was a person with mental retardation. The Social Security Administration, for example, diagnosed him with mental retardation when he was ten years old. (Social Security Administration, Disability Determination and Transmittal (3/9/83)). When Bies was eleven, the Social Security Administration again found that he was a person with mental retardation. (Social Security Administration, Disability Determination and Transmittal (11/27/84)). At age twelve, the Illinois Bureau of Disability Adjudication Services gave Bies a psychological evaluation for children, which revealed that he had a full scale IQ of 50. (Dr. Myers, Illinois Bureau of Disability Adjudication Services, at 2). His vocabulary score at age twelve was in the lowest one percent of the population, and was comparable to that of a seven year old. *Id.* The psychologist performing the evaluation for the state concluded that Bies was "mildly mentally retarded." *Id.*

Bies also underwent multiple psychological evaluations in connection with his trial that resulted in uncontested opinions that he has mental retardation. Dr. Myron Fridman, for example,

concluded that Bies is "marginally functioning [and] mildly mentally retarded." (Dr. Myron Fridman, "NGRI Report," at 3 (9/11/92)). Similarly, Dr. Donna Winter, whose evaluation the Ohio courts expressly relied upon, reached the following conclusions:

> Mild mental retardation to borderline mental retardation (Verbal IQ = 70; Performance IQ = 67; Full Scale IQ = 68); (2) organic brain dysfunction characterized by specific learning disability; and (3) a chronic and severe personality disorder characterized by emotional instability, impulsivity and problems with appropriate control of anger.

(Dr. Donna Winter, "NGRI Report," at 6 (9/10/92); *see also* Dr. Winter, "Mitigation Report," at 7). Dr. Winter further concluded that Bies' intelligence was impaired, he was functionally illiterate, he could not think logically, and his mild mental retardation constituted a mental defect under Ohio law. (Dr. Winter, "Mitigation Report," at 6-7; Dr. Winter, "NGRI Report,"at 6).

II. The Prosecutor's Concessions and State Court Findings of Mental Retardation.

A. Trial and direct appeal.

Evidence of Bies' mental retardation was

presented at trial. The proof was such that even the Hamilton County prosecutor conceded in closing argument that Bies' "IQ . . . [is] 68 ... Michael Bies is not intelligent. I think that we can all accept that." (Trial Tr. 1180).

On direct appeal, the issue of whether Bies is mentally retarded was briefed by the State and Bies' counsel, and both the Ohio Court of Appeals and the Ohio Supreme Court made independent findings that Bies' was mentally retarded.[1] The Ohio Court of Appeals' independent review of the record led it to conclude:

> Bies' psychological difficulties revolved around: (1) mild mental retardation to borderline mental retardation; (2) a chronic and severe personality disorder characterized by emotional instability, impulsivity and problems with appropriate control of anger; and (3) probable organic brain dysfunction

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[1]At the time of Bies' direct appeal, Ohio appellate courts were required to "review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate." Ohio Rev. Code §2929.05; *see also* Ohio Rev. Code §2929.04(B) (enumerating aggravating and mitigating factors); *State v. Claytor*, 574 N.E.2d 472, 481 (1991) ("The mitigating factor involving Claytor's undisputed mental illness and the impact it had on his reasoning process should have been accorded more weight").

> characterized by specific learning disabilities . . . [and] are entitled to some weight in mitigation.

State v. Bies, 1994 Ohio App. LEXIS 1304, at *28 (March 30, 1994). Subsequently, the Ohio Supreme Court's own independent review yielded the finding that "Bies' personality disorder and mild to borderline mental retardation merit some weight in mitigation."[2] *State v. Bies*, 658 N.E.2d 754, 761 (1992).

B. State post-conviction proceedings prior to *Atkins*.

Bies filed his first application for state post-conviction relief in 1996. That application included a claim that the execution of a mentally retarded person would constitute cruel and unusual punishment. In response, the State conceded that "[t]he record reveals defendant to be mildly mentally retarded with an IQ of about 69," but asserted that relief should be denied because there was no legal prohibition to executing a person with mental

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[2]Both of these findings of mental retardation were made before the Ohio Supreme Court responded to *Atkins v. Virginia*, 536 U.S. 304 (2002), by formally adopting a standard for mental retardation in *State v. Lott*, 779 N.E.2d 1011 (Oh. 2002). Nevertheless, as the Warden concedes, Dr. Winter's mental retardation diagnosis prior to Bies' trial was rendered using the standard later adopted in *Lott*. *See* Petition at 26 ("Dr. Winter applied the diagnostic method that was later outlined in *Lott*"); *see also Bies v. Bagley*, 519 F.3d 324, 334-35 (6th Cir. 2008).

retardation. Mot. For Judg. Pursuant to O.R.C. 2953.21(c), Court of Common Pleas, Hamilton County, at 16 (11/22/96).

The state post-conviction court's findings and conclusions mirrored the positions taken by the State:

> The defendant's fifth claim for relief is that it is cruel and unusual punishment to execute a retarded person. As to this claim, the Court makes the following Findings of Fact: (1) The defendant is shown by the record to be *mildly mentally retarded with an IQ of about 69.* The Court makes the following Conclusions of Law: As a matter of law, a mildly mentally retarded defendant may be Punished by execution.

Court of Common Pleas, Hamilton County, Findings of Fact, Conclusions of Law, at 9 (7/22/98) (citations omitted) (emphasis added).

On appeal from the denial of post-conviction relief, the State again conceded that Bies was mentally retarded in its submissions to both the Ohio Court of Appeals and the Ohio Supreme Court. *See* Pl. Brief, Court of Appeals, First Appellate Dist., at 21 (2/9/99) ("The record reveals defendant to be mildly mentally retarded with an IQ of about 69"); Pl. Mem. in Resp., Supreme Court of Ohio, at 2 (9/15/99) (same).

III. The State's Course Reversal in Response to *Atkins*.

This Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), was handed down while Bies's second application for post-conviction relief was pending in state court,[3] and his petition for federal habeas corpus relief was pending in the United States District Court for the Southern District of Ohio. Relying on *Atkins*, Bies returned to state court with a third application for post-conviction relief, again asserting that his execution would violate the Eighth Amendment because he is mentally retarded, and adding that the State was collaterally estopped from relitigating the factual issue of his mental retardation.

Ignoring its own earlier concession before the same court (as well as the Ohio Court of Appeals and the Ohio Supreme Court), the State responded to the *Atkins* claim with the contention that "Bies' I.Q. score coupled with his adaptive behavior skills indicate that he is not mentally retarded." *See, e.g.*, Pl. Memo in Opp'n to Def. Mot. For Summ. Judg., State of Ohio, Hamilton County, at 5 (9/8/03). In response to Bies' estoppel argument, the State contended – again without acknowledging its prior concessions or the state court findings – that the

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[3]The claims raised in this second application for state post-conviction relief were not related to the issues now before this Court.

already-settled historical fact of Bies' mental retardation should be re-examined at an evidentiary hearing pursuant to the procedure outlined by the Ohio Supreme Court's decision in *Lott*. *Id.* Citing an inability "to determine whether the experts applied the test [for mental retardation] as laid out by the courts" in *Atkins* and *Lott*, the state post-conviction court denied Bies' motion for summary judgment. *State v. Bies*, Court of Common Pleas, Hamilton County, Ohio, Summary Judgment, at 4, 6 (4/5/04).[4]

IV. Federal Habeas Corpus Proceedings.

Bies returned to federal court challenging the state post-conviction court's determination that the factual question of his mental retardation could (and should) be relitigated. Applying the rule established by this Court in *Ashe v. Swenson*, 397 U.S. 436 (1970), the district court held that the prior findings of mental retardation constituted determinations of an "ultimate fact" barring further litigation, and that the state court's decision to the contrary was factually and legally unreasonable under *Ashe*. *See Bies v. Bagley*, 2005 U.S. Dist. LEXIS 41032, at *8-9 (Dec. 30, 2005); *see also id.* at *12 (observing that, in light of three prior state court findings that Bies is mentally retarded, the "new procedures for

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[4]As previously noted, the Warden concedes in the petition for writ of certiorari that Dr. Winter used the test for mental retardation subsequently embraced by the Ohio Supreme Court in *Lott*, *supra*.

determining mental retardation . . . [were] immaterial").

On appeal by the Warden, the Sixth Circuit agreed with the district court's determination that relitigation of the settled fact of Bies' mental retardation was barred under *Ashe*'s rule that, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Bies v. Bagley*, 519 F.3d 324, 332 (6th Cir. 2008) (quoting *Ashe*, 397 U.S. at 443). The Sixth Circuit supported this conclusion with a detailed analysis of the record developed at trial, the arguments asserted by the parties on direct appeal, the review undertaken and findings rendered by the Ohio courts on direct appeal, and the standard for establishing mental retardation as applied by Dr. Winter prior to trial and later adopted by the Ohio Supreme Court in *Lott*. *Bies*, 519 F.3d at 333-39.

Having determined that the Double Jeopardy Clause barred further litigation of Bies' mental retardation, the Sixth Circuit went on to conclude that habeas relief was authorized under 28 U.S.C. §2254(d)(2) because "[c]lear and convincing evidence ... demonstrate[s] that the Ohio state court based its decision to permit relitigation of [Bies'] mental retardation on *unreasonable determinations of fact*." *Bies*, 519 F.3d at 340.[5] (emphasis added). The court

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[5]The Sixth Circuit's formulation of the standard by which Bies was required to overcome the state court's factual

explained that the state post-conviction court's claims of uncertainty about whether Dr. Winter had applied the mental retardation standard later adopted in *Lott* were "contrary to the record," which showed that *Lott* had adopted the clinical test accepted by the psychological profession, and that Dr. Winter had applied that test herself. *Id.* at 340-41; *see also id.* at 342 ("In light of the overwhelming evidence that Dr. Winter did in fact apply the clinical standard recognized by her own profession, we conclude that clear and convincing evidence demonstrates that the Ohio trial court unreasonably found that Dr. Winter could have applied a different standard"). "Accordingly," the Sixth Circuit held, Bies' "double jeopardy rights are being violated pursuant to a state court decision that is based on unreasonable determinations of fact." *Id.* at 342.

REASONS THE WRIT SHOULD BE DENIED

The Warden purports to challenge the Sixth Circuit's conclusion that, under the highly idiosyncratic circumstances of this case, the State of Ohio cannot be afforded another opportunity to litigate the long-resolved, and long ago conceded, factual question of Bies' mental retardation now that

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determination – *i.e.*, requiring Bies to demonstrate by clear and convincing evidence that the state court's factual determinations were unreasonable – combined the requirements of 28 U.S.C. §§2254(e)(1) and (d)(2) in a way rejected by this Court as "too demanding" in *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). Nevertheless, the court concluded that Bies satisfied even this demanding standard.

the State has a stronger legal incentive to do so. In mounting this challenge, however, the Warden ignores the grounds upon which the Sixth Circuit actually made its decision, and instead offers a set of arguments bearing, at best, only a tangential relationship to the Sixth Circuit's judgment. As discussed below, the Warden's collection of straw men do not warrant issuance of the writ of certiorari.

I. The Sixth Circuit's Opinion Does Not Raise the AEDPA Concerns the Warden Attempts to Present.

The Warden asserts that, "[u]nder AEDPA, Bies must establish that the Ohio court's decision was 'contrary to' or 'an unreasonable application of' this Court's precedents" in order to establish his entitlement to relief under §2254(d)(1). Petition at 18; *see also id.* at 19 (asserting that §2254(d)(1)'s "unreasonable application" clause "does not apply," and that, "[t]hus, the question is whether the state court's decision was 'contrary to' clearly established federal law ..."). This wilfully overlooks the AEDPA analysis actually undertaken by the Sixth Circuit which, on its face, does not even implicate, let alone violate, §2254(d)(1).

Section 2254(d) has two subdivisions: (d)(1) and (d)(2).[6] Subdivision (d)(1) permits habeas relief

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[6]The statute provides as follows:

(d) An application for a writ of habeas corpus on

where the state court's decision on the merits of a claim "was contrary to, or involved an unreasonable application of, clearly established federal law." Subdivision (d)(2) permits relief where the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." Because these subdivisions are written in the disjunctive, the statute permits relief on a meritorious constitutional claim where *either* (d)(1) *or* (d)(2) is satisfied. *See Miller-El v. Dretke*, 545 U.S. 231 (2005) (finding relief authorized under §2254(d)(2) without mentioning §2254(d)(1)); *Rice v. Collins*, 546 U.S. 333, 342 (2006) (recognizing for §2254(d) purposes that "[t]he question whether a state court errs in determining the facts is a different question from whether it errs in applying the law"); *Lewis v. Ortiz*,

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

28 U.S.C. §2254(d).

2007 WL 1467162, at *17 n.7 (D.N.J. 2007) ("[A] petitioner who satisfies §§ 2254(d)(2) and 2254(e)(1) need not also satisfy the unreasonable application clause of § 2254(d)(1) ...") (citations omitted).

In this case, the Sixth Circuit affirmed the grant of habeas relief under §2254(d)(2), not §2254(d)(1). As the Sixth Circuit recognized, the state court's decision turned on its own view that the record did not reveal whether Dr. Winter's mental retardation diagnosis was rendered using the test later adopted in *Lott*, and on the state court's beliefs that Dr. Winter's testimony contained "no analysis," and that her diagnosis "'appears to be based primarily on the IQ test.'" *Bies*, 519 F.3d at 340-41. Pursuant to §2254(d)(2), the Sixth Circuit undertook a detailed examination of the reasonableness of the state court's factual determinations "in light of the evidence presented in the state court proceeding," and concluded as follows:

> The Ohio trial court's determination that Dr. Winter may not have applied the clinical definition of mental retardation was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d)(2). As the Supreme Court of Ohio followed Dr. Winter's testimony in its 1996 finding that Petitioner is mentally retarded, the Ohio trial court's unreasonable determination of fact led to its equally

> unreasonable determination that the 1996 finding relied on a different method than the one described in *Lott*. Accordingly, we hold that Petitioner's double jeopardy rights are being violated pursuant to a state court decision that is based on unreasonable determinations of fact.

Bies, 519 F.3d at 341-42 (internal citation omitted).[7]

Given the Sixth Circuit's clear and exclusive reliance upon §2254(d)(2), the Warden's invocations of §2254(d)(1) are irrelevant. Moreover, and more importantly, the Warden's failure to challenge the Sixth Circuit's selection or application of §2254(d)(2) leaves that portion of the judgment undisturbed and makes this case a poor candidate for review on certiorari. *See, e.g., Stevens v. Marks,* 383 U.S. 234, 246-47 (1966) (Harlan, J. concurring and dissenting) (stating that the Court's reversal of the judgment below was on grounds never properly set forth by the petition and not within the limited issues for certiorari).

II. The Warden's Insistence That Relitigation Remains Available

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[7]The unreasonableness of the state court's factual determination is underscored by the Warden's concession on p. 27 of the petition that Dr. Winter used the appropriate clinical definition of mental retardation in concluding that Bies is a person with mental retardation.

Because Bies' Death Sentence Was Affirmed Before this Court's Decision in *Atkins* Ignores the Theory under Which the Sixth Circuit Actually Resolved the Double Jeopardy Issue.

The Warden argues at length that the State cannot be barred from relitigating Bies' mental retardation because no judge or jury entered an "acquittal" of the death penalty in this case. *See* Petition at 12-18. Like the §2254(d)(1) arguments discussed above, the Warden's "acquittal" theory simply argues past the Sixth Circuit's decision.

It is true that a formal acquittal by a judge or jury triggers the Double Jeopardy Clause. *See, e.g.*, *Sattazahn v. Pennsylvania*, 537 U.S. 101, 120 (2003) ("The standard way for a defendant to secure a final judgment in her favor is to gain an acquittal"). However, contrary to the Warden's position, formal acquittal is not the only trigger. As this Court recognized nearly four decades ago, the rule of collateral estoppel is also "embodied in the Fifth Amendment guarantee against double jeopardy," such that, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 445 (1970).[8]

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[8]The Double Jeopardy Clause also extends to bar retrial after a mistrial declared in the absence of manifest necessity. *See*,

Having recognized that Bies' mental retardation is an "ultimate fact" in light of the categorical exclusion established by *Atkins*, the Sixth Circuit rightly selected the analysis prescribed by *Ashe* for Bies' double jeopardy claim. The Warden offers no argument either that the *Ashe* rule should not have been applied, or that the Sixth Circuit somehow misapplied it. Instead, the Warden simply proceeds as if *Ashe* does not exist. Indeed, although *Ashe* figures prominently in the Sixth Circuit's opinion, the Warden's petition cites it only (indirectly) once. Petition at 22.

Once it is acknowledged that collateral estoppel is "an ingredient of the Fifth Amendment guarantee against double jeopardy," it becomes clear – as it did for the Sixth Circuit – that *Ashe* provides the appropriate framework for the circumstances of

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e.g., *Sattazahn*, 537 U.S. at 120-21; *United States v. Scott*, 437 U.S. 82, 94 (1978). The range of circumstances to which the Clause applies reflects the range of interests it was designed to protect. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)) ("The Clause ... guarantees that the State shall not be permitted to make repeated attempts to convict the accused, 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty'"); *United States v. Jorn*, 400 U.S. 470, 479 (1971) ("[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws").

this case. As *Ashe* recognized, the acquittal requirement should not be applied in a "technically restrictive" way, but rather "with realism and rationality." *Ashe*, 397 U.S. at 444. In *Ashe* itself, realism and rationality demanded recognition of the fact that although the defendant had never been "acquitted" of robbing the second victim, the jury's verdict at an earlier trial on a different charge necessarily included a factual finding that was inconsistent with the defendant's conviction for the second victim's robbery.

The formal acquittal requirement insisted upon by the Warden is a poor fit for Bies' case for the same reasons it was a poor fit in *Ashe*. Although the Ohio Supreme Court's proportionality analysis ultimately led to a general conclusion that the aggravating circumstances outweighed the mitigating factors, the collateral estoppel inquiry does not end there, for the issue the Warden seeks to relitigate is "identical" to an issue already litigated and resolved in Bies' case. Thus, as in *Ashe*, the question here is not whether Bies was "acquitted" of an offense (or sentence) in an earlier proceeding, but whether resolution of "an issue of ultimate fact" in an earlier proceeding involving the same parties bars relitigation of that issue. *Id.* at 443. It does. *See Taylor v. Sturgell*, 128 S.Ct. 2161, 2171 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)) ("Issue preclusion ... bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the

context of a different claim.").

Here, there is no question that the "ultimate fact" of Bies' mental retardation has already been resolved. The Ohio Court of Appeals on direct review found as follows:

> Bies psychological difficulties revolved around: (1) mild mental retardation to borderline mental retardation; (2) a chronic and severe personality disorder characterized by emotional instability, impulsivity and problems with appropriate control of anger; and (3) probable organic brain dysfunction characterized by specific learning disabilities . . . [and] are entitled to some weight in mitigation.

State v. Bies, 1994 Ohio App. LEXIS 1304, at *28 (March 30, 1994). The Ohio Supreme Court's independent review likewise concluded that "Bies' personality disorder and mild to borderline mental retardation merit some weight in mitigation." *State v. Bies*, 658 N.E.2d 754, 761 (1992). And the first state post-conviction court made a "[f]inding[] of fact" that Bies "is shown by the record to be mildly mentally retarded with an IQ of about 69." Court of Common Pleas, Hamilton County, Findings of Fact, Conclusions of Law, at 9 (7/22/98) (citations omitted).

In addition to the three state court findings, the State has also conceded on no fewer than three

occasions that Bies is mentally retarded.[9] At trial, the Hamilton County prosecutor's closing statement acknowledged that Bies' "IQ ... [is] 68 ... Michael Bies is not intelligent. I think that we can all accept that." (Trial Tr. 1180). In opposing Bies' first application for state post-conviction relief, the State admitted that the "record reveals defendant to be mildly mentally retarded with an IQ of about 69." Mot. For Judg. Pursuant to O.R.C. 2953.21(c), Court of Common Pleas, Hamilton County, at 16 (11/22/96). And in subsequent submissions to the Ohio Court of Appeals and the Ohio Supreme Court, the State again conceded that the "record reveals defendant to be mildly mentally retarded with an IQ of about 69." Pl. Brief, Court of Appeals, First Appellate Dist., at 21 (2/9/99); Pl. Mem. in Resp., Supreme Court of

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[9]This Court has recognized that a party is precluded from assuming a certain position in a legal proceeding after it has earlier advocated a contrary position when (1) the party's later position is clearly inconsistent with its earlier position; (2) the party has succeeded in persuading a court to accept that party's earlier position; and, (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *see also In re Smith*, 285 F.3d 6 (D.C. Cir. 2002) (citing *New Hampshire,* and noting that the government would later be bound to support petitioner's claim for relief, where it had previously argued that applicable law should permit petitioner to raise and prevail upon his claim that his conviction was no longer valid); *Whaley v. Belleque*, 520 F.3d 997, 1002 (9th Cir. 2008) (estopping the government from "represent[ing] in federal court the opposite of what it represented to the state court when it succeeded in defeating [petitioner's] claim . . . [and] reversing its position in order to suit its current objectives").

Ohio, at 2 (9/15/99).

To permit the relitigation sought by the Warden in the face of multiple state court findings and multiple concessions by the State itself would offend the interests protected by the Double Jeopardy Clause just as surely as did the second trial reviewed in *Ashe*. Bies has already endured the burden of multiple clinical evaluations, a trial on guilt and sentencing, and multiple steps of direct and collateral review, all of which consistently yielded findings rendering him categorically ineligible for a sentence of death. Reopening the issue of mental retardation now, at the request of a party which participated in all of those prior proceedings, would succeed only in providing the State with an opportunity to further pursue a wrongful execution. *Cf. Green*, 355 U.S. at 187-88 (Double Jeopardy Clause prevents relitigation in part to protect against the possibility of convicting an innocent person at a subsequent proceeding). The Sixth Circuit was therefore correct to conclude under *Ashe* that further litigation of Bies' mental retardation is barred. The Warden's petition – which neither acknowledges nor attacks the Sixth Circuit's *Ashe* analysis – provides no basis for overturning that holding on certiorari.

III. The Warden's Assertion That the Sixth Circuit "Misapplied the Rules of Collateral Estoppel" Is Simply a Request for Error Correction.

The Warden attacks the Sixth Circuit's collateral estoppel analysis in two ways, neither of which warrants review by the Court. First, the Warden contends that the Ohio Supreme Court's pre-*Atkins* finding of mental retardation is not the same as a finding of "retardation under the Eighth Amendment." Petition at 27; *see also id.* at 24 (challenging validity of prior mental retardation determinations because "*Atkins* and *Lott* had not yet been decided at the time").[10] This simply conflates the factual determination that Bies is mentally retarded, which has not changed, with the legal consequence of that determination, which changed with *Atkins*. As this Court reiterated just last Term, a prior factual determination retains its preclusive effect "even if the issue recurs in the context of a different claim." *Taylor*, 128 S.Ct. at 2171.

The Warden's second disagreement with the Sixth Circuit's collateral estoppel holding is that Bies' finding of mental retardation was "not necessary" to the Ohio Supreme Court's decision. Petition at 27. The Warden does not suggest that

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[10]The Warden further proposes "*de novo* fact-finding, reliance on professional evaluations, taking expert testimony, and issuing a written opinion." *Id.* (citations omitted). Those things have already been done. Dr. Winter's diagnosis of mental retardation was explained in fifty six pages of testimony, and that testimony formed the basis of two state appellate court findings and a subsequent finding by the state post-conviction court. Those findings resolved "an issue of ultimate fact," and the collateral estoppel principles incorporated in the Double Jeopardy Clause prohibit relitigation. *Ashe*, 397 U.S. at 443.

the Ohio Supreme Court would not have been obligated to make a finding on mental retardation (and all other aggravating and mitigating factors) in order to perform the review mandated by statute; in fact, the Warden effectively concedes that such findings were necessary. *See* Petition at 28. Instead, the Warden argues that Ohio's sentencing scheme discounts characteristics of the defendant proffered as mitigating unless they are accompanied by proof of a "specific link ... to [the defendant's] crime." *Id.* This characterization of Ohio's appellate review in capital cases does not square with the Ohio Supreme Court's statement in this case that Bies' "mild to borderline mental retardation merit[s] some weight in mitigation."[11] *Bies,* 658 N.E.2d at 761. Regardless

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[11]As the Warden describes it, appellate review in Ohio is incompatible with this Court's rejection of a "nexus" requirement for establishing the "constitutional relevance" of mitigating evidence in *Tennard v. Dretke*, 542 U.S. 274, 286-87 (2004). As *Tennard* explained, mental retardation is an "inherently mitigating" factor, regardless of any nexus between that condition and the defendant's crime. *Id.* at 287.

Moreover, even if the "nexus" argument did not do the Warden more harm than good under *Tennard*, it would still suffer for ignoring the distinction between the fact of Bies' mental retardation and the ways in which that fact could be accorded weight in mitigation under Ohio law. While some evidence of a link between the offense and mental retardation may be necessary in order to fall within Ohio Rev. Code §2929.04(B)(3)'s "*because of* mental disease or defect" mitigating factor, no such link is required before giving mitigating weight to mental retardation under Ohio Rev. Code §2929.04 (B)(7) (italics added). *See Bies,* 658 N.E.2d at 761 (citations omitted); *see also State v. Fox,* 631 N.E.2d 124, 131-32 (1994) (defendant's personality disorder was

of which interpretation is correct, however, the Warden has conceded that the mental retardation finding was a necessary ingredient of the Ohio Supreme Court's review of Bies' death sentence.

Finally, and more fundamentally, the Warden's petition contains nothing to suggest that this case presents an issue of national significance. While the petition asserts that the holding below could somehow affect other cases involving "capital defendants who introduced evidence of their limited intellectual functioning in pre-*Atkins* penalty-phase proceedings," Petition at 32, it points to no other cases actually in this posture. The Warden insists that the "Sixth Circuit's ruling should be corrected," but error correction – particularly under circumstances as idiosyncratic and unlikely to recur as those present in this case – is an inadequate basis for the exercise of this Court's certiorari jurisdiction. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 250 (1969). Furthermore, as the multiple state court findings and the multiple State concessions demonstrate, even a reversal of the Sixth Circuit's decision would not result in error correction, for relitigation of Bies' mental retardation would inevitably result in confirmation of the fact that Bies is mentally retarded and categorically ineligible for the death penalty. *Cf. Kyles v. Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting) ("What we have

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not mitigating under Ohio Rev. Code §2929.04(B)(3), which requires causal link between disorder and criminality, but could still be mitigating under Ohio Rev. Code §2929.04 (B)(7)).

here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err – precisely the type of case in which we are *most* inclined to deny certiorari").

CONCLUSION

WHEREFORE, for the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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